

# Compliance with recommendations

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# Introduction

*Whereas the courts hand down binding judgments, the National Ombudsman of the Netherlands can only attach recommendations to his decisions. At first sight, this may appear to be a weakness of the institution but experience shows that recommendations are in fact a powerful means of improving the propriety of government practice. Most of the Ombudsman's recommendations are implemented, even though they are not binding. So what is the secret of the Ombudsman system?*

This article starts by considering the constitutional and statutory framework within which the National Ombudsman of the Netherlands operates. It goes on to discuss the ways in which he can influence government and shows that these are not confined to formal decisions and recommendations. This is followed by a tripartite classification of recommendations: specific, more general, and generic guidelines for proper government practice on matters like enforcement, public participation and the treatment of compensation claims from individuals, businesses and institutions. This analysis leads on to an identification of the factors influencing government to accept the Ombudsman's recommendations. His authority and expertise prove to be important in this respect. Finally, the article cites examples both of recommendations and of special projects that have resulted in guidelines for government practice.

## The work of the National Ombudsman

Since 1999, the National Ombudsman has been enshrined as an institution in the Dutch Constitution. At that time, an amendment was made inserting a new article 78a into Chapter 4 of the Constitution. This Chapter deals with what are known as the 'High Councils of State' (now the Council of State, the Netherlands Court of Audit, the National Ombudsman and the permanent advisory bodies). The office itself was established by Act of Parliament – the National Ombudsman Act (*Wet Nationale ombudsman*) – in 1982. The Constitution provides that the National Ombudsman is to investigate actions taken by administrative authorities and may do so either on request or of his own accord. The manner in which this is to be done is laid down in the National Ombudsman Act. The National Ombudsman and his two Deputy Ombudsmen are appointed on the advice of the House of Representatives for a term of six years, after which re-appointment is possible. Since the introduction of the General Administrative Law Act (*Algemene wet bestuursrecht* or AWB), the procedure for dealing with complaints made under the internal and external right of complaint (instituted in 1999 and 2005 respectively) has been governed by Chapter 9 of that Act.

The National Ombudsman is competent to handle complaints (formally known as 'petitions') from individuals, businesses and institutions. Such complaints may concern any administrative authority in the Netherlands. Section 1:1 of the AWB defines an 'administrative authority' as 'an organ of a legal entity which has been established under public law, or another person or body which

is invested with any public authority'. This means that the National Ombudsman has powers to investigate (either on request or on his own initiative) not only the conduct of government ministers and autonomous administrative authorities, but also the actions of private sector bodies if they are engaged in carrying out the executive tasks of government. Accordingly, his remit includes bodies like the independent Youth Care Agencies and bodies like the Salvation Army, part of whose work involves the performance of public tasks. Certain actions taken by bailiffs under public law also fall within his remit. A special statutory provision brings the actions of the police within his jurisdiction and the Public Prosecution Service comes within it via de Minister of Security and Justice. The Ombudsman's investigatory powers even extend to the General Intelligence and Security Service (AIVD) and its military counterpart the Military Intelligence and Security Service (MIVD), although complaints about those services must first be examined by a special supervisory committee. However, his jurisdiction does not include the judiciary.

Subnational government authorities (such as provinces, water authorities and municipalities) fall within the jurisdiction of the National Ombudsman unless they opt out by making alternative arrangements. Major Dutch cities like Amsterdam, Rotterdam, The Hague and Utrecht have their own local ombudsmen, who frequently also serve the surrounding area. Some areas, like Zeeland and Overijssel, have an ombudscommittee. The National Ombudsman engages in active cooperation with the local ombudsmen serving the main cities. In 2011, for instance, he took the initiative in launching a joint investigation concerning the use of stop and search powers in the major cities and at Schiphol airport.

Before a complaint can be accepted for external investigation by the National Ombudsman, it must have been handled internally by the administrative authority concerned. Such internal complaints handling is increasingly important. A growing number of administrative authorities now appreciate the value of complaints procedures as a way of obtaining feedback on their performance. The National Ombudsman also oversees the quality of internal complaints procedures. In 2010, a report was issued on the way the Youth Care Agencies deal with complaints. In the course of preparing this report, a set of principles of good internal complaints handling was drawn up in cooperation with these Agencies.<sup>1)</sup>

The investigatory powers of the National Ombudsman are comparable to those of the courts and the complaint-handling procedure includes a right of reply, both for the complainant and for the administrative authority concerned. Under section 9:27 of the AWB, the National Ombudsman determines whether or not the administrative authority acted properly in the matter under investigation. Actions of any kind may be considered, although the AWB excludes decisions where the complainant still has a right of objection to the administrative authority or to demand a judicial review procedure under administrative law. However, the National Ombudsman is competent to examine the way administrative authorities handle such objections and frequently criticises them for

1) National Ombudsman report no. 2010/045.

their lack of promptness in this respect. The National Ombudsman's jurisdiction does not extend to the content of legislation or general government policy.

Under the AWB, the National Ombudsman must accompany each of his decisions by a statement of the standard of proper conduct that has been breached. Over the years, this has resulted in the development of a list of around 25 standards of proper conduct. They include not just matters such as promptness, adequate information gathering and provision, and proportionality, but also respect for fundamental rights like the right to physical integrity. The latter standard is often applied when considering police dispersal tactics, such as baton charges, mounted charges, or the use of police dogs. However, it can also be relevant to other forms of government activity, such as the failure of municipalities to comply with court judgments, or in relation to complaints about Youth Care Agencies.

Section 9:27 (3) of the AWB also states that the Ombudsman may attach recommendations to his decisions on the propriety of actions, while section 9:36 (4) stipulates that the administrative authority must, within a reasonable period of time, notify the Ombudsman of the action it intends to take on the recommendation. If the administrative authority intends to take no action on the recommendation, it must notify the Ombudsman of this and state its reasons. Although there is no statutory basis for it, a practice has developed by which the National Ombudsman may inform Parliament of the failure to take action on a recommendation and so obtain a political opinion on the case. In practice, where an administrative authority raises objections to a recommendation, discussions usually take place to see whether it would be possible for it to take some modified form of action. Over the last three years, 94% of all recommendations have been implemented.<sup>2)</sup>

Each year, the National Ombudsman deals with around 14,000 complaints and publishes written reports on about 350 cases. Of these reports, some 35% contain recommendations. He conducts around ten investigations a year on his own initiative and these almost always result in recommendations. There are several reasons for the huge disparity between the number of complaints received and the number of reports issued. Firstly, the National Ombudsman refers many complainants to the competent authority, for example because the complaint still needs to be handled internally or because recourse may be had to an objection or judicial review procedure. Secondly, the intervention method is used in around 4,000 cases. This means that talks take place with officials designated by the relevant administrative authorities to liaise with the National Ombudsman (and pressure is, where necessary, applied) to see how the complaints can best be resolved. Moreover, in complex cases, an intake interview may be held, followed by mediation. The number of cases in which professional mediation methods are applied is increasing year on year. In 2010, such methods were used in 57 cases. Mediation can produce specific agreements that the administrative authority is committed to implement. No formal investigation by the Ombudsman is then required.

The majority of complaints reaching the National Ombudsman concern the police and justice system, taxation, social security or youth affairs. The public demand for an accessible and independent means of external scrutiny is particularly great with regard to de facto police action in relation to on-the-spot fines and arrests and the failure of the police to register complaints about criminal activity

made by the public. The police forces and Public Prosecution Service increasingly recognise the value of such scrutiny and act on the findings and recommendations of the National Ombudsman. This is driven partly by growing concern about public satisfaction: a major trend in Dutch public administration over recent years. The public's dissatisfaction with the quality of service it receives and the consequent political interest in the issue has brought it to the top of many administrative authorities' agendas. Adverse media reports and parliamentary comment can make the public image of a body like the Tax Department a major issue, jeopardising the prestige of a government minister.

An interesting example of the importance of service quality is provided by a study conducted by the Rotterdam-Rijnmond police into the satisfaction of road users fined for traffic offences. Remarkably enough, over 70% of them were satisfied with the actions of the police. Where they were not satisfied, the main reason was the feeling that they had not been taken seriously or given the chance to put their side of the story. Of course, from the police point of view, there are both practical and moral reasons for limiting the extent to which people are allowed to do this. After all, some people will just try to wriggle out of paying a fine, however justified its imposition.

In 2011, a third Deputy Ombudsman post is to be created in order to provide a special Ombudsman for Children. The remit of this new Children's Ombudsman will be based in part on the UN Convention on the Rights of the Child and will be far broader than that of the National Ombudsman. The Children's Ombudsman will be able to issue recommendations relating not only to administrative procedures, but also to legislation and policy. Moreover, the Children's Ombudsman will have jurisdiction over the actions of both public and private sector organisations.

## The Ombudsman's influence on the actions of government

The National Ombudsman does not see the right of complaint and the consequent handling of complaints as ends in themselves. While it is clearly important that individuals, businesses and institutions should be able to express their dissatisfaction with the actions of administrative authorities and that their complaints should be taken seriously, it is better still to prevent such complaints. For that reason, the National Ombudsman needs to exert a more structural influence on the way administrative authorities deal with the public. Proper treatment is not just a question of being 'pleasant' and 'courteous': it lies at the very root of the legitimacy of government action and public compliance. Proper treatment is the concrete expression of procedural fairness. For the people involved, the feeling that government action has been fair is often essential.<sup>3)</sup> This is all the more important at a time when there is less general acceptance of authority and when the increasing individualisation of society is leading citizens to expect to be respected as individuals. This is why the National Ombudsman advocates that authorities should seek direct personal contact with people presenting complaints and problems, take them seriously, treat them with respect, and deal with them as equals. People are usually prepared to cooperate – even if the outcome is not in their favour – provided that they receive adequate personal attention and are shown sufficient respect. This is the area in which it is most important for the National Ombudsman to influence government attitudes – in particular, the propriety of government actions in relation to individuals. The key to the National

2) Annual Reports for 2007, 2008 and 2009. One recent quarterly report to the House of Representatives actually shows 100% implementation of recommendations.

3) T. R. Tyler, *Why do people obey the law? Procedural justice, legitimacy and compliance*, Yale University Press, New Haven, Connecticut, 1990.

Ombudsman's work is effective influence. The constant aim is to change how things happen on the ground and not simply to deal with complaints in accordance with the law. The background to this is the difference (revealed by research) in the styles of supervision exercised by the courts on one hand and the Ombudsman on the other. Because of their powers to quash administrative decisions, the courts exercise a more repressive style of supervision, while the Ombudsman employs a more reflexive approach by way of influence and dialogue.<sup>4)</sup>

The Ombudsman primarily exercises effective influence by using the right of complaint and the Ombudsman's power to undertake investigations on his own initiative to provide administrative authorities with feedback concerning the public's experience of dealing with them. The Ombudsman constantly seeks to hold up a mirror to government. Issuing recommendations is one way of doing this.

### Three kinds of recommendations

Although the legislation refers only to the possibility of issuing recommendations, there are in practice three different kinds of recommendations: specific recommendations about individual complaints, more general recommendations directed at improving particular administrative practices, and – widest of all – generic guidelines on administrative procedures.

Specific recommendations are made where the actions of government have been less than proper and have produced a certain imbalance that needs to be corrected. The word 'remedy' is particularly appropriate in this respect.<sup>5)</sup> Sometimes the issue is fairly straightforward: for example, the authority's failure to issue a decision, answer a letter or supply relevant information. Sometimes it is more specialised: for example, its failure to conduct a technical study regarding the nuisance caused to local residents by the presence of a speed bump. In other cases, the issue is action detrimental to a member of the public which requires an apology or offer of compensation. In cases like this, the Ombudsman regularly recommends that the authority should meet the person face-to-face to discuss what compensation is appropriate. Administrative authorities are increasingly prepared to comply with such recommendations and the Ombudsman now urges them not to view the question of compensation in a strictly legal light (in terms purely of blame, damage and causal connections) when dealing with situations where something must clearly be done to restore public confidence.<sup>6)</sup>

General recommendations (directed at changing particular administrative practices and perhaps the administrative rules on which they are based) are less common than specific ones. An important example of their use is in relation to the Police Code of Conduct, which is based on the Police Act (*Politiewet*). It lists, in particular, standard criteria for the use of physical force in measures such as handcuffing and the use of pepper spray. The National Ombudsman has sometimes criticised measures taken by the police on the grounds that they were not regulated by this Code. Examples include the blindfolding of arrestees or the use of police dogs. Following a number of dog-bite incidents, the Ombudsman recommended the amendment of the Code to include explicit criteria for the latter.

General recommendations may also concern modifications to routine administrative procedures to ensure that people are given better information about their rights. For example, the National Ombudsman has criticised the information given to people receiving fines concerning the legal remedies open to them.

Another area where they have been used is the modification of ICT systems. When the Tax Department stopped allowing the use of computer discs for digital tax returns, the Ombudsman recommended that it continue doing so for a few years longer in order to accommodate taxpayers (particularly the elderly) who may not have access to the latest computer hardware. In the event, following consultation with the House of Representatives, the State Secretary decided not to implement this recommendation.

General recommendations can also be directed at strengthening the internal right of complaint. The General Administrative Law Act stipulates that, before resorting to the Ombudsman, individuals, businesses and institutions must submit their complaints to the administrative authority concerned. Authorities are increasingly prepared to take their complaint-handling responsibilities seriously but some internal complaints procedures used to be unsatisfactory. Examples included the police, the Public Prosecution Service and the youth care system. In the case of the Public Prosecution Service, failure to recognise complaints as such was a major problem. Since they were often seen as expressing dissatisfaction with the prosecution, complaints – which might have been important in themselves – were often disregarded. Consultation between the National Ombudsman and the Board of Procurators General (which heads the Public Prosecution Service) has led the Service to pay greater attention to its internal complaints procedures. The police have likewise acted – partly at the instigation and with the help of the National Ombudsman – to improve their complaints procedures. In the case of the youth care system, there used to be considerable differences in who could complain and about what in the various regions. The same was true of the way the different regions responded to the advice of the statutory complaints advisory committees. Solutions to these issues have been found in close consultation with the Youth Care Agencies concerned and they have accepted the result as the basis for internal complaints procedures.<sup>7)</sup> In cases concerning them, the Ombudsman now assesses whether complaints have been handled in accordance with these basic principles.

Over the last few years, a new kind of recommendation has emerged: generic guidelines on administrative procedures. These recommendations are the result of large-scale investigations undertaken by the Ombudsman on his own initiative. Based on these investigations of structural problems between individual citizens and government bodies, the principles of proper administration have been translated into decisions on certain general topics. The consequent recommendations constitute generic guidelines on administrative procedures. One of the earliest examples concerned the way government bodies dealt with their correspondence with the public. In Dutch, the word 'correspondence' (*'correspondentie'*) is a legal term encompassing formal applications and written objections as well as letters with no direct legal standing, such as requests for information. This investigation led to the development of a set of guidelines on correspondence (known as the *'Correspondentiewijzer'*) constituting a code of conduct for administrative authorities when dealing with letters from individual citizens. The National Ombudsman subsequently carried out a series of

4) M. Hertogh, *Consequenties van controle: de controlestijl van de administratieve rechter en de Nationale Ombudsman vergeleken*, 1997.

5) See the UK Parliamentary and Healthcare Ombudsman's *Principles for Remedy*.

6) National Ombudsman report no. 2009/135 (on the proper handling of compensation claims).

7) National Ombudsman report no. 2010/045.

checks to see whether practice in this regard had improved. These showed that many administrative authorities had indeed made progress, for example as regards the speed of their replies. Eventually, the Ministry of the Interior and Kingdom Relations took over the task of monitoring the handling of letters from members of the public and made it an integral part of the management system of government departments. Things appear to be improving, since complaints about slow response to correspondence have gradually declined as a proportion of all complaints to the National Ombudsman. Apart from this, the Ombudsman's regular monitoring of the speed of response to correspondence prompted a private members' bill that led to the introduction of fines for failing to meet time limits for decision-making. The Ombudsman is not particularly happy with this, since it merely contributes to a further juridification of the system. Indeed, it may lead to abuses: for example, to avoid breaching the time limits, administrative authorities may take less careful decisions, in the expectation that errors can be remedied in the course of the objections procedure. Also, some ingenious members of the public have found ways to exploit the new system of fines by sending so many letters and applications that they clog up bureaucratic channels and cause delays, making the sender eligible for compensation.

Over the last few years, generic guidelines have been produced for administrative procedures relating to matters such as enforcement, public participation in spatial planning and other decision-making procedures, and the treatment of compensation claims. The sets of guidelines (*wijzers*) are produced in collaboration with the administrative authorities concerned and are designed to help them act properly in their dealings with members of the public.

Where enforcement is concerned, the guidelines relate to situations in which citizens experience nuisance as the result of illegal action by other members of the public and ask their municipality to take enforcement action to stop it. For example, a neighbour may have built something without permission or may be making a lot of noise. The basic principle of the Enforcement Guidelines (*Handhavingswijzer*) is that the municipality should tell the complainant whether it intends to take action or not. People often find it worse not to know than to receive unwelcome news quickly. Moreover, it is often important for the municipality to refer the opposing parties to a mediator. This is especially so where neighbour disputes are concerned. Neighbourhood mediation is now common in the Netherlands.

Public Participation Guidelines (*Participatiewijzer*) have also been produced. The General Administrative Law Act provides for various kinds of public participation procedures in the environmental law field (to do with the environment and spatial planning) and authorities are now increasingly seeking to involve the public in decision-making processes. However, people frequently feel frustrated by their experience of public participation. They are asked for their opinion but then find that their views are ignored or that the decision was predetermined and the whole exercise just an empty show. In the Public Participation Guidelines (drafted in consultation with municipalities and other bodies), the Ombudsman lists a number of rules that can help ensure that citizens are taken seriously and that they feel that this is the case.

## Dilemma: compliance

The National Ombudsman sees compliance with recommendations as an important issue. On the one hand, he can play safe by issuing fewer recommendations; on the other, making recommendations – even on sensitive subjects – increases the effectiveness of his work. Needless to say, specific recommendations without far-reaching consequences attract compliance more easily than general recommendations, let alone generic guidelines.

What are the key success factors in this respect? They are fairly obvious but perhaps still worth stating. First of all, the personal authority of the Ombudsman is extremely important. His authority is based partly on good personal relationships within government and parliament and partly on the reputation he has built up. That reputation makes it more difficult for an administrative authority to defend any decision to disregard a recommendation. Secondly, the Ombudsman needs to have sufficient expertise in the area addressed by a recommendation. Contact with external experts – often university academics – can be helpful in this respect. Thirdly, there needs to be close contact concerning the recommendation. Having completed his investigation, the Ombudsman sends the parties concerned an account of his findings. Since it is only after this that he embarks on the decision-making process that may culminate in recommendations, his decision and any recommendations come more or less as a surprise to the administrative authority. This procedure may be contrasted with that of the Netherlands Court of Audit, which avoids such surprises. By statute and tradition, the Court of Audit begins by presenting its report to the minister. The minister responds to it and the report is modified to take account of that response before the Court reaches its conclusions. Indeed, in some cases (usually large-scale investigations leading to recommendations likely to have a structural impact) the Ombudsman follows a similar procedure: he begins by exploring the problem and formulating solutions in close consultation with administrative authorities, interested parties and experts. If his recommendations are then communicated in advance, this may help to reduce resistance to them. The report on the proper treatment of compensation claims (discussed later in this article) is a good example.

However, engaging in advance consultation may also produce a polemic which, while it may sometimes be fruitful, may also be aimed purely at blocking the recommendation. In that case, it is better to pre-empt argument and simply publish the recommendation sight unseen in the report. So far, specific recommendations have not, as a rule, been communicated to administrative authorities in advance. However, this rule is not absolute and the National Ombudsman is always prepared to respond to individual circumstances. Sometimes an administrative authority may pick up pointers given in the course of the investigation and make changes before they have been actually recommended in a report. Equally, the investigation itself may produce changes in administrative practice. The National Ombudsman records such changes in his decision and notes his approval. Technical and legal issues are regularly discussed with administrative authorities before issuing the relevant reports, in order to ensure that the recommendations can be implemented in practice.

Despite all this, experience shows that a report or recommendation may occasionally lead to a clash with one or more administrative authorities. In such cases, however, the conflict itself sometimes

gives rise to discussion which eventually produces a constructive outcome. This is also part of the Ombudsman's job as a critic of government. For example, the Ombudsman's public criticism of the use of force by the police during certain incidents eventually produced an invitation to act as 'trendwatcher' in periodic discussions with the Board of Chief Constables. Similarly, critical reports and recommendations have on occasion generated vigorous debate which helped to improve attitudes towards members of the public.

## Recommendations in practice

To give a clear impression of the impact of recommendations and the importance of their implementation by administrative authorities, this section gives a number of examples from the Ombudsman's day-to-day practice.

First of all, here is a straightforward example of a specific recommendation. By agreement with the Ministry of Defence, an entrepreneur had for many years used a military training ground for adventure activities organised as part of company outings and other events. A change in policy and a breakdown in internal communication at the Ministry led to the entrepreneur being accused of using the training ground illegally and told to cease doing so immediately. The Ombudsman found that this abrupt policy change and unsympathetic treatment of the entrepreneur were less than proper and issued a recommendation to the Ministry to discuss the situation with him face to face. The satisfied entrepreneur later reported that he had received an apology and an attractive picture of the area as a souvenir of the period in which he had used the training ground.<sup>8)</sup>

In another case, a firm took action against the Ministry of Agriculture, Nature and Food Quality on a point of European law and won its case in the court of first instance. The Ministry pursued the case right up to the Supreme Court. The firm complained to the Ombudsman that the Ministry had done so vexatiously and that, by taking this action, it had caused the firm to incur substantial costs. The Ombudsman decided that the complaint was well-founded and issued the following recommendation: 'The National Ombudsman recommends the Minister of Agriculture, Nature and Food Quality to consider compensating the petitioner for the costs of the legal proceedings at the court in Arnhem insofar as they exceed the standard costs awarded.' The Minister at first refused to do so but was persuaded to change his mind by parliamentary pressure after the Ombudsman brought the case to the attention of the House of Representatives. The recommendation was eventually implemented.<sup>9)</sup>

One very poignant case involved the suicide of a young defendant just a few days before the date of his trial. In his farewell letter to his parents, he said he had been pressurised by the police into confessing to inappropriately touching little boys. The Ombudsman did not investigate the facts of the case but felt that, in view of the young man's limited education, it was inconceivable that he had made the statement recorded in the official report. The wording of the report looked suspiciously as if had been deliberately tailored to fit the legal definition of the offence. This prompted the Ombudsman to make the following recommendation: 'The National Ombudsman urges the Minister of Justice to state in codes of practice for the Public Prosecution Service and police that

audio/video recordings of interviews with suspects should be standard practice and to identify those cases where such recordings are unnecessary in view of their lack of added value, and requests the Minister to report back to him on this matter within the next three months.' The underlying aim of this recommendation is to enable defence lawyers and courts to check the value of a confession. The Minister took this recommendation into account in his decision-making on the recording of such interviews and the presence of counsel during them. This decision-making was in part necessitated by case law from the European Court of Human Rights in Strasbourg.<sup>10)</sup>

In another case, a municipality invited tenders but then abruptly cancelled the tendering procedure following a change in policy. As a result, firms had spent money on preparing their tenders without any chance of receiving the contract. The Ombudsman found that this was less than proper and asked the municipal executive to consider offering the complainant an ex gratia payment in recognition of the costs he had incurred in this respect. The executive refused, prompting legal proceedings and debate in the municipal council.<sup>11)</sup>

Finally, there was the case of a terminally ill man who complained that the computerised police records system had contained erroneous information about him for the last twenty years. He wanted to clear his name before he died. The erroneous information was that he was a known alcoholic and drugs user; on the basis of it, he had been assigned a high-risk code. Since the Ombudsman's report related to only one of the 26 Dutch police forces, a separate letter was sent to the Minister of the Interior and Kingdom Relations recommending that the planned new police records system should contain only verified information and that there should be a simple way for individuals to correct errors in the information held about them.<sup>12)</sup>

## Special projects

To add to the more or less routine reports and recommendations discussed above, here are some examples of investigations that were undertaken on the Ombudsman's own initiative and led to the issue of guidelines for improvements in administrative practices.

## Mislaid documents

In their dealings with the Aliens Police, the Royal Military and Border Police and the Immigration and Naturalisation Service (IND), foreign nationals were frequently told that the authorities had mislaid personal documents (such as passports, birth certificates, marriage certificates and diplomas) handed in to them. To recover their documents, they then had to embark on a complex round of inquiries among the bodies involved. If this proved fruitless, it was not even clear which body was liable for the damage suffered. A round table discussion with representatives of these services produced a clarification of the issue, an overview of the action already taken to achieve a structural solution and, ultimately, a set of guidelines for the procedure to be adopted when a foreign national approached one of these bodies with a request for the return of such personal documents. Following consultation, this procedure was formally adopted and accepted by the State Secretary for Justice as

8) National Ombudsman report no. 2006/255.

9) National Ombudsman report no. 2008/179.

10) National Ombudsman report no. 2006/010.

11) National Ombudsman report no. 2009/276.

12) National Ombudsman report no. 2010/319.

the basis for future policy. The use made of the procedure was monitored via subsequent cases. There has since been a sharp reduction in complaints of this kind.<sup>13)</sup>

### Compensation

The National Ombudsman regularly receives complaints about the treatment of compensation claims. The division of responsibilities between the administrative and civil courts is such that this can be an issue in both areas of law. Compensation in relation to wrongful decision-making in the public law field is generally a matter for the administrative courts. Where losses are the result of administrative practice not subject to appeal, however, power lies with the civil courts. The National Ombudsman has traditionally refrained from involvement in such cases: where the administrative authority could reasonably have reached its decision to refuse compensation, the Ombudsman has not intervened.

In the course of the recent investigation, the government ministries were surveyed to gather information on practices regarding the treatment of compensation claims and good practices were identified. Intensive consultation with the heads of the ministries' legal affairs departments led to the drafting of a number of guidelines aimed at reducing the number of legal proceedings regarding compensation claims. These were then discussed in detail with the Minister of Justice and the finalised guidelines were ultimately presented to him. The government subsequently gave formal approval for the guidelines, while nevertheless indicating that further study would be necessary to see how certain aspects of them would work in practice. It was also stressed that the guidelines in no way replace the principles of legal liability, but are merely complementary to them. Essentially, the guidelines state that there are four ways to deal properly with claims for compensation from government bodies: *Government should adopt an attitude aimed at resolving the conflict underlying the claim and at avoiding escalation. It should also base its reaction to such claims on a generous and flexible attitude, seeking to achieve an appropriate solution, even in cases where there is no immediate legal basis for compensation. Finally, government should seek to avoid legal proceedings and adopt a proactive stance.* There has been extensive discussion of the guidelines in legal journals.<sup>14)</sup>

### The Tax Department

Each year, the National Ombudsman uses the intervention method to deal with hundreds of complaints about the administration of rent, child and care allowances by the Tax Department. To avoid the endless repetition of such complaints in years to come, the Ombudsman selected the top eight examples (from a list of 1200 common complaints) and submitted them to the Tax Department together with the reasons for his choice and a request to know what changes the Tax Department intended to make in its current administrative practices. The report contains both the response from the Tax Department and the Ombudsman's comments on it. In most cases, the Tax Department was able to show that it had learned from the complaints and taken concrete measures in response to them.<sup>15)</sup> This report was also discussed in the specialist press.<sup>16)</sup>

### Freedom to demonstrate

As the seat of national government, The Hague is the scene of many demonstrations and assemblies and these are generally managed by the police in a constructive manner. Where solo protests or small-scale spontaneous demonstrations are concerned, however, there have been a relatively large

number of clashes. These have created the impression that unnecessary escalation too often occurs between police and individual demonstrators. In the course of the investigation, the cause of these incidents was explored during wide-ranging discussions with demonstrators, police and the city's mayor (who is responsible for maintaining public order). It gradually emerged that neither side was really clear about the rules for demonstrations and assemblies. For example, the police routinely asked to see a "permit" for solo demonstrations, while no such thing is required: collective demonstrations merely have to be notified to the authorities in advance and solo protests can take place without even that formality. The report described the current state of affairs regarding the legal requirements for demonstrations and assemblies (also taking note of ECHR case law) and led to the publication of guidelines. Following discussions with political representatives, the mayor, the police and demonstrators, and taking ECHR case law into account, a summary of the rules on notification and on the conduct and management of demonstrations was produced and issued in credit card format. At the request of the police, a thousand cards were distributed and since then few new complaints have been received.<sup>17)</sup>

### Self-employed workers without employees

The linkage of electronic databases maintained by the Tax Department and the UWV (which is responsible for unemployment benefits etc.) revealed that many people starting up new one-man businesses had supplied different information for the calculation of their (remaining) unemployment benefit and their tax deductions. The authorities concluded that large-scale fraud was taking place and took widespread action to recover the relevant benefit payments and impose sanctions under administrative and criminal law. Complaints to the Ombudsman and signals reaching the House of Representatives swiftly raised doubts concerning the propriety of this response. Discussion between the House of Representatives and the National Ombudsman led to an investigation of the practices of the UWV, in particular as regards the provision of information to people starting up new one-man businesses. The Ombudsman concluded that the information provided had been a factor in the situation. If people had sometimes supplied the UWV with information that was not in accordance with the law, it was because of the information they had been given. For this reason, the action taken to recover benefit payments and impose sanctions had not been proper. Based on this report, there was a series of discussions with the standing parliamentary committee and the Minister of Social Affairs and Employment. Eventually, this led to a review of 3000 cases in which workers felt that their treatment had not been proper and the decision of the UWV was reversed in a substantial number of them.<sup>18)</sup>

### Reflexive influence

Recommendations and investigations undertaken on the Ombudsman's own initiative are not the only ways of influencing the practices of administrative authorities. The issue of recommendations needs to be viewed in the more general context of the various means available to the Ombudsman to influence authorities. These include the presentation of his annual report to the House of Representatives. Since 2006, the National Ombudsman has used the first part of his annual report to express his views on a specific topic regarding relations between government and individual

13) National Ombudsman report no. 2008/290.

14) National Ombudsman report no. 2009/135. See also: J. Hoitink, *Behoorlijk omgaan met schadeclaims: wees coolant, maar met verstand*, *Overheid en Aansprakelijkheid*, 2010, 3; D. Allewijn, *Behoorlijk omgaan met indieners van schadeclaims*, O&A 2010, 4; A.J.J.G. Schijns, *Het ombudsmanrapport Behoorlijk omgaan met schadeclaims in het licht van de behoeften van slachtoffers van rampen. Over de (im)materiële behoeften van slachtoffers, het rapport van de ombudsman en de rol van het aansprakelijkheidsrecht*, O&A 2010, 5; A.F.M. Breninkmeijer, *Verantwoord omgaan met publieke middelen; Bespreking van het thema 'Behoorlijk omgaan met schadeclaims'*, O&A 2010, 30.

15) National Ombudsman report no. 2010/015.

16) R. Beemster, A.F.M. Breninkmeijer and A. Stehouwer, *Met de Tax Department gaat het steeds beter. Een impressie vanuit het werk van de National Ombudsman*, *Weekblad Fiscaal Recht* 2010/182.

17) National Ombudsman report no. 2007/290. The rules given on the card are as follows: 'Advance notification procedure: Solo protests do not need to be notified to the authorities; All other demonstrations must be notified in advance; Arrangements for demonstrations may be agreed with the authorities in advance, but this is not obligatory; Nobody except the mayor has the power to impose restrictions or conditions'; Extra restrictions may be imposed concerning particular places (embassies, government buildings, etc.).

► ► Continued on p. 15



citizens.<sup>19)</sup> The Ombudsman goes in person to present his annual report to the President of the House of Representatives during a plenary session of the House and gives a brief address. The standing Committee on Internal and Kingdom Affairs and any other relevant standing committees then discuss the content of the annual report with the Ombudsman. Finally, there is a plenary debate on it in the House of Representatives, in the presence of relevant government ministers (always including the Minister of the Interior and Kingdom Relations).

Under the job description drawn up by the House of Representatives, the National Ombudsman is expected to make an active contribution to public debate. To do this, he gives regular talks and lectures and contributes to the postgraduate training of police officers and other officials. In addition, he gives regular press, radio and TV interviews, writes letters to the press and makes specialist contributions to the legal literature. His Office provides courses on proper conduct in routine work situations for the staff of administrative authorities like the immigration service (IND) and the police. Finally, special seminars are organised for the liaison officers designated by administrative authorities in fields like the police, youth care system and taxation; these address topics like the use of mediation in complaints handling and the design of internal complaints procedures.

The National Ombudsman's annual report for 2008 was on the subject of 'chain cooperation' and asked whether administrative authorities are managing to concert their actions effectively enough in situations where the interests of the individual are affected by the work of a number of different bodies. Such situations arise, for example, at the interface of taxation and social security, or where the municipality is responsible for administrative questions and the police for related criminal law issues (as in administrative and criminal law enforcement). In 2009, in the wake of that annual report, the Ombudsman held a conference with a number of major administrative authorities and urged them to make an immediate start with cooperation, especially with regard to situations where people were at risk of falling between two stools. The result was new partnerships and a strengthening of existing ones. In complex matters concerning multiple administrative authorities, the Ombudsman can now increasingly rely on this multi-authority cooperation. For example, the law prescribes criminal penalties for vehicle licence holders who fail to meet certain obligations (having third party insurance and having their vehicles periodically tested for roadworthiness). In situations where an owner has lost possession of a particular registered vehicle or in cases of identity fraud, the citizen has to deal with a multitude of authorities, including the vehicle licence registration authority (RDW) and the central fine collection agency (CJIB), which operates virtually automatically via the linkage of government databases. These two authorities have now ensured that, where fines are wrongly imposed, citizens can be helped in an effective and informal manner rather than having to resort to (sometimes repeated) legal proceedings.

## Conclusions

By its very nature, the National Ombudsman's work in handling complaints under the General Administrative Law Act concerns specific situations in which individuals, businesses and institutions feel that they have been improperly treated by some part of the complex government machine. An investigation of the facts and a decision on the propriety of the action(s) involved is frequently enough to satisfy the complainant; sometimes, however, more is required. In that case, it is open to the National Ombudsman to attach recommendations to his decisions. Likewise, where the Ombudsman undertakes investigations on his own initiative, there are obvious reasons for him to issue recommendations accompanying his decisions, especially where problems are fairly structural in nature. A major difference between the courts and an ombudsman is that the judgments of the courts are binding whereas an ombudsman's decisions are not; nor are his recommendations legally enforceable. In practice, however, experience shows that between 90 and 100% of the recommendations of the National Ombudsman of the Netherlands are implemented.

There are three different kinds of recommendations: recommendations made in response to individual complaints and usually designed to produce a 'remedy'; more general recommendations directed at improving particular administrative practices, and – widest of all – generic guidelines on administrative procedures. Recommendations are not the only means of influencing the practices of administrative authorities. The annual report and contributions to public debate are also effective means.

There are two crucial factors that influence compliance with recommendations: the personal authority of the Ombudsman and the practical feasibility of implementing the recommendation. To guarantee the latter, there needs to be close communication between the National Ombudsman and the administrative authorities concerned. This is another difference between a court and an ombudsman. A court speaks to the outside world only via its judgments, whereas an ombudsman has far more means of communication at his disposal. Effective use of them helps to ensure regular observance of the principles of proper administration in the routine practice of government.

► ► ► Continued from p. 13  
During the demonstration:  
Nobody except the mayor  
has the power to forbid a  
demonstration<sup>18)</sup>; There is no  
such thing as a permit for  
demonstrations; The police  
are entitled to ask to see the  
notification form; Nobody  
except the mayor can order the  
dispersal of a demonstration<sup>19)</sup>;  
No demonstration may be  
dispersed solely on the grounds  
of non-notification<sup>19)</sup>; The police  
can ask to see identity papers  
if this is necessary to their  
investigations or for security  
reasons. (<sup>19)</sup> Restrictions may  
not be imposed on the freedom  
to demonstrate except in the  
interests of public health, road  
safety or public order.)

18) National Ombudsman  
report no. 2010/025  
(ZZP'ers met een valse start).

19) 'A rule is a rule' is not good  
enough, 2007; The Citizen in  
Chains, 2008; Beyond Conflict,  
2009.

On 30 November 2010, the National Ombudsman gave a paper on Dutch experience concerning compliance with Ombudsman recommendations. The paper is to be published in the second quarter of 2011 as part of the proceedings of the conference at which it was given ('Een federale ombudsman voor de 21e eeuw: verankering door vernieuwing/Un médiateur fédéral consolidé pour le 21ème siècle: des réformes nécessaires?'): an event organised to mark the 25th anniversary of the establishment of the office of Federal Ombudsman of Belgium.

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