

## **Summary - To report or not to report civil service crime?**

A study into compliance with and knowledge about the legal obligation to report crimes under Article 162 of the Penal Code

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The situation in which a civil servant finds out that a colleague has been or is being bribed by a construction company is a good example of a form of civil service crime to which the legal obligation to report applies. This legal obligation to report results from Article 162 of the Penal Code. Partly because of parliamentary questions about this legal obligation to report, the need has arisen to gain insight into the value of this legislative article and to explore whether the present form of the legal obligation to report is satisfactory. Moreover, since the Dutch Cabinet has indicated its intention to promote attention for recognizing, signalling and reporting corruption, the Dutch Scientific Research and Documentation Centre of the Ministry of Justice has commissioned Beke Consultancy and Research to conduct a study into the way the civil servants' legal obligation to report functions.

### **Purpose, research questions and research methods**

This study has two main goals. The first goal is to gain insight into the way in which the (potential) reporter and the investigating and prosecuting authorities deal with this legal obligation to report in everyday practice. The second goal is to shed light on the desirability and the possibilities for extending or sharpening this legal obligation to report. The ultimate goal is to contribute to safeguarding the integrity of the government and to the instrumentation of investigation and prosecution. On the basis of these goals the following four research questions were formulated:

- I        What can be said about the reports of crime to which Article 162 of the Penal Code applies?
- II       How do public bodies and civil servants deal with this legal obligation to report?
- III      How do investigating authorities deal with reports based on Article 162 of the Penal Code?
- IV      What could be done to improve the functioning of this legal obligation to report?

In order to answer these questions a fivefold research strategy was used. First of all a broad desk research was carried out into civil service crime, the legal obligation to report, the relevant articles of law, violations of integrity and whistleblowers. Additional analyses of statistics were made in order to try and gain insight into the number of times Article 162 of the Penal Code was used. Furthermore, more than 700 civil servants from different types and sizes of government organizations completed an online survey to assess their knowledge about and the functioning of the legal obliga-

tion to report among civil servants. To deepen our understanding of the subject more than twenty experts and other persons involved, including a few whistleblowers, all from very different backgrounds, were interviewed. Finally, civil service and criminal files on reportable cases were studied in order to gain insight into the way civil service and investigating authorities act with respect to this law.

### **The legal obligation to report civil service crime explained**

In order to study the way the legal obligation to report functions the relevant article of law was examined first. The most important section of Article 162 is phrased as follows:

Article 162 of the Penal Code

1. Public bodies and civil servants who, when exercising their duties, gain knowledge of a crime in which they are not charged with the investigation, are legally obliged to report that crime forthwith and to hand over all the relevant items to the Public Prosecutor or one of his assistants,
  - a. if the crime is a civil service crime as described in Title XXVIII of the Second Book of the Penal Code, or
  - b. if the crime has been committed by a civil servant who has violated a special civil duty or has abused power, occasion or means resulting from his office, or
  - c. if the crime entails a violation or unlawful use of a rule or regulation the implementation or enforcement of which was assigned to them.

The Article was drafted in 1926 and was meant to uphold the integrity of the civil service and to contribute to the tasks of the Public Prosecution Service. Until 1984 civil servants were obliged to report every criminal fact with which they were confronted when exercising their duties. In 1984 this article of law was revised in order to make the content easier to apply in practice. The term civil servant was further defined, the relevant criminal offences were limited and the passive duty to inform (handing over items regarding the crime to the Public Prosecutor) was added.

However, the extension of the term civil servant has not led to greater clarity, because it is not clear to whom exactly the legal obligation to report applies. Case law has demonstrated that the term civil servant has a broader meaning in criminal law than in civil service legislation: it is an open term. With respect to the legal obligation to report a broad definition applies including civil servants in the sense of civil service legislation, contract employees and employees of private organizations responsible for public tasks. In practice, however, and due to these definition problems a large part of these 'civil servants' feel that this article of law does not apply to them.

There also appears to be a lack of clarity about the criminal facts referred to. Paragraph 1(a) includes a clearly defined category of crimes, i.e. the civil service crimes mentioned in Articles 355 to 380 of the Penal Code.

The descriptions in paragraphs 1(b) and 1(c) are vaguer: They refer to more common crimes committed as a civil servant and to crimes involving violation or illegal use of a rule or regulation. In particular, it concerns those rules and regulations the civil servant is responsible for executing or for seeing to it that they are observed. Due to the vague description of the criminal offences in question the term 'civil service crime' has been chosen for this report. The term includes all criminal offences to which the legal obligation to report applies. Finally, the obligation to report applies only when civil servants become aware of a form of civil service crime when exercising their duties.

#### **The legal obligation to report: the figures**

Several strategies were used to gain an impression of the number of situations in which the obligation to report applies. One of the problems in doing so is that there is nowhere any mention of Article 162 of the Penal Code in the registration systems the police use. After all, the obligation is the reason behind reporting the crime and only the Penal Code article of the crime committed is registered. That is why civil service crimes registered in the registration systems of the police (BPS and HKS respectively) were looked into, data of the National Prosecutor's Office were analyzed and six annual reports of larger official organizations were closely studied.

Previous research, such as studies of civil service corruption and whistleblowing legislation, was also taken into account. The findings of the survey give an impression of the frequency of reportable situations. The data available, however, provide an indistinct and diffuse picture of the prevalence of civil service crime; the dark figure is high and solely on the basis of the analyses it is not possible to draw any sound conclusions about the extent of civil service crime in the Netherlands and the implementation of Article 162 of the Penal Code. It is clear, though, that an estimated minimum of 150 cases are actually reported every year. It is impossible to provide any concrete data on the number of cases that are not reported or that are internally dealt with.

#### **The legal obligation to report: the procedure**

The integrity policy in itself has existed for quite some time now, but only since March 2006 have national and local governments been legally obliged to pursue an integrity policy. It consists of a number of measures aimed at promoting proper behaviour of civil servants in their official capacity. The rules for reporting abuse have been included in this as well. The obligation to report is the final piece of the procedures relating to integrity policy.

The survey shows that a majority of the civil servants – 80 per cent – are not familiar with the obligation to report. Five per cent of the respondents said that they were quite familiar with the content of the legal article and four per cent knew the terms and conditions in detail. Large differences can be found, however, between and within organizations. Various aspects influence matters, such as the nature of the work and the attention the organization pays to integrity policy. Also, the distance to the national

tional government or the top of the organization is important. The closer to the top, the more people are aware of the risks involved and the more knowledge they have about the obligation to report. The problems with regard to reporting civil service crime, however, are mainly due to the organization's management.

In spite of not being familiar with internal procedures many potential reporters indicated they would report to their superiors instead of going straight to the police if they suspected a case of civil service crime. This is in line with civil service law and whistleblowing legislation. According to the procedures for reporting integrity violations civil servants do not personally report, but the officials in charge. This is also in line with the civil servants' pledge of secrecy, which states that a civil servant is not allowed to make public sensitive, internal information just like that. According to some respondents it remains to be seen how bad it is that so few civil servants are familiar with the obligation to report.

If a civil servant who wants to report a civil service crime is unable or unwilling to report to the organization's management, he must be able to do so with a trusted representative in accordance with internal procedures. This trusted representative is only allowed to act if the civil servant involved agrees to it. Moreover, if a civil servant is unable to report his suspicions within the organization or if the case is covered up, he can go straight to the Public Prosecution Service. As this may not be in the interests of the organization, organizations might not be motivated to draw attention to the existence of the obligation to report.

The obligation to report cases of civil service crime is not a logical consequence of internal rules and regulations. These rules and regulations partly overlap. For civil servants, however, there is great uncertainty about the differences and similarities between the two regulations and it is not clear either to what extent they give up their rights of protection by the whistleblowing legislation, should they report without intervention of the organization's management.

Although the obligation to report is established by law, not complying with this obligation does not carry sanctions for the potential reporter and receiver (the officials in charge) from a criminal law point of view. Because of this it may seem that both potential reporter and the organization's management have a 'choice' between reporting or not reporting (which is not a real choice after all because of the obligation to report). The choice to report can be motivated by varying personal, ethical and social motives and interests. These interests can conflict with one another, since on the one hand a civil servant may be willing to report because of a guilty conscience or from a social point of view, but on the other hand he may not want to betray his own colleagues and risk his own job and career perspective. The whistleblowing legislation, which is meant to protect the reporting employee, was established for exactly this reason. According to this regulation an employee must not suffer adverse consequences with respect to his position as an employee both during and after the report-

ing procedure. Nevertheless, the biggest risks for whistleblowers seem to originate from within the organization.

In many cases an internal fact-finding investigation is conducted first, before any formal reporting is done. To this end various organizations have an internal department or integrity bureau. In some cases, for example when specific expertise is required, an independent criminal investigation bureau is called in. If subsequent investigation demonstrates that it is indeed a case of neglect of duty – and in the case of violation of integrity this is always the case – it is the task of the competent authorities to determine whether – and if so, which – disciplinary measures will be imposed.

When the internal investigation establishes that a civil service crime has indeed been committed this must be (formally) reported. In spite of the fact that many organizations indicated that they would always report such cases, it appears that at that point in time so many moments of choice have already passed that the chance of a case not being reported is considerable. Out of fear of damage to their image, organizations often prefer to solve abuse internally. Finally, this study also shows that if a report is actually made, this is more frequently done out of a moral sense of duty than because of the obligation resulting from Article 162. So the obligation to report is only one of many stimuli in an intricate whole which determines whether or not a civil service crime will be reported in the end.

#### **Criminal law processing of reports**

Investigating civil service crime involves the Public Prosecution Service, the police, the national department of criminal investigation and sometimes special investigation services as well. The Public Prosecution Service is in charge of the investigation, decides whether or not to prosecute civil service crime and determines which investigation authority carries out the investigation. The national department of criminal investigation generally deals with the more serious and sensitive cases regarding integrity violations. As a rule, the police handle the remaining cases. Occasionally, special investigation units are involved. The outcome of the internal fact finding investigation and the knowledge of the internal department for integrity are often used in the formal investigation.

Not all reports of civil service crime with the investigating authorities lead to a formal investigation. Unless in cases of civil service corruption, the priorities of the police often lie elsewhere and only limited manpower is made available. The national department of criminal investigation also needs to set priorities. They use a number of criteria to determine the seriousness – and thus the priority – of a case. These criteria include the seniority of the civil servant in question, the type of organization and any media impact the case might have. Within the Public Prosecution Service the prosecution of corruption in the civil service does take high priority. Civil service crime is not restricted to corruption, however. Offences not involving corruption seem to be given much lower priority by the police and the Public Prosecution Service. In practice it also

turns out that individual Public Prosecutors deal with such cases in different ways. For government organizations it is frustrating and offensive that the obligation to report civil service crime obviously does not appear to result in the obligation to formally investigate and prosecute such cases.

Whether or not investigative capacity will be deployed appears to depend on whether an internal investigation has been done already and whether there is a suspect who has confessed to the crime. If a crime is reported directly (without an internal investigation being conducted first) and it is not about corruption, chances are that the Public Prosecution Service considers the facts to be too 'meager' and the case is dismissed. The criminal proceedings are over then. If an internal investigation leads to a confessing suspect, prosecution requires only little capacity and is usually successful. If, on the other hand, a case is internally investigated and there is no confessing suspect, chances are that the evidence has been partially destroyed in the meantime. It can then take a long time before the case is closed and the judge has passed an irrevocable verdict.

Respondents from government organizations regularly voiced their frustration about the fact that reports based on the obligation to report apparently do not result in an obligation to (formally) investigate and prosecute. The priority felt is too low and obviously it is not very clear what reporting organizations can and may expect. Corruption cases are an exception to this rule.

In order to draw attention to a case direct contacts with the Public Prosecution Service seem to be very important. If the regular route via the police is followed, then chances are that a report of civil service crime – other than corruption – does not lead to (a formal) investigation and prosecution of the case.

Any problems during the investigation are mainly caused by the evidence procedure since suspicions cannot always be proven. This may be a reason for the Public Prosecutor not to sue. If disciplinary actions have already been taken internally, chances are the case will be dismissed or settled out of court. This could mean that in cases in which the internal route has not started yet or still has to be completed and no disciplinary actions have been taken yet, a suspect is punished more severely (i.e. under criminal law as well).

Government organizations have had varying experiences with the feedback provided by the Public Prosecutor about the investigation and prosecution of civil service crime. Since the entire route of internal investigation, formal investigation and court decision may take years; this may cause problems for the organization because it is difficult in incidental cases – and is seen as difficult in more cases - to take disciplinary measures internally before the court's decision is irrevocable.

All this is by no means conducive to the willingness of government organizations to report. Also the fear of claims for damage made by civil servants because of 'unjustly' imposed disciplinary measures does not help. So it is understandable that various re-

spondents gave the impression that sometimes an internal handling of incidents is preferred. In no way can solely the reporting organizations be blamed for this.

#### **Future scenarios for the article of law and protection of the person reporting**

This study shows that the doubts concerning the way the obligation to report a case of civil service crime functions, are legitimate. Since civil servants will often report a suspicion of abuse internally, the question remains how bad this is. It is a fact, however, that there are so many decision moments that people will often refrain from reporting. In this process the obligation to report is only one of many stimuli. The ambiguity surrounding the relationship between the obligation to report and the whistleblowing legislation contributes to this. There is also a great need for better protection of the person who reports. The protection being offered now is often insufficient or people feel it like that. This is harmful to the integrity of the government. One of the possible solutions is a more independent reporting centre.

Moreover, this study shows that the priority investigating authorities place on a report that does not involve civil service corruption is not always satisfactory. Neither does the long period of time the internal and external investigations and the criminal proceedings take, encourage civil servants to choose for reporting a case. In order to improve the functioning of the obligation to report it is important to be really clear about the purpose of the obligation to report. Is it just about a well-functioning obligation to report or is a more honest civil service the ultimate goal? Seven possible scenarios for the future of the obligation to report have been developed:

- Scenario 1: Continue like before. The existence of the article of law is a good thing; it has a symbolic function.
- Scenario 2: Keep the present form, but pay much more attention to it.
- Scenario 3: Complete adaptation of the integrity policy.
- Scenario 4: Adaptation and clarification of this article of law.
- Scenario 5: Abolition of this article of law.
- Scenario 6: Adaptation of this article of law in order to make it apply to every citizen
- Scenario 7: Failing to comply with this article of law will be made a criminal offence.