

Research project EUPRETRIALRIGHTS

Improving the protection of fundamental rights and access to legal aid for remand prisoners in the European Union

ANALYSIS OF NATIONAL LAW

National norms as regard to access of detained persons to the law and to court

Report on the NETHERLANDS

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INTRODUCTORY PART: CONTEXTUALIZATION

- *The legal framework on pre-trial detention*

In order to understand the specific situation of pre-trial detention in the Netherlands, it is important to shortly describe the legal framework concerning pre-trial detention.² Pre-trial detention (*voorlopige hechtenis*) entails the forms of deprivation of liberty by the judge that precedes the execution of the sentence. It infringes upon the right to personal liberty as safeguarded in article 15 of the Dutch Constitution. Article 15 of the Dutch Constitution only allows restrictions on the basis of an Act of Parliament. With regard to the deprivation of liberty in the scope of criminal proceedings this statutory basis can be found in Title 4 of Book 1 of the Code of Criminal Procedure (*Wetboek van Strafvordering*, CCP). The term pre-trial detention as used in this report entails the forms of deprivation of liberty by the judge that precede the execution of the sentence.³ Accordingly, it also covers the category of prisoners who have appealed to their sentence or are within the statutory time limit for doing so. The term pre-trial detention in the Netherlands is not used interchangeably with the term remand, as the latter covers only the first phase of the pre-trial detention, as explained below.

Before the pre-trial detention phase, a suspect can be deprived of his liberty by means of *police detention*: arrest for questioning (*ophouden voor onderzoek*, article 56a CCP) for a maximum of nine hours⁴ and subsequently police custody (*inverzekeringstelling*) for a maximum of three days (Article 57 and 58 CCP).⁵ The competence to issue police custody is vested in the public prosecutor and the assistant public prosecutor. During this period of time, the suspect is held on the police station. A cell on a police station must comply with the rules set for police cell complexes (*Regeling politiecellencomplex*)⁶.

Pre-trial detention can be divided in three stages: (1) remand in custody (*inbewaringstelling*) on the basis of article 63 CCP, (2) detention in custody (*gevangenhouding*) and (3) arrest (*gevangenneming*) on the basis of article 65 CCP. These three stages and the location where the pre-trial detention takes place are described below.

Ad. 1. Remand in custody (*inbewaringstelling*)

On the basis of article 63 CCP, the Public Prosecutor can request for a person suspected of having committed a criminal offence to be remanded in custody. The examining judge (*rechter-commissaris*) decides on this request and can grant the order for a maximum period of 14 days (article 64, first paragraph, CCP).

Ad. 2. Detention in custody (*gevangenhouding*)

After the period of remand in custody the Public Prosecutor may request the detention in custody (article 65 CCP). This request is decided upon by the court in chambers (*raadkamer*), which consists of three members (article 21, fifth paragraph, CCP). Detention in custody can be granted for a maximum period of 90 days (article 66, first paragraph, CCP). The suspect is heard during this procedure.

Ad. 3. Arrest (*gevangenneming*)

² This description stems from M.M. Boone, J.M.W. Lindeman & P. Jacobs, *DETOUR - Towards Pre-trial Detention as Ultima Ratio - 2nd Dutch National Report on Expert Interviews*, Vienna: Institute for the Sociology of Law and Criminology 2018, published on <<http://www.irks.at/detour/publications.html>>.

³ G.J.M. Corstens (edited by M.J. Borgers), *Het Nederlands strafprocesrecht*, Deventer: Kluwer 2014, p. 442.

⁴ Not counting the hours between midnight and 9:00 AM.

⁵ Extension for another 3 days is possible in case of urgent necessity by order of the public prosecutor, article 58, paragraph 3, CCP.

⁶ Regeling van 25 maart 1994, *Stcrt.* 1994, 64, laatstelijk gewijzigd op 2 maart 2017, *Stcrt.* 2017, 13163, i.w.tr. op 18 maart 2017.

Arrest on the basis of article 65 CCP can be ordered if the suspect is at liberty and has to be taken into custody to appear before the judge.

As a basic principle, pre-trial prisoners are held in a remand prison (*huis van bewaring*) (article 9, paragraph 2, sub a of the Penitentiary Principles Act, *Penitentiaire beginselenwet*, PPA). On the basis of article 24 of the Rules on the selection, placement and transfer of prisoners (*Regeling selectie, plaatsing en overplaatsing van gedetineerden*⁷), the first placement of the pre-prisoner awaiting his sentence in first instance will be in a remand prison located in or assigned to the district of prosecution (paragraph 1). Pre-trial prisoners who have appealed to their sentence or are within the statutory time limit for doing so can already be transferred to a prison for sentenced prisoners (article 10, paragraph 1, PPA). The judge ordering the pre-trial detention may decide that the pre-trial prisoner is placed in another facility than in a remand prison in case of special personal circumstances. In such case, the order for pre-trial detention mentions the place where the pre-trial detention will be executed (article 78, paragraph 4, CCP). For the investigation of the suspect's mental facilities, the examining judge (*rechter-commissaris*) can decide to place the prisoner in a special facility (articles 196-198 and 317 CCP). Usually, such investigation takes place in the Pieter Baan Centre, the psychiatric observation clinic of the Ministry of Justice and Safety.⁸ On the basis of article 15, paragraph 5, PPA, the selection officer may decide that if the prisoner suffers from mental disease or defect, he can be brought to a psychiatric hospital. The selection officer (*selectiefunctionaris*), an external public servant who decides where a prisoner should be placed, can decide that the remand prisoner is kept on the police station in case of a shortage of space for a maximum period of 10 days (excluding the time of the police arrest for questioning and the police custody).

- *The location of the pre-trial detention*

As a rule, the period of stay in police detention (the phase before pre-trial detention) is short: less than a week. Police detention will take place in a police cell (see above). After police detention, as a basic principle, pre-trial prisoners are held in a remand prison (*huis van bewaring*) (article 9, paragraph 2, sub a of the Penitentiary Principles Act, *Penitentiaire beginselenwet*, PPA). On the basis of article 24 of the Rules on the selection, placement and transfer of prisoners (*Regeling selectie, plaatsing en overplaatsing van gedetineerden*⁹), the first placement of the pre-prisoner awaiting his sentence in first instance will be in a remand prison located in or assigned to the district of prosecution (paragraph 1). Pre-trial prisoners who have appealed to their sentence or are within the statutory time limit for doing so can already be transferred to a prison for sentenced prisoners (article 10, paragraph 1, PPA). The judge ordering the pre-trial detention may decide that the pre-trial prisoner is placed in another facility than in a remand prison in case of special personal circumstances. In such case, the order for pre-trial detention mentions the place where the pre-trial detention will be executed (article 78, paragraph 4, CCP). For the investigation of the suspect's mental facilities, the examining judge (*rechter-commissaris*) can decide to place the prisoner in a special facility (articles 196-198 and 317 CCP). Usually, such investigation takes place in the Pieter Baan Centre, the psychiatric observation clinic of the Ministry of Justice and Safety.¹⁰ On the basis of article 15, paragraph 5, PPA, the selection officer may decide that if the prisoner suffers from mental disease or defect, he can be brought to a psychiatric hospital. The selection officer (*selectiefunctionaris*), an external public servant who decides where a prisoner should be placed, can decide that the remand prisoner is kept on the police station in case of a shortage of space for a maximum period of 10 days (excluding the time of the police arrest for questioning and the

⁹ Regeling van 15 augustus 2000, *Stcrt.* 2000, 176, laatstelijk gewijzigd op 17 augustus 2017, *Stcrt.* 2017, 48627, i.w.tr. op 1 september 2017.

¹⁰ P.M. Frielink & M.J.H.J. de Vries-Leemans, *Handboek strafzaken* [21.8], Deventer: Wolters Kluwer.

police custody). The pre-trial prisoner may request a placement in (or transfer to) another remand prison, with or without a different level of security or another regime, to the selection officer, who decides upon this request. Also, the prison director can request a transfer to another remand prison (article 18 PPA *juncto* article 24, paragraph 2, of the previously mentioned Rules on the selection, placement and transfer of prisoners). If the selection officer intends to transfer the prisoner to a prison that has a selection advisory committee (*selectie-adviescommissie*) such as is the case with the maximum-security facility, the *Extra Beveiligde Inrichting (EBI)* in Vught, he must submit the proposed decision to this committee for advice first. In emergency situations this is not required, in which case the selection advisory committee will give its opinion during its next meeting (article 24, paragraphs 4 and 5, of the Rules on the selection, placement and transfer of prisoners).

- Regimes

On the basis of article 19, paragraph 1, PPA, the execution of deprivation of liberty or a custodial measure takes place in a regime of a general community (*regime van algehele gemeenschap*) or a restricted regime (*regime van beperkte gemeenschap*) unless placement in an individual regime is necessary.

In a regime of a general community, prisoners stay together in living and working spaces and take part in activities jointly (article 20, paragraph 1, PPA). During the nights, the weekends and on bank holidays they stay on their cell (paragraph 3). According to article 3 of the Prison Rules (*Penitentiare Maatregel*) the day program (applicable in the hours between the opening of the cell doors in the morning and closing in the evening) for a (remand) prison is determined in the house rules of the institution (paragraph 1). In a regime of general community, the day programme includes at least 59 hours per week and provides between 18 to 63 hours of activities and visits (*bezoek*). Under the restricted regime between 18-63 hours of activities and visits must be offered (paragraphs 2 and 3).

For a long time, placement in a regime of a general community was the basic principle. This changed in March 2014, with the introduction of the promotion and degradation system. This system is based on a traffic light model: green (desired) behaviour means promotion, orange means 'can do better', and red qualifies as unwanted behaviour and means degradation.¹¹ All prisoners, except persons who have reported themselves to prison to undergo their sentence (*zelfmelders*) start in the basic programme. The basic programme only includes the most basic rights as laid down in the PPA, such as exercise, recreation and work and a minimum of activities for rehabilitation and aftercare. Prisoners who display 'green' behaviour are promoted to the so-called plus programme. The plus programme is the basic programme supplemented by extra hours of additional activities, more possibilities for education, visits, activities for rehabilitation etcetera. When prisoners display 'red' behaviour, they return to the basic programme, which allows for only 43 hours of activities. The prison director takes the decision on whether a prisoner is subject to promotion and degradation.¹² In the promotion and degradation system, the behaviour of prisoners is decisive for, *inter alia*, the amount of activities offered. The idea behind the system is that it would stimulate the prisoners 'own responsibility' in making their time in prison as valuable as possible.¹³ Since the introduction of the promotion-degradation system in 2014, the regime of a general community is only still applicable in (very) low-security prisons (*zeer beperkt beveiligde inrichtingen*).¹⁴

¹¹ *Staatscourant* 2014, 4617 and *Kamerstukken II* 2013/14, 33745, 9.

¹² The legal remedies to this decision will be explained under i) of this report.

¹³ P. Jacobs, 'The Development of *Rechtsburgerschap* of Prisoners: A National and European Perspective', in: F. de Jong (ed.), *Overarching Views of Crime and Deviancy. Rethinking the Legacy of the Utrecht School*, The Hague: Eleven International Publishing 2015, p. 390.

¹⁴ Toelichting op de wijziging van de Regeling selectie, plaatsing en overplaatsing van 20 februari 2014, *Stcrt.* 2014, 4617.

Prisoners can be placed in an individual regime when they pose a custodial risk for themselves or others because of their personality, behaviour or other personal circumstances, or the nature of the committed or suspected crime, for which reason they cannot be placed in a general or restricted regime (article 11 of the Rules on the selection, placement and transfer of prisoners). The Minister of Justice and Safety determines which prisons or which prisons wing have an individual regime. The selection officer decides on whether the prisoners is placed in or transferred to a prison or prison wing with an individual regime. In a restricted regime, prisoners undertake their activities jointly, but otherwise remain on their cell (article 21 PPA).¹⁵ In the individual regime, the prisoner is entitled to activities (article 22, paragraph 1, PPA). The prison director decides on the extent to which the prisoner is entitled to participate in activities individually or jointly (article 22, paragraph 2, PPA).¹⁶

- *The EBI and TA*

In the Netherlands, there is one maximum security facility, the *Extra Beveiligde Inrichting (EBI)* in Vught. In the EBI, both pre-trial prisoners and sentenced prisoners are kept. The EBI is designed to house both prisoners on remand and convicted prisoners who (1) pose an extreme flight risk and an unacceptable risk to society because of the danger of recidivism for serious violent offences, or (2) pose an unacceptable risk to society if they escape from detention, but the risk of flight as such is of secondary importance. This involves situations where the escape of the prisoner would lead to serious societal unrest.¹⁷ The EBI is characterized by a very high level of external control and a very strict security regime. Existing legislation provides for far-reaching powers of the prison director and restrictions on the rights and freedoms of the prisoners. Since its inception in 1993, the EBI has been criticized, mainly for its very restrictive regime in the light of article 3 ECHR prohibiting torture, inhuman and degrading treatment and punishment. In 2003, the European Court of Human Rights (ECtHR) found a violation of article 3 in two cases of prisoners complaining about their treatment on the EBI.¹⁸ In 2013, an evaluation of the EBI by the Research and Documentation Centre (*Wetenschappelijk Onderzoeken Documentatiecentrum, WODC*), however, lead to the conclusion that the EBI regime as such cannot be deemed unlawful in the light of national and international standards.¹⁹ The researchers concluded that elements of the regime which were unlawful, such as systematic searches and the absence of any possibility to talk to life partners and close relatives without a glass partition, had been adjusted. This was also the case for elements which were not unlawful as such, but for which provisions could be made to meet prisoners' complaints, such as the possibility to study case files in one's cell. This did not alter the fact that there were still points of contention, according to the researchers, especially in the very restrictive regime that includes far-reaching imitations on various basic rights, such as the right to privacy, family life and physical integrity.²⁰

A similar strict security regime to the EBI is applied in the terrorist wing (*Terroristenafdeling, TA*), a special detention unit created to prevent prisoners suspected of and convicted of terrorist crimes from radicalizing and recruiting others. In 2006 such terrorist wing was created in

¹⁵ P.M. Schuyt & P. Jacobs, *T&C Strafrecht*, art. 22 Pbw. The way to appeal to this decision is described under i) of this report.

¹⁶ The legal remedies to this decision will be explained under i) of this report.

¹⁷ H.G. van de Bunt, F.W. Bleichrodt, S. Struijk, P.H.P.M. de Leeuw & D. Struik, *Gevangen in de EBI. Een empirisch onderzoek naar de Extra Beveiligde Inrichting (EBI) in Vught*, Den Haag: Boom Lemma uitgevers 2013.

¹⁸ ECtHR 4 February 2003, *Van der Ven and others against the Netherlands and Lorse against the Netherlands*, app.nos. 50901/99 and 52750/99.

¹⁹ H.G. van de Bunt, F.W. Bleichrodt, S. Struijk, P.H.P.M. de Leeuw & D. Struik, *Gevangen in de EBI. Een empirisch onderzoek naar de Extra Beveiligde Inrichting (EBI) in Vught*, Den Haag: Boom Lemma uitgevers 2013.

²⁰ H.G. van de Bunt, F.W. Bleichrodt, S. Struijk, P.H.P.M. de Leeuw & D. Struik, *Gevangen in de EBI. Een empirisch onderzoek naar de Extra Beveiligde Inrichting (EBI) in Vught*, Den Haag: Boom Lemma uitgevers 2013.

Vught (*Penitentiare Inrichting Vught*), followed by the terrorist wing at the De Schie prison (*Penitentiare Inrichting De Schie*) in Rotterdam in 2007. On both the EBI and the TA prisoners are placed in an individual regime. On the TA, prisoners spent a lot of time in their cell (sometimes 22 hours per day) and there is very limited contact with other prisoners and visitors from the outside world.²¹ In 2017, Open Society Justice Initiative and Amnesty International have criticized, *inter alia*, the automatic placement of people suspected or convicted of terrorist offences on the TA, the lack of effective ways to challenge the initial placement on the TA, the restrictive confinement and excessive monitoring of prisoners and the invasive full-nudity body searches.²² In October 2018, Amnesty and the Open Society Justice Initiative made a submission to the UN Committee against Torture,²³ warning that the Dutch government's use of the TA has resulted in cruel, inhuman or degrading treatment or punishment.²⁴ Although the 2017 report led the Dutch government and prison authorities to announce changes in policy on (*inter alia*) the full nudity strip searches and risk-assessments, there is still much doubt as to the scope and subject/matter of these changes. Also, the alleged inefficiency and lack of independence of the Dutch National Prevention Mechanism (NPM) are causing concern. Despite these worries there is also some optimism as to the impact that the report had and the fact that academics, judges, prosecutors, detainees and even prison authorities had and still have a critical attitude towards the TA.²⁵

- Contacts with the outside world.

Contacts with the outside world are very important for pre-trial prisoners to prepare for their criminal case. In this respect it is important that pre-trial prisoners are able to consult with their lawyer, in person and over the phone and to send and receive mail.

In this respect, it is important to note that the right to have contact with the outside world can be restricted or removed in case the person is subject to restrictions (*bepalingen*). Such restrictions can be imposed on both persons who are held in police custody (*inverzekeringstelling*) and pre-trial prisoners. On the basis of article 62, paragraph 2, CCP and article 76 CCP the person subjected to restrictions can be restricted in e.g. his right to receive visitors, to make phone calls and to send and receive mail. Such restrictions can be ordered by the Public Prosecutor when necessary for the criminal investigation to prevent the suspect from obstructing the criminal proceedings. The suspect may appeal to the decision by the Public Prosecutor to impose the restrictions with the examining judge or the court in chambers when deciding on the pre-trial detention (article 62a, paragraph 4, CCP). When a suspect is subject to restrictions, he is still allowed to have unrestricted contact with his lawyer (article 62, paragraph 2 CCP *juncto* article 45 CCP).

General rules on the rights of the prisoner concerning contacts with the outside world apply when the prisoner is not subjected to restrictions and can be found in chapter VII of the PPA

²¹ In 2010, an evaluation of the TA by the Research and Documentation Centre was published: see T.M. Veldhuis, E.H. Gordijn, S.M. Lindenberg & R. Veenstra, *Terroristen in detentie. Evaluatie van de Terroristenafdeling*, Den Haag: WODC 2010.

²² Amnesty International Netherlands and Open Society Foundations, *Inhuman and unnecessary. Human rights violations in Dutch high-security prisons in the context of counterterrorism*, October 2017.

²³ Open Society Justice Initiative and Amnesty International Netherlands, *Inhuman and unnecessary. Submission to the UN committee against torture. Ill-treatment in the context of counterterrorism and high-security prisons in the Netherlands*, 2018 <<https://www.opensocietyfoundations.org/sites/default/files/submission-uncat-netherlands-20181015.pdf>> (last accessed on 21 November 2018).

²⁴ <<https://www.opensocietyfoundations.org/briefing-papers/submission-un-commission-against-torture-review-netherlands>> (last accessed on 21 November 2018).

²⁵ <<https://www.penalreform.org/blog/detaining-terrorists-challenges-solutions-and-the-lessons-weve/>> (last accessed on 21 November 2018).

(articles 36-40)²⁶. These include the prisoner's right to receive mail (article 36-37 PPA), to receive visitors from the outside world (article 38 PPA) and to make phone calls (article 39 PPA). These rights, however, are not absolute and may be subjected to limitations, which are mentioned in the articles itself and in most case are decided upon by the prison governor.²⁷

Article 36 PPA contains the basic principle that prisoners may send and receive letters. The PPA offers possibilities for the prison governor to check the content of the letter, although this is subjected to restrictions (article 36 PPA). Checking the content of the letter or refusing to send the letter is not possible with mail to so-called privileged persons. Privileged persons and organisations are exhaustively mentioned in article 37, paragraph 1, PPA and include, *inter alia*, the legal counsel provider of the prisoner, the National Ombudsman, (members of) the Supervisory Committee, and (members of the) Council for the Administration of Criminal Justice and Protection of Juveniles. Article 36 does not offer the prisoner a right to receive and sent emails, although some institutions experiment with possibilities for prisoners to send and receive email.²⁸

On the basis of article 38 PPA, the prisoner has the right to receive visitors at least one hour per week (article 38 PPA).²⁹ The house rules may deviate from this minimum and usually go above this minimum.³⁰ On the basis of article 38, paragraph 3, PPA, the prison director may decide to refuse visiting arrangements of one or more persons for a maximum period of twelve months in view of one of the grounds mentioned in article 36, paragraph 4, PPA: a) securing the order or security in the institution, b) the protection of public order or national security, c) the prevention or investigation of criminal offences, d) the protection of victims or persons involved in crimes. The prison director may also decide to end visiting arrangements and to remove the visitor on the basis of these grounds (paragraph 4). On the basis of article 38, paragraph 7, privileged persons must have access to the prisoner at all times. These persons have access to the prisoner on times and places determined in the house rules. During a meeting, the privileged person can talk to the prisoner freely, unless the prison director – after consultation with the visitor – decides that the prisoner poses a severe threat to the safety of the visitor. In this case, the prison director communicates what supervisory measures will be taken to make sure that the meeting is as undisturbed as possible. These supervisory measures may not result in confidential statements between the prisoner and his legal assistance provider being available to third parties (article 38, paragraph 7, PPA).

On the basis of article 39 PPA, the prisoner has the right to make phone calls for at least 10 minutes once a week (paragraph 1). The house rules may offer more possibilities to make phone calls. On the basis of paragraph 3 the right to make phone calls may be restricted by the prison director. On the basis of paragraph 4 the prisoner must be allowed to make phone calls with privileged persons mentioned in article 37, paragraph 1 PPA if the need thereto and the opportunity exists (see under 3.3 below).

The prison director also decides on the application of disciplinary sanctions (article 50 PPA). When a prisoner is placed in solitary confinement as a result of a disciplinary sanction for a maximum of two weeks (article 55, paragraph 1, PPA) or as a mandatory measure for a maximum of two weeks with a possible extension of two weeks each time (*ordemaatregel*, article 24 PPA), the prisoner can be restricted in the right to receive visitors as well. According to article 21 of the Rules concerning the punishment and segregation cells (*Regeling straf- en*

²⁶ Article 40 PPA concerns contacts with the media. This stipulation will not be discussed below, as this falls outside of the scope of the research.

²⁷ The legal remedies to appeal to this decision are discussed in the report under i).

²⁸ C. Kelk (edited by M.M. Boone), *Nederlands detentierecht*, Kluwer: Deventer 2015, p. 220.

²⁹ Article 38 PPA is elaborated on in the Rules concerning the admission and refusal of visitors and the restriction of telephone contacts (*Regeling toelating en weigering bezoek en beperking telefooncontacten penitentiaire inrichtingen*, Regeling van 8 april 2006, *Stcrt.* 2006, 77, i.w.tr. op 22 april 2006.

³⁰ P.M. Schuyt & P. Jacobs, *T&C Strafrecht*, art. 38 Pbw.

*afzonderingscel penitentiaire inrichtingen*³¹), however, the prison director must ensure that the prisoner is able to keep in contact with the outside world, according to what is determined in the house rules (paragraph 1). The prison director can limit the prisoner's right to make calls of to receive visitors only when necessary in the interest of securing the order of security in the institution or when this is necessary with regard to the behaviour or mental or physical condition of the prisoner (paragraph 2). Visitors are received apart from other prisoners and the visits are supervised (paragraph 3). Privileged persons, however, remain the right to have unrestricted contact with the prisoner (paragraph 4).

- Labour

On the basis of article 47 PPA the prisoner has the right to participate in labour activities, if labour is available. Prisoners who are sentenced (also in first instance, but awaiting appeal) are obliged to work (paragraph 3). This does not apply to pre-trial prisoners who are awaiting their trial in first instance, they are not under an obligation to work, but nevertheless may decide to do so.

- Multi-occupancy cell

Historically, prisoners in Dutch prisons were placed in a single-occupancy cell. However, the last years there has been a major shift towards the use of multi-occupancy cells. This is remarkable, since prison rates in the Netherlands have dropped drastically over the last years and many prisons have closed over the years. It is mainly for major budget cuts announced in the 'Masterplan DJI 2013-2018' that has caused the wide-scale intensification of the use of multi-occupancy cells. Currently, all prisoners are placed in a multi-occupancy cells, unless there are contra-indications for placement in such cell. The contra-indications, mentioned in article 11a of the Rules on the selection, placement and transfer of prisoners, are: a mental disorder, addiction problems, the prisoner's state of health, behavioural problems, the background of the offence committed and/or the restrictions imposed on him.

What bodies are entitled to receive formal complaints? How effective are they (with regard to Article 13 ECHR)?³²

Complaints of persons who have been held in a police cell are dealt with by the regional police Complaints Committees. Each unit of the police has an independent Complaints Committee that advises the police chief about the judgment on a complaint. Police Complaint Committees consist of members who do not work for the police. Many of them work as judges, lawyers or for the municipality. The members are appointed by the Minister of Justice and Security. He is advised on this by the Complaints Committee, the police chief, the regional mayor and the chief public prosecutor. Complaints are dealt with according to the rules concerning the complaint handling by the police (*Regeling Klachtbehandeling Politie*³³), a copy of which must be present at every police station (article 9). Complaints of persons who have been held in a police cell can also be directed to the National Ombudsman.

In each of the 10 regional units of the national police, a Supervisory Committee of arrestees (*Commissie van Toezicht Arrestantenzorg*) is active since 2004. These committees monitor the way in which the police take care of its arrestees. These Supervisory Committees do not deal with individual complaints, but they make unannounced visits to these locations and check whether the police adequately take care of its arrestees. They report directly on those visits to the police and make recommendations about necessary improvements. In addition, an annual

³¹ Regeling van 15 juni 1999, *Stcrt.* 1999, 132, i.w.tr. op 15 juni 1999.

³² Parts of this text were already published as P. Jacobs & A.M. van Kalmthout, 'The Dutch complaint and appeal procedure for prisoners in the light of European standards', in: G. Cliquenois & H. de Suremain (eds.), *Monitoring Penal Policy in Europe*, New York: Routledge 2018, p. 54-69.

³³ Regeling van 13 december 2012, *Stcrt.* 2012, 26850, laatstelijk gewijzigd op 2 maart 2017 *Stcrt.* 2017, 13163, i.w.tr. op 18 maart 2017.

report is made once a year and is offered to the chief of police. The police chief provides these reports to the minister, indicating what he has done with the recommendations of the Supervisory Committee for the care of arrestees. The committees consist of independent members appointed by the Minister of Justice and Security. This is done on the basis of an open application procedure and on the recommendation of the regional mayor and chief public prosecutor. The committees are supported by an official secretary.³⁴

As soon as the suspect is transferred from the police cell to a penitentiary institution, another regime applies. A Supervisory Committee has to be appointed in each penitentiary institution (Article 7 PPA). This committee has (a) to oversee the enforcement of custodial sentences in the prison or wing; (b) to take cognizance of any complaints lodged by prisoners; (c) to arrange for complaints to be dealt with pursuant to the provisions laid down in Article 60 et seq. and (d) to advise and inform the authorities on matters relating to the enforcement of custodial sentences in the prison or wing. The Supervisory Committee shall also maintain regular and personal contact with prisoners to ensure that it is acquainted with their wishes and needs. Each member of the Committee shall act as visiting officer on a monthly (or, in large penitentiary institutions, weekly) rota basis (so-called *maandcommissaris* or *weekcommissaris*). The Supervisory Committee is an external and independent body, that consists of members of the general public, as independent representatives of society. The committee consists of at least six members and is composed as broadly as possible, but must at least consist of a judge, a lawyer, a physician and a social worker. The members of the Supervisory Committee are appointed by the Minister of Justice and Security for a period of five years. Reappointment can take place twice.

According to article 60 PPA each prisoner may file a complaint with the Complaints Committee (*beklagcommissie*) concerning a decision taken by or on behalf of the prison governor. The Complaints Committee is composed of three members of the Supervisory Committee (*Commissie van Toezicht*). The Supervisory Committee is an external and independent body, that consists of members of the general public, as independent representatives of society. The committee consists of at least six members and is composed as broadly as possible, but must at least consist of a judge, a lawyer, a physician and a social worker. The members of the Supervisory Committee are appointed by the Minister of Justice and Security for a period of five years. Reappointment can take place twice.

As stated above, on the basis of article 60 PPA, a prisoner may file a complaint with the Complaints Committee concerning a decision taken by or on behalf of the prison governor. Complaints can also be lodged on the grounds of delayed decision making or the absence of decision making. If a decision is not taken within the statutory term or – when such term is not defined – is not taken within a reasonable time, a refusal or omission to take a decision will be assumed. The restriction ‘decisions taken by or on behalf of the governor’ means that no complaints are possible against purely factual behaviour of the staff, that cannot be seen as belonging to their executive duty. Excluded are also complaints on general rules or regulations that are applicable to all prisoners. The only way to challenge general rules is to institute interim relief proceedings (*kort geding*) at the civil court. Not many cases are deemed admissible, since when there is a way for legal recourse that is provided with safeguards (such as the penitentiary complaint and appeal procedure), the complaint will be declared inadmissible. Although not many cases are dealt with, interim relief proceedings may concern important penitentiary matters.³⁵ When a prisoner wants to complain, he must file his complaint with the Complaints Committee of the penitentiary institution where the decision was taken. This must be done no later than 7 days after the day of which the prisoner is notified

³⁴ <<http://www.toezichtarrestantenzorg.nl/cta/wat-doen-de-ctas/>> (last accessed on 28 September 2018).

³⁵ See Kelk/Boone 2015, p. 102 and 103 for examples.

of the decision. A complaint filed after the end of this period shall nevertheless be admissible if in reason it cannot be concluded that the prisoner is in default. The written complaint must mention as accurately as possible the decision to which the complaint relates and the reasons for the complaint. The complaint must be written in Dutch, but – if needed – may be written in another language (article 61 PPA).

To avoid a formal hearing and to try to deal with the complaint in a more informal way, the secretary of the Complaints Committee may hand over the complaint to a member of the Supervisory Committee – who is not member of the Complaints Committee – with the request to try and mediate between the prisoner and the governor (article 63 PPA). After a successful mediation the case will be dropped. Otherwise, the complaint is reviewed by the Complaints Committee, unless the chairman of the Complaints Committee regards the complaint as simple or as manifestly inadmissible or manifestly unfounded. If that is the case, he can review the complaint on his own (article 62 PPA). If the case is dealt with by the entire Complaints Committee, the applicant as well as the governor are invited to a – non-public – hearing³⁶ during which both parties are heard and can ask each other questions and react to each other statements. The Complaints Committee may also obtain written and oral information from other persons. The complainant is entitled to be assisted free of charge by a lawyer and – if needed – an interpreter (article 65 PPA). An important safeguard for the complainant is that pending the outcome of the complaint review, the chairman of the Appeals Committee may at the complainant's request, and after hearing the governor, suspend all or part of the implementation of the decision to which the complaint relates (article 66 PPA). After the oral hearing, the Complaints Committee must deliver a decision on the complaint within four – in exceptional circumstances eight – weeks counting from the date on which the complaint was received (article 67, paragraph 1 PPA). This decision must in principle be in writing, although the law allows the chairman of the Complaints Committee to communicate the decision orally to the parties. However, if one of the parties decides to lodge an appeal, a written report still has to be made. The decision must be reasoned and dated and must contain a report of the hearing. It has also to mention the possibility for both parties of appealing to the Appeals Committee (article 67 PPA). If the complainant has insufficient command of the Dutch language, a translation in a language he understands will be provided free of charge (article 67 PPA).

In its decision, the Complaints Committee declares the complaint as wholly or partly a) inadmissible, b) unfounded or c) founded. A complaint must be declared founded if the Complaints Committee concludes that the decision to which the complaint relates: 1) is contrary to a statutory regulation in force in the prison or a provision binding upon all parties of a treaty in force in the Netherlands; or 2) is unreasonable or unjust, if all interests in the case are weighed up. If a complaint is declared fully or partly well-founded the Complaints Committee has the following options: It may: 1) instruct the governor to take a new decision in conformity with the decision of the Complaints Committee, 2) annul the decision of the governor by replacing it by its own decision, 3) limit itself to an annulment in whole or in part. When the annulment concerns a decision of the governor that has already been implemented and cannot be reversed, the Complaints Committee can determine that the complainant will be compensated. This compensation may be given in kind, such as extra visit(s) or telephone calls, but financial compensation is also possible. To this end, the Appeals Committee has formulated certain compensation tariffs to harmonize the compensation amounts that are applied by the Complaints Committees.³⁷ These amounts have a symbolic rather than a real compensatory character (article 68 PPA).

³⁶ According to Article 62, paragraph 4 PPA a public hearing is only prescribed in case 'the Complaints Committee is of the opinion that a non-public review is incompatible with any stipulation binding upon all parties of a treaty in force in the Netherlands'.

³⁷ See <<https://www.rsj.nl/Rechtspraak/Rechtspraakprocedure/>> (last accessed on 9 April 2018).

Both the claimant and the governor may lodge an appeal against the decision of the Complaints Committee within seven days after having received the decision. They may file their appeal to the Appeals Committee (*Beroepscommissie*) of the Council for the Administration of Criminal Justice and Protection of Juveniles (*Raad voor strafrechtstoepassing en Jeugdbescherming*, RSJ). This Council with its 75 members, appointed by the Crown, has two separate sections: the Section Advice and the Section for the Administration of Justice. The Appeals Committee operates in varying composition of three members from the Section for the Administration of Justice, assisted by a secretary of the Council. The Appeals Committee deals not only with appeals concerning all penitentiary institutions, but is also the appeal instance for juveniles in juvenile institutions and persons with a hospital order who stay in a forensic hospital. Also, it deals with complaints with respect to the decisions of the selection officer and decisions on medical intervention by or on behalf of the physician of the institution, as will be explained below.

Generally, the appeal procedure and the competences of the Appeals Committee are the same as described for the Complaints Committee. There are some differences: in appeal, mediation is excluded, the appeal review is always done by three members, the judgement should always be in writing and the law prescribes only that the decision in appeal has to be delivered as soon as possible, without determining a time limit. Furthermore, the Appeals Committee may determine that a) the governor and the complainant are given the opportunity to clarify the notice of appeal only in writing; b) the oral comments can be made before a member of the Appeals Committee and c) in case oral information is obtained from another person, the governor and the complainant are exclusively given the opportunity to submit in writing the questions they wish to ask that person (article 69 PPA). Legislative proposal 34736 seeks to amend article 69 PPA so that cases can be dealt with by a single judge.

The Appeals Committee can decide a) to declare the appeal as wholly or partially inadmissible; or to wholly or partly confirm the resolution of the Complaints Committee, either with adoption or with improvement of the grounds; or b) wholly or partly annul the Complaints Committee's resolution. If that is the case, the Appeals Committee will do what the Complaints Committee should have done (article 71 PPA). The appeal procedure does not suspend the implementation of the decision of the Complaints Committee, except when this decision allows also a compensation to the complainant. However, pending the outcome of the appeal review, the chairman of the Appeals Committee may, at the request of the person who lodged the appeal, and after hearing the other persons involved, suspend all or part of the implementation of the decision of the Complaints Committee (article 70 PPA).

The complaints and appeal system as described in the previous paragraphs is applicable to adult prisoners in all types of prisons and, except differences, also to juveniles in youth detention centres and prisoners in forensic psychiatric institutions. The respective provisions are laid down in articles 65-78 of the Young Offenders Institutions (Framework) Act (*Beginnelsenwet justitiële jeugdinstellingen*) and articles 56-70 of the Hospital Orders (Framework) Act (*Beginnelsenwet verpleging ter beschikkinggestelden*). In all three laws, the right to complain is restricted to decisions taken by or on behalf of the governor. This means that the decisions taken by another authority than the governor are beyond the reach of the complaint provisions. This is especially the case with respect to the decisions of the selection officer (article 15 PPA) and decisions on medical intervention by or on behalf of the physician of the institution.

The selection officer is an external public servant who decides where a prisoner should be placed. Prisoners who disagree with his committal to the selected penitentiary institution, or his transfer to another institution may submit a reasoned objection, that is dealt with by the same penitentiary consultant (article 17 PPA). If the prisoner is not satisfied with the decision about his objection, he can lodge an appeal with the Appeals Committee that will deal with the

case as described before. Also, the decisions of the medical staff are not decisions taken by or on behalf of the governor. A prisoner who wants to object to a decision taken against him by a member of the medical staff has first to make a written request to the Medical Adviser of the Ministry of Safety and Justice to mediate in the dispute. If mediation is not possible, the prisoner can still lodge an appeal with the Appeal Committee of the Council for the Administration of Criminal Justice and Protection of Juveniles. In this case the composition of the Appeals Committee that is dealing with medical issues must consist of a legal expert and two physicians. The provisions with respect to these medical appeals as laid down in articles 28-34 of the Penitentiary Order are not different from the provisions for ordinary appeals. Noteworthy is that the rights conferred to the prisoner with respect the appeal procedure, may also be carried out by a) the trustee if the prisoner has been placed under legal restraint; b) the mentor if a mentorship has been established for the benefit of the prisoner and c) the parents or guardian in case the prisoner is a minor. However, the Medical adviser or the Appeals Committee may veto this right in case they consider this not being in the interest of the prisoner (article 34 Penitentiary Order).

The complaint and appeal procedure has an important function in the Dutch prison system, as it not only provides relief for prisoners who claim to have been the victim of unlawful treatment in prison, but it has also created a normative framework for the assessment of treatment in prison, which has a strong preventive function.

A critical note on the complaint and appeal procedure for prisoners on the TA was placed by Amnesty International in their 2017 report. Here, Amnesty International noted that TA lack an effective way of challenging their day-to-day restrictive confinement. Former prisoners said they could file a complaint with the Complaints Committees at Vught and De Schie and that they could appeal the committees' decisions to the Council for the Administration of Criminal Justice and Protection of Juveniles but, they said, these processes proved ineffective, as both often deemed complaints inadmissible when the treatment that a prisoner complained of is within the director's purview of authority, such as limiting the number of hours of outside contact, restricting interactions with prisoners outside their cells, or regulating the number of hours prisoners are required to stay in their cells. The committees typically have ruled that such decisions had a legitimate legal basis in the PPA, and opined that the directors' 'hands were tied' by the TA rules. Appealing to the Council for the Administration of Criminal Justice and Protection of Juveniles was considered also ineffective for prisoners who wanted to challenge the number of hours they were forced to spend in their cells or the restrictions they faced for those few hours they were allowed outside their cells. Like the Complaints Committees, as the Council for the Administration of Criminal Justice and Protection of Juveniles has often failed to strike down actions that were within the purview of the director's domestic legal authority. Besides, both Complaints Committee and the Council for the Administration of Criminal Justice and Protection of Juveniles usually do not automatically assess possible conflicts between TA rules and international law - in particular articles 3 and 8 ECHR unless one of the parties raises such claims.³⁸

A prisoner can lodge a complaint with the National Ombudsman. In essence, the National Ombudsman is empowered to scrutinize the manner in which public sector authorities fulfil their statutory responsibilities. This can concern acts of the Minister of Justice and Security, the prison board, the Complaints Committee or the Appeals Committee of the Council for the Administration of Criminal Justice and Protection of Juveniles. It may also concern a situation of the treatment of a prisoner by the prison staff in a for him sensitive issue. Not so much requests are attended to by the Ombudsman, but it may concern severe cases, such as the

³⁸ Amnesty International Netherlands and Open Society Foundations, *Inhuman and unnecessary. Human rights violations in Dutch high-security prisons in the context of counterterrorism*, October 2017, p. 34-35.

death of a prisoner. The reports of the Ombudsman are published on its website and despite the lack of binding force they have a great deal of moral authority.³⁹

- i. What is the impact of ECtHR judgments on the system of legal aid/access to legal information?

The Dutch system of legal protection for prisoners through the complaints and appeal procedure for prisoners is unique in the world. In 2018, Jacobs and van Kalmthout concluded that the Netherlands belong to the few countries where the complaint and appeal system has got a high approval rating by the ECtHR and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).⁴⁰

As a general conclusion, it can be said that the legal system of complaint and appeal procedures is in line with what is required by the European standards. Still, on the basis of our empirical findings some points of concern in the light of these standards can be formulated. We will elaborate on this in the report on workstream 3.

³⁹ C. Kelk (edited by M.M. Boone), *Nederlands detentierecht*, Kluwer: Deventer 2015, p. 69.

⁴⁰ See: ECtHR 10 January 2012, *Ananyev and others v. Russia*, app.nos. 42525/07 and 60800/08, paragraph 215 and CPT Report to the Netherlands 1992, paragraph 144, Report to the Netherlands 2007, paragraph 49, Report to the Netherlands 2013, paragraphs 49-50 and Report to the Netherlands 2017, paragraph 79. P. Jacobs & A.M. van Kalmthout, 'The Dutch complaint and appeal procedure for prisoners in the light of European standards', in: G. Cliquennois & H. de Suremain (eds.), *Monitoring Penal Policy in Europe*, New York: Routledge 2018, p. 54-69.

1. LEGAL SUPPORT (i.e. access to legal information (information on rights and duties))

1.1 Obligations as regard to legal support

For a long time, no right to a lawyer for suspects during police interrogation existed in the Netherlands. As a result of the *Salduz*-jurisprudence by the ECtHR, the Dutch Supreme Court (*Hoge Raad*) introduced the right to consultation of a lawyer *before* the first interrogation by the police.⁴¹ This led to discussion whether the Dutch practice was in line with the ECtHR caselaw, that seemed to suggest that the lawyer should also be present *during* the interrogation. The discussion moved rapidly with the introduction of European directive 2013/48/EU and the need to implement this directive in national legislation. Following a judgement by the Supreme Court of 22 December 2015, as of 1 March 2016, lawyers were allowed to be present during each police interrogation.⁴² In its report of the visit to the Netherlands in March 2016, the CPT has welcomed this development, and notes that indeed all persons interviewed by the CPT's delegation during the visit confirmed that they had been offered the opportunity to consult a lawyer in private before their questioning by the police and that the lawyer could be present during the questioning.⁴³ Shortly after that, 1 March 2017, formal legislation implementing the directive entered into force. Article 27c CCP now holds that persons who are arrested are informed about these rights promptly after the arrest but in any case, before the first interrogation (paragraph 3, sub b). When the person is not arrested (*een niet aangehouden verdachte*) he is notified that he has the right to be assisted by a lawyer before the first interrogation and the right to interpretation and translation (article 27c, paragraph 2, CCP).

Specific for penitentiary matters, on the basis of Article 56 PPA, every prisoner should be informed about his rights, including his right to file a complaint and appeal, upon arrival in the prison. This information should be in writing, in a language he understands. In practice, this is mostly done by handing the prisoner a copy of the house rules, which is available in different languages. We will elaborate on this issue in §1.3 of this report and in the report on workstream 3.

1.2 Legal support to non-native speakers

Dutch law does not make a distinction between legal support to native or non-native speakers. Of course, to allow for legal support to non-native speakers, interpretation and translation services can be necessary. As per 1 October 2013, The Netherlands have implemented Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings.⁴⁴ Article 27, paragraph 4 CCP holds the general rule that any suspect who does not, or not sufficiently, master the Dutch language, is allowed the assistance of an interpreter. This means that no unnecessary impediments may be raised regarding the assistance of an interpreter. More specifically, Article 28 paragraph 5 CCP holds that an interpreter can be called in by the lawyer for the purpose of communication between the lawyer and his or her client. Article 29b CCP holds the specific obligation to provide the suspect with an interpreter for police interrogation. Similar obligations can be found for hearings by the examining judge (Article 191 CCP) and the trial

⁴¹ HR 30-06-2009, ECLI:NL:HR:2009:BH3084.

⁴² HR 22-12-2015, ECLI:NL:HR:2015:3608.

⁴³ Report to the Government of the Netherlands on the visit to the Netherlands carried out by the CPT from 2 to 13 May 2016, CPT/Inf (2017) 1, p. 15.

⁴⁴ To a large extent, Dutch practice was already in line with the Directive, new additions were provisions for the right to translation of essential documents. In addition to legal provisions in the CCP, there is also the Instruction assistance by interpreters and translators during the investigation and prosecution of criminal offences (*Aanwijzing bijstand van tolken en vertalers bij de opsporing en vervolging van strafbare feiten* (2013A019, *Stcr.* 2013, 35062).

judge (Article 276 CCP). The Criminal Cases Fees Act (*Wet tarieven in strafzaken, Wts*) provides that the State will pay for the interpreter.⁴⁵

The PPA holds that a detainee can file his complaint in another language than the Dutch language. The chair of the Complaints Committee can decide for the written complaint to be translated (Article 61 PPA). Also, the chair will have to ensure the presence of an interpreter during the hearing if the applicant does not sufficiently master the Dutch language (Article 65 PPA). The decision of the Complaints Committee will have to be translated as well. This is primarily a task for the penitentiary institution, but if they cannot provide a translation, the chair will have to arrange for one (Article 67 (4) PPA) The cost for translations and the interpreter will be paid by the state (Article 45 Prison Rules holds that the Criminal Cases Fees Act also applies here). The provisions regarding state paid remuneration for interpreters in the Criminal Cases Fees Act are also applicable on the consultations between lawyers and their clients, both in criminal cases and in prison litigation.⁴⁶

So, all in all, legal support to non-native speakers is available under the same conditions as it is available to native speakers. Possible language barriers are overcome as much as possible through the assistance by a state paid interpreter, also for consultations between the lawyer and his client.

1.3 Actors providing legal information

The Netherlands have implemented Directive 2012/13/EU (Right to information in criminal proceedings).⁴⁷ As such, each suspect that has been arrested will have to be informed by the police, in writing, of the rights addressed in that directive (Article 27c CCP⁴⁸). In practice, the police will hand out a leaflet to suspects.⁴⁹ In her opinion before a judgement by the Supreme Court, Attorney General Spronken put forward that she believes that the directive was not implemented adequately in the Netherlands, because there are no formal and detailed instructions as to how the police should act. It is uncertain whether the existing instructions to hand out the aforementioned leaflet⁵⁰ are binding or merely suggestions for a *best practice*.⁵¹ The Supreme Court did not address these findings in the A-G's opinion, though.

Regarding prison rights during police detention (and notwithstanding regulation 2012/13/EU), the chief of police will have to arrange that each arrestee is provided with information (in a language s/he understands) regarding the daily routine in the police station⁵² as well as with information regarding his or her rights and obligations.⁵³ There are no specific instructions as

⁴⁵ Article 4 Besluit tarieven in strafzaken 2003 (*Criminal Cases Fees Decree 2003*) sets fixed remunerations in this regard.

⁴⁶ Article 26 Besluit vergoedingen rechtsbijstand 2000 (Bvr) (*Legal Aid Payments Decree 2000*) is also applicable on prison litigation (this follows from article 1, under (d), Bvr and the appendix to the decree).

⁴⁷ Law of 5 November 2014, *Stb.* 2014, 433.

⁴⁸ Also see: Besluit mededeling van rechten in strafzaken, *Stb.* 2014/434 (*Decree on information on rights in criminal proceedings*).

⁴⁹ Minors get this leaflet: https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/brochures/2017/03/03/je-wordt-verdacht-van-een-strafbaar-feit-engels/Informatieblad_Je_wordt_verdacht_minderjarigen_Engels_v3.pdf. Adults get this leaflet: <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/brochures/2017/03/01/u-wordt-verdacht-van-een-strafbaar-feit-engels/104356-informatieblad-u-wordt-verdacht-engels-v4.pdf>. 'Werkinstructie: Consultatie- en verhoorbijstand verdachte'.

⁵⁰ Opinion of 04-04-2017 (§3.3.12), ECLI:NL:PHR:2017:376, before HR 30-05-2017, ECLI:NL:HR:2017:968. Also see: Spronken 2017.

⁵¹ See §1.4 above. Also, see Article 26 Ambtsinstructie voor de politie, de Koninklijke Marechaussee en andere opsporingsambtenaren (*Official Instructions for the Police Royal Military Constabulary and Special Investigating Officers*).

⁵² §3.6 Landelijk reglement arrestantenzorg (*National regulation on care of arrestees*).

to what exact rights and obligations should be addressed, though. As a rule, suspects do not stay in a police cell very long (less than a week; see the introduction of this report) and the actual pre-trial detention will take place in a penitentiary institution.

Specific for penitentiary matters, on the basis of Article 56 PPA, the prison director must ensure that every prisoner is informed of his rights and obligations under or pursuant to the PPA in writing and as far as possible in a language he understands. Paragraph 2 adds that in particular the prisoner must be informed of his right to file a complaint or appeal and to turn to the member of the Supervisory Committee serving as a visiting officer on a monthly or weekly rota basis. According to paragraph 3, a detained foreign national will be informed of his right to inform the consular representative of his country of his detention upon entering the establishment.

Informing the prisoner about his rights in practice is vital for him when it comes to being able to factually exercise his rights.⁵⁴ According to the Explanatory Memorandum with article 59 PPA, the obligation of the prison governor to inform the prisoner about his rights begins with his entrance, but is not restricted to this moment. In the law, no precise way of informing the prisoner is mentioned. The Explanatory Memorandum notes that in many prisons an audio-visual presentation has been developed about the state of affairs in the institution and their legal position. This audio-visual presentation, however, must not come in the place of written information.⁵⁵ Every prisoner must have access to the specific penitentiary regulations that apply. This applies in particular to the PPA, the Prison Rules (*Penitenciaire maatregel*), the regulations drawn up by the Minister relating to the arrangement of the prison and the house rules. The Explanatory Memorandum notes that the language barrier may be a complicating factor in the communication. Nevertheless, all parties involved must be expected to ensure that the information provided is understood by the detainee.⁵⁶ When it comes to transmitting essential information, the telephone interpreting service (*tolkentelefoon*) must be used. The Ministry of Justice can contribute to this by ensuring the availability of the (standard) regulations in current official languages. In the establishment, staff members, fellow prisoners and the telephone interpreting service can also form an indispensable link.⁵⁷

In practice, informing the prisoner of his rights and duties in the prison is mostly done by handing the prisoner a copy of the house rules, which is available in different languages. According to the Explanatory Memorandum with the PPA, the house rules, if set up as a catalogue of the rights and obligations of the prisoner, are suitable to provide the prisoner with the necessary information about his internal legal position.⁵⁸ In the Model Regulations for house rules (*Regeling model huisregels penitenciaire inrichtingen*⁵⁹) information on the legal position of the prisoner, including his right to lodge a complaint and appeal are included. In Rule 13.1 of the Model Regulations it is determined that the house rules must be made available for inspection on the prison ward and in the library. Also, the prisoner must receive a copy for inspection at his request without delay. In addition to the house rules, the Model Regulations for house rules determine that the prisoner must be able to inspect the PPA, the Explanatory memoranda to the PPA and the Penitentiary measure, the ministerial regulations and the circulars. These materials must at least be made available in the library.

In addition to the formal obligations mentioned above, legal information on detention matters in most cases will be provided by the lawyer assisting the prisoner in his criminal case. This

54 See C. Kelk (edited by M.M. Boone), *Nederlands detentierecht*, Deventer: Wolters Kluwer 2015, p. 64-66.

55 *Kamerstukken II 1994/95*, 24 263, 3, p. 70.

56 *Kamerstukken II 1994/95*, 24 263, 3, p. 70.

57 *Kamerstukken II 1994/95*, 24 263, 3, p. 70.

58 *Kamerstukken II 1994/95*, 24 263, 3, p. 12.

59 Regeling van 24 juli 1998, *Stcrt. 1998*, 158, laatstelijk gewijzigd op 5 november 2015, *Stcrt. 2015*, 40088, i.w.tr. op 1 december 2015.

lawyer may also be the one representing the prisoner during a complaint and appeal procedure, although the prisoner may also choose to have another lawyer than the one dealing with the criminal case to deal with his penitentiary complaint or appeal procedure (for example when the matter occurs long after the criminal case has been finished).

In penitentiary institutions, the Supervisory Committee also has an important function in this respect, since every month or week a member of this committee will serve as a visiting officer on a monthly or weekly (depending on the size of the prison and the workload) rota basis (*maand- of weekcommissaris*) and will go into the prison to talk to prisoners about potential conflicts and problems (Article 7 PPA and Article 17 Prison Rules). This visiting officer can provide the prisoner with information on his legal position, and advise him to whether or not file a complaint on a certain matter. This visiting officer, however, can also mediate in the conflict, and in this way facilitate a settlement. There is no strict legislation on the way in which the visiting officer has to perform his duties and as such s/he has quite some discretion as to what advice to give the detainee. The Supervisory Committee is an external and independent body; an element in the Dutch system that was praised in the jurisprudence of the ECtHR (see Introduction under i).

In some prisons, legal clinics run by law students are active. This is for example the case in Utrecht, in the prisons of Nieuwegein and Nieuwersluis. The legal consultation hours for prisoners (*Juridisch Spreekuur Gedetineerden, JSG*) was created to provide prisoners with low-threshold legal assistance. During the legal consultation hours two law students go into the prison and answer questions by prisoners, who have indicated on a note that they want to talk to the students. Also, the prisoners may go to the students directly when they pass by. The questions posed are wide-ranging, varying from questions about their legal position in the prison, to possibilities for housing after release and parental contact arrangements. Students participate in this initiative on a voluntarily basis. The initiative is coordinated by two assistant professors at the Willem Pompe Institute at Utrecht University.⁶⁰ In Amsterdam and Nijmegen similar legal consultation hours for prisoners exist. The Amsterdam legal consultation hour for prisoner is active in the prisons in Lelystad, Almere, Alphen aan den Rijn and the Schiphol Criminal Justice Complex (*Justitieel Complex Schiphol*)⁶¹, the Nijmegen legal consultation hour for prisoners in the prison Arnhem-Zuid.⁶² The initiatives in Amsterdam and Nijmegen are organised and run by students. We will elaborate on these initiatives in the report on workstream 3.

Prisoners may also contact the Legal Services Counter (*Juridisch Loket*) for free legal advice. The Legal Services Counter is an independent body established in the first decade of the 21st century by the Legal Aid Board (Article 7 (2) of the Legal Aid Act)⁶³. This service is, however, not specifically aimed at people in detention. There used to be specific service counters within some of the penitentiary institutions, but currently services for detainees are mostly provided per email or phone. We will elaborate on this more in the report on workstream 3.

Information on legal matters can also be provided to prisoners by members of Bonjo, the interest group of (ex) prisoners.⁶⁴ Bonjo is an association with over sixty members and has an office that can be reached by phone in case of questions by (ex) prisoners. Every two months a by Bonjo published newspaper is distributed in all penitentiary institutions to prisoners. The

⁶⁰ <<https://www.uu.nl/organisatie/departement-rechtsgeleerdheid/over-het-departement/onderdelen/willem-pompe-instituut-voor-strafrechtswetenschappen/juridisch-spreekuur-voor-gedetineerden>> (last accessed on 9 April 2018).

⁶¹ <<http://www.juridischspreekuur.com/>> (last accessed on 9 April 2018).

⁶² <<http://www.bjnijmegen.nl/toekomst/juridisch-spreekuur-voor-gedetineerden/>>(last accessed on 9 April 2018).

⁶³ Legal Aid Act (*Wet op de rechtsbijstand*), see Chapter 2 below.

⁶⁴ <<http://www.bonjo.nl/>> (last accessed on 9 April 2018).

newspaper brings news that is of interest for prisoners, but also provides for contact possibilities with criminal lawyers. Again: we will elaborate more on this in the report on workstream 3.

Although it is not their primary task, other persons and organisations working in prison may provide prisoners with information on their legal position in prison. In daily prison life for example, prisoners have a lot of contact with prison officers (*penitenciaire inrichtingswerkers, piw'ers*), who will be able to provide prisoners with a lot of information, also concerning legal matters. Also, spiritual councillors by the Spiritual Care Department (*Dienst Geestelijke Verzorging, DGV*) of the Custodial Institutions Agency (*Dienst Justitiële Inrichtingen*) may provide information on the legal position of prisoners. Both groups are not primarily aimed to provide legal assistance to prisoners, but they may give information on also legal matters in their contacts with prisoners. The same goes for staff of the Probation Services, mostly involved during the last period of the detention, and any other person visiting the prisoner. Also, members of organisations such as *Gevangenenzorg Nederland* that frequently visit prisoners may provide legal information to prisoners. Legal assistance to foreigners may be provided by embassies and consulates.

1.4 Practical arrangements

Rules concerning contacts with the outside world for police cells are formulated in *Landelijk reglement Arrestantenzorg*.⁶⁵ According to these rules, every suspect must receive written and/or digital information about the course of events in the police cell complex and his rights and obligations in a language that he understands (3.6). The lawyer has the right to speak to his client under the required supervision, according to what is determined in the house rules. He can make an appointment with the operational coordinator to this purpose (3.8.2). No letters, presents or parcels are accepted, other than clean clothing, literature and letters from the lawyer or parents. Exceptions are only possible after consultation with the (assistant) public prosecutor (4.2.6). The suspect is free to make phone calls, unless this is prohibited by the course of the proceedings, according to what is determined in the house rules (4.2.7). The starting point is that the suspect is not subject to any restrictions other than those that are absolutely necessary in the interest of the criminal investigation or in the interest of the preservation of order (4.4).

Whether there are practical arrangements for specific organisations providing legal information as described above depends on the organisation. Supervisory Committees have arrangements with their prisons on when, for example, the visiting officer will go into the prisons. Similar arrangements will be made with the legal consultation hours for prisoners active in a specific prison.

Privileged persons (as described in Introduction under i) have access to prisoners at all times, contrary to other visitors who are only allowed to visit the prisoner during certain hours and places mentioned in the house rules. In practice, this means that a prisoner may receive his lawyer provided that this has been communicated to the prison minimally one day in advance during office hours. If a prisoner wants to receive during a part of the day or block period in which he is assigned to work, this is not possible, unless the case is of an urgent nature and the prison governor decides that he will not participate in the work activities during that period of time. In such case the prisoner is not entitled to wages for that part of the day or that block period (article 3.8.2 of the Model Regulations, *Regeling model huisregels penitenciaire inrichtingen*⁶⁶).

⁶⁵ D.d. 14 June 2016, published on <<https://www.politie.nl/binaries/content/assets/politie/algemeen/onderwerpteksten/algemeen/reglement-arrestantenzorg-versie-2016.pdf>> (last accessed on 8 May 2018).

⁶⁶ Regeling van 24 juli 1998, *Stcrt.* 1998, 158, laatstelijk gewijzigd op 5 november 2015, *Stcrt.* 2015, 40088, i.w.tr. op 1 december 2015.

As described in the Introduction under i, the prisoner must be allowed to make phone calls with privileged persons mentioned in article 37, par, 1 PPA if there is a need thereto and the opportunity exists. Particularly in the case of pre-trial prisoners, there may be a great need for telephone contact with their lawyer, with regard to sometimes rapid developments in their criminal case. It goes without saying that this should be facilitated by the prison. Such task is inherent to the task of a remand prison, namely to facilitate a proper process of law (see 3.3).⁶⁷ We will elaborate on this in the report on workstream 3.

1.5 Legal information tools

According to Rule 13.1 of the Model Regulations the prisoner is entitled to be able to inspect the PPA, the Explanatory memoranda to the PPA and the Penitentiary measure, the ministerial regulations and the circulars. These materials must at least be made available in the library. We will elaborate on this in the report on workstream 3. In many prisons in the reintegration centres (*Reintegratiecentrum, RIC*) computers can be used to find online information, although internet access is never unlimited. Here, often also other information carriers (such as DVD's) can be used. In the Zaanstad Criminal Justice Complex (*Justitieel Complex Zaanstad*), opened in 2016, prisoners are provided with digital devices to arrange for appointments with visitors and to order groceries. The prison can also make use of the internal CCTV system to make announcements and to provide information about, for example, the day programme. We will go into the availability of legal information tools and the use of internet tools in depth in the report on workstream 3.

1.6 Reporting on legal information

There is no legal obligation for, e.g., Supervisory Committees to report regularly and publicly on their actions. Nevertheless, the Supervisory Committee reports every year in an annual report on its activities. This annual report is an important source of information about matters that play in a specific establishment. From 2012, the annual reports are published on the website of the Custodial Institutions Agency.⁶⁸ The Council for the Administration of Criminal Justice and Protection of Juveniles also publishes its annual report on its website.⁶⁹ Yearly reports are also published by the national coordination meeting of the Supervisory Committees for arrestees⁷⁰, the regional police Complaints Committees⁷¹ and the National Ombudsman.⁷²

⁶⁷ C. Kelk (edited by M.M. Boone), *Nederlands detentierecht*, Kluwer: Deventer 2015, p. 236.

⁶⁸ <<https://www.dji.nl/over-dji/organisatiestructuur/commissie-van-toezicht/index.aspx/>> (last accessed on 9 April 2018).

⁶⁹ <<https://www.rsj.nl/Over-de-Raad/Jaarverslagen/>> (last accessed on 9 April 2018).

⁷⁰ Article 6, paragraph 3, of the Regeling toezicht arrestantenzorg politie. Regeling van 1 juni 2015, *Stcrt.* 2015, 17047, laatstelijk gewijzigd op 2 maart 2017, *Stcrt.* 2017, 13163, i.w.tr. op 18 maart 2017.

⁷¹ Article 5 of the Regeling van 13 december 2012, *Stcrt.* 2012, 26850, laatstelijk gewijzigd op 2 maart 2017 *Stcrt.* 2017, 13163, i.w.tr. op 18 maart 2017.

⁷² <<https://www.nationaleombudsman.nl/jaarverslag-0>> (last accessed on 8 May 2018).

2. LEGAL AID (i.e. legal costs and legal representation fees)

2.1 Fees and mandatory (or not) character of legal representation

Legal representation in criminal cases is never obligatory in the Dutch system. The same is true for legal representation in penitentiary proceedings. Accordingly, a pre-trial prisoner can enter in these proceedings without representation. Nevertheless, on the basis of Article 65 PPA, the prisoner has the right to be assisted by a legal assistance provider or other confidential adviser, who has received permission from the Complaints Committee for this (paragraph 1). If the complainant does not have sufficient command of the Dutch language, the chairman of the Complaints Committee will arrange for the assistance of an interpreter (paragraph 2). This can be done by a person who is present during the hearing or through the use of the telephone interpreting service (*tolkentelefoon*).

As per Directive 2013/48/EU, that has been implemented in the Dutch CCP, each suspect should be enabled to consult with a lawyer before the first interrogation by the police. This implies that all suspects, from the moment they are deprived of their liberty by means of police arrest for questioning, will have access to a lawyer by default (article 28b CCP). Any suspect is free to choose his or her lawyer, which he/she will have to pay for him/herself, but suspects of more severe crimes will get a 'Duty lawyer' (*piketadvocaat*) assigned to them by the Legal Aid Board (article 28b, paragraphs 1 and 2 CCP). The bottom line of the legal aid scheme in this stage of the proceedings is that all suspects that are deprived of their liberty have access to the legal aid scheme in order to get pre-trial assistance by a lawyer.

As said, in penitentiary proceedings, legal assistance is not obligatory, but the prisoner has the right to legal aid and the assistance does not necessarily have to come from a (defence) lawyer: the law mentions 'a legal assistance provider' (*rechtsbijstandverlener*) or 'a fiduciary' (*vertrouwenspersoon*) (article 65, paragraph 1, PPA). While 'rechtsbijstandverlener' is a term specifically defined by law,⁷³ 'vertrouwenspersoon' is not and, as such, any other person can – in theory – be allowed to provide legal aid in proceedings under the PPA.

Within rather strict limits, the LAB can certificate a lawyer, free of charge, for these prison litigation proceedings, but this certificate should be distinguished from the certificate for pre-trial assistance mentioned above (also see the table in §2.8 below). It is possible that the same lawyer gets two certificates, for both the pre-trial assistance and the penitentiary proceedings. Another possibility is that two different lawyers are assigned.

Civil court proceedings are very exceptional within the realm of criminal litigation or prison litigation. Assistance by a lawyer is, as a rule, obligatory (article 79 Code of Civil Procedure), unless the case is brought before the limited jurisdiction court judge (*kantonrechter*), which is unlikely for prison litigation cases (Article 93 Code of Civil Procedure).

2.2 Legal aid scheme

The most important legal provisions are the CCP, the Legal Aid Act⁷⁴ (LAA) and the PPA. The Dutch legal aid scheme provides legal aid to people who have limited financial means.⁷⁵ The LAA distinguishes between 'rechtshulp' (which literally translates into 'legal aid') and 'rechtsbijstand' (which literally translates into 'legal assistance'). Rechtshulp is also referred to as

⁷³ Article 1, under I PPA and Article 1 and 8 LAA. In general: a lawyer who is allowed to work as 'advocaat' under the *Advocatenwet* (*Counsel Act*).

⁷⁴ In Dutch: *Wet op de Rechtsbijstand* (*Wrb*).

⁷⁵ For more information on the Dutch Legal Aid scheme, also see: Legal Aid Board, *Legal Aid in the Netherlands, a broad outline*, 2017 (<https://www.rvr.org/binaries/content/assets/rvrorg/informatie-over-de-raad/12835_legalaid-brochure_2017.pdf>, (last accessed on 23 October 2018). Also see Preložnjak 2017, p. 40-41.

'First-line legal aid' (*eerstelijns rechtsbijstand*), provided for by a Legal Services Counter. Legal assistance is also referred to as 'Secondary legal aid', provided for by a Board-registered lawyer. In our reports, we mostly use the term 'legal aid by a lawyer' in the sense of 'Secondary legal aid', unless we specifically mention otherwise.

As a general rule (not limited to criminal cases) Article 34 LAA provides that only people with an annual income or assets below a certain threshold (income-limit)⁷⁶ will qualify for subsidised legal aid. Article 35 furthermore provides that even below that threshold, an income-related personal contribution is due, with a bare minimum of €143.⁷⁷ Thus, in the general legal aid scheme the income-limit and the personal contribution are leading factors. Legal aid is never entirely free of charge. Article 43 (1) LAA provides an important exception for criminal proceedings: in cases in which the CCP or the CC⁷⁸ provides that a lawyer should be assigned, legal aid is free of charge, regardless of the income of the suspect. There are some exceptions, but the ground rule is that any suspect that is deprived of his liberty against his will (held for questioning, police arrest or pre-trial detention) should initially have access to lawyer free of charge.⁷⁹ Legal assistance free of charge is, in more serious cases, also available for prison litigation. In all other cases (i.e. most suspects who are not deprived of their liberty) the general legal aid scheme will be applicable.

Under the legal aid scheme, board-registered lawyers can get a 'certificate' (*toevoeging*) which enables them to provide legal aid⁸⁰ in a specific case for a specific client or they can be appointed as a duty lawyer to clients who have been arrested and assist them during the first phase after their arrest (arrest for questioning and police custody). Duty lawyers will take turns in availability shifts. Most criminal defence lawyers both work as duty lawyers and through certificates. It is for example not uncommon that a lawyer meets a new client while on duty and later on continues as his defence lawyer with a certificate. In both cases they will get a remuneration for their services. The height of this remuneration is determined in article 37 LAA and the Legal Aid Payments Decree 2000⁸¹ (LAPD). The remuneration has been the topic of vehement discussion over the past years. Most lawyers, criminal lawyers included, feel that the remuneration is too low. A state committee has also come to this conclusion.⁸²

More in detail, the legal provisions are as follows. The CCP provides that a lawyer will have to be assigned in most cases when a suspect is held for questioning, is taken in police custody or in pre-trial detention (article 28b, 39-44 CCP). Legal aid up until police custody and the first pre-trial detention hearing before the examining judge is provided by a duty lawyer. After that

⁷⁶ The amount mentioned in the article is indexed every year, for 2018 the maximum income was €26,900 for single persons or €38,000 for married persons or single persons with children, the maximum assets were €30.000. The average income per person in the Netherlands in 2016 was approximately €30.000. The minimum wage set by the government was approximately €20.000.

⁷⁷ Legal Aid (Personal Contributions) Decree (*Besluit eigen bijdrage rechtsbijstand*).

⁷⁸ Criminal Code. In Dutch: *Wetboek van Strafrecht*.

⁷⁹ Since 2017, the suspect that eventually gets convicted may have to pay back the cost of this legal aid, we will elaborate on that further on in this section.

⁸⁰ The LAA distinguishes between 'rechtshulp' (which literally translates into 'legal aid') and 'rechtsbijstand' (which literally translates into 'legal assistance'). Rechtshulp is also referred to as 'First-line legal aid' (*eerstelijns rechtsbijstand*), provided for by a Legal Services Counter (*Juridisch Loket*). Legal assistance is also referred to as 'Secondary legal aid', provided for by a Board-registered lawyer. In our reports, we mostly use the term Legal aid in the sense of 'Secondary legal aid', unless we specifically mention otherwise.

⁸¹ In Dutch: *Besluit vergoedingen rechtsbijstand 2000*.

⁸² Report by Commissie-Van der Meer: *Andere tijden. Evaluatie puntentoekenning in het stelsel van gesubsidieerde rechtsbijstand, 2017*. The report is only available in Dutch. Some news coverage on it in English can be found here: <https://www.fairtrials.org/news/dutch-lawyers-unite-against-cuts-legal-aid> and here: <https://www.liberties.eu/en/news/legal-aid-system-netherlands-change/13369> (last accessed 15 November 2018).

the lawyer will get a certificate. As mentioned, pre-trial assistance by a lawyer is initially free of charge, but there is an important exception in article 43, paragraph 3, LAA (see below). Article 43, paragraph 2 LAA holds that article 43, paragraph 1 LAA applies, *mutatis mutandis*, to (inter alia) legal assistance as specified in article 65, paragraph 1, PPA. This means that legal assistance in penitentiary proceedings is also free of charge. Article 43, paragraphs 1 and 2, LAA need to be read in connection with article 12 LAA, stipulating that unnecessary or unreasonable claims for subsidised legal assistance can be dismissed. For example, article 12, paragraph 2, subsection g, LAA holds that no subsidised legal assistance will be granted to people who can reasonably be expected to deal with the litigation themselves (or with the help of legal assistance providers outside the scope of the LAA). This provision is especially relevant for legal assistance in penitentiary proceedings (based on article 43, paragraph 2 LAA jo. Article 65 (1) PPA), as the LAB has the policy that the complaints procedure of the PPA is, in principle, relatively simple and easily accessible. Legal assistance in such cases is not deemed necessary. The LAB has developed specific policy rules to establish whether the complexity of the case warrants a certificate or not (see below). A refusal to grant a certificate is open for objection proceedings and administrative appeal proceedings.

Very recently, new legislation has come into force. Since March 1st 2017, article 43 (3) LAA provides that those who have an income above the threshold mentioned in article 34 LAA and who have been condemned of the crime that they received legal assistance for by virtue of article 43(1) LAA, can be required to reimburse the remuneration paid to the lawyer.⁸³ This new legislation implies that only those who get acquitted actually receive legal aid free of charge. This new legislation has already been characterized as a serious threat to the autonomy of the defence.⁸⁴ Also, questions have been raised regarding its compatibility with the ECHR and the EU Directive 2013/48/EU.⁸⁵ It is not possible yet to determine the scope and the effects of this new legislation. The LAB has announced that they will indeed demand reimbursement in all eligible cases, but to our knowledge, they have not sent out the first demands yet. On the one hand, a lot of suspects will not reach the threshold of Article 34 LAA, as a lot of criminals do not have a regular income. On the other hand, though, the threshold is quite low, so a suspect with a more or less decent job who gets arrested in the last months of the year, may have already reached the threshold. Of course, the perspective of having to pay back the costs of the defence lawyer can be detrimental to the amount of expertise a suspect is willing to allow on his case. As will be shown below, the basic remuneration in the legal aid scheme is not very high, but in more complicated cases, a lawyer can ask for additional subsidies. The lawyer will have to inform his or her client about the financial risks and the client could consequently decide to limit the defence to the basic level.⁸⁶ The new legislation is not of influence on the assignments in proceedings concerning conditions of detention, in which a lawyer will have been assigned in accordance with article 43(2) Wrb *juncto* article 65(1)PPA.

2.3 Emergence of a right to legal aid in penal facilities

2.3.1 Pre-trial assistance

Legal assistance in pre-trial matters has been a right for pre-trial prisoners since the latest version of the Dutch CCP entered into force in 1926. Before that time, the suspect would mainly be deprived of legal protection in the preliminary stage of the proceedings. Although the 1926

⁸³ The income-related personal contribution will not be applied, though, so once below the threshold, no personal contribution will be necessary.

⁸⁴ P.T.C. van Kampen, 'Verdediging 2.0', *RM Themis* 2017, p. 313-322.

⁸⁵ D.V.A. Brouwer, 'Terugvordering van de kosten van rechtsbijstand', *Strafblad* 2017, 16, p. 256-265.

⁸⁶ D.V.A. Brouwer, 'Terugvordering van de kosten van rechtsbijstand', *Strafblad* 2017, 16, p. 256-265.

CCP's aim was to promote more adversarial proceedings, in practice a lot of the rather inquisitorial elements maintained present.⁸⁷ Full disclosure of the case file or the right to question witnesses or expert opinions are examples of defence rights in the pre-trial stage that have developed quite slowly over the past decades, much under the influence of the ECHR and the case law of the ECtHR. Access to a lawyer in the pre-trial stage was however provided for since 1926, but defence rights could (temporarily) be restricted in the interest of the investigation. Specialized criminal defence lawyers played a marginal role, which was also due to the large amount of trust in the judiciary and the rather mild penal climate.⁸⁸ It was not until the end of the 1960s and the start of the 1970s – a time in which big societal changes took place – that the position of criminal defence lawyers grew stronger and the legal position of the suspect was strengthened.⁸⁹ The legal aid scheme evolved both in the sense that more suspects could apply for it and the payment for the lawyers got better, a development that continued into the 1980s, although by then the political climate had changed and much more emphasis lied on fighting criminality.⁹⁰

As of 1990s, highly specialized criminal lawyers have become the norm: criminal litigation is an established field of expertise and, also due to the continuing influence of the ECtHR case law, procedural rights are a relevant factor. However, due to the still highly inquisitorial nature of the criminal procedure and the decline of the judicial scrutiny of the preliminary investigation, the prosecution has become a very powerful party. As Prakken and Spronken note: '[t]he prosecution is now the most powerful organ in the criminal process, not only in individual cases, but also in relation to criminal policy. The power of the prosecutor not to prosecute if the general interest so requires – the principle of discretionary powers⁹¹ – has evolved towards a system of criminal policy in the hands of a hierarchical and bureaucratic public prosecution office under the control of the minister of justice.'⁹² It is, e.g., not until the preliminary investigation has been wrapped up that the defence will get full access to the case file. This continues to be the case in the first decades of the 21st century, although, as said, the financing of the legal aid scheme is now perceived to be too poor, which is potentially to the detriment of the quality of the legal assistance.⁹³

As stated before, the aftermath of the *Salduz*-judgment has been a very important influence on the practice of defence lawyers in the Netherlands. Although the right to access to a lawyer before and during the first interrogations by the police has been a topic of discussions for a long time,⁹⁴ the right to consult a lawyer prior to the first interrogation by the police has only

⁸⁷ T. Prakken & T. Spronken, 'The investigative stage of the criminal process in the Netherlands', in: E. Cape, J. Hodgson, T. Prakken and T. Spronken (eds.), *Suspects in Europe. Procedural rights at the investigative stage of the criminal process in the European Union*, Antwerpen/Oxford: Intersentia 2007, p. 155.

⁸⁸ T.N.B.M. Spronken, *Verdediging. Een onderzoek naar de normering van de het optreden van advocaten in strafzaken* (diss. Maastricht), Deventer: Kluwer 2001, p. 195.

⁸⁹ T.N.B.M. Spronken, *Verdediging. Een onderzoek naar de normering van de het optreden van advocaten in strafzaken* (diss. Maastricht), Deventer: Kluwer 2001, p. 102.

⁹⁰ T.N.B.M. Spronken, *Verdediging. Een onderzoek naar de normering van de het optreden van advocaten in strafzaken* (diss. Maastricht), Deventer: Kluwer 2001, p. 196-197.

⁹¹ This principle is more commonly referred to as the 'expediency principle', - PJ&JL.

⁹² T. Prakken & T. Spronken, 'The investigative stage of the criminal process in the Netherlands', in: E. Cape, J. Hodgson, T. Prakken and T. Spronken (eds.), *Suspects in Europe. Procedural rights at the investigative stage of the criminal process in the European Union*, Antwerpen/Oxford: Intersentia 2007, p. 156.

⁹³ P.P.J. van der Meij, 'Voor een dubbeltje op de eerste rang?', *Strafblad* 2016, 49, p. 343-349.

⁹⁴ T. Prakken & T. Spronken, 'The investigative stage of the criminal process in the Netherlands', in: E. Cape, J. Hodgson, T. Prakken and T. Spronken (eds.), *Suspects in Europe. Procedural rights at the investigative stage of the criminal process in the European Union*, Antwerpen/Oxford: Intersentia 2007, p. 168-169, T.N.B.M. Spronken, *Verdediging. Een onderzoek naar de normering van de het optreden van advocaten in strafzaken* (diss. Maastricht), Deventer: Kluwer 2001, p. 107 et seq.

been implemented shortly after the Salduz-judgement and the right to have a lawyer present during the police interrogation has been implemented as of March 1st 2016, after a ruling of the Dutch Supreme Court. As of March 1st, 2017, there is statutory legal provision for the right to have a lawyer present before and during the police interrogations.

2.3.2 Legal assistance in penitentiary proceedings

In her article 'The development of *Rechtsburgerschap* of prisoners', Jacobs has already described in detail how the legal position of prisoners in the Netherlands has evolved in the 20th century:⁹⁵

'When considering penal reform in the Netherlands of the last 70 years, the influence of the Second World War cannot be overestimated. After the atrocities of this war came to light, the necessity to prevent such events in the future was felt globally, which led to the creation of several human rights instruments, e.g. the UN Universal Declaration of Human Rights in 1948. On the national level, the Second World War resulted, *inter alia*, in an awareness that people who are deprived of their liberty should be treated humanely. This development was inspired by the fact that many people of the Dutch resistance against the German dictatorship had personally experienced the tough circumstances in prison during the war. This awareness led to major reforms in prison legislation, despite the limited amount of resources available in these years. In 1947, the Fick Committee presented a report that formed the basis for the new 1953 Penal System (Framework) Act (*Beginzellenwet Gevangeniswezen*). An important step in the development of a legal position for prisoners was the creation of a Supervisory Committee (*Commissie van Toezicht*) in this new law. This Supervisory Committee was created to deal with prisoners' complaints and to monitor the treatment of those deprived of their liberty in a penitentiary institution. This provided the Supervisory Committee with the possibility to counterbalance the powerful role of the prison governor in decisions regarding daily life in prison and the treatment of the prisoners. The Supervisory Committee consists of members of the general public, as independent representatives of society, allowing supervision by persons outside prison and thus allows supervision from the outside world on this 'total institution'.⁹⁶

The work of the scholars of the so-called Utrecht School (*Utrechtse School*), mainly in the period 1948-1960, has contributed significantly to the humanization of the criminal law system in general and the prison system in particular. (...)

Despite growing awareness in the 1970s that deprivation of liberty only involves a loss of the right to physical liberty and no more than that (and that, as a result, prisoners should be limited in their rights no more than strictly necessary for the deprivation itself), it took until 1977 for a legal position for prisoners to be created. On the basis of the then created regulations, prisoners may file a complaint with the Complaints Committee concerning decisions taken by, or on behalf of, the governor. The Complaints Committee is composed of members of the Supervisory Committee and can take binding decisions. The governor and the complainant may appeal against the Complaints Committee's decision by entering an appeal to the Appeals Committee comprised of the Council for the Administration of Criminal Justice and Youth Protection (*Raad voor Strafrechtstoepassing en Jeugdbescherming*, RSJ), a system of legal protection for prisoners that has more or less remained the same until today. This system not only provides relief for prisoners who claim to have been the victim of unlawful treatment in prison, but it has also created a normative framework for the assessment of treatment in prison, which has a strong preventive function.

Legal ways for prisoners to file a complaint about certain decisions concerning them are an essential feature of the notion of *rechtsburgerschap*, according to the definition as provided by Kelk (who succeeded Rijkssen as a professor in penitentiary law in 1980)

⁹⁵ The following text is quoted from Jacobs 2015, p. 386-392.

⁹⁶ E. Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates*, New York: Anchor books 1961.

in his dissertation 'Rights for prisoners' (*Recht voor gedetineerden*), which he defended in 1978.⁹⁷ In his dissertation, Kelk argued in favour of an approach that would allow prisoners as much as possible the same rights as all free citizens in the community have, and to provide prisoners with legal remedies to be able to enforce these rights in a contradictory procedure. (...)

Nowadays, the idea of prisoners as *rechtsburgers* is widely acknowledged in the Netherlands. The rights of prisoners are firmly rooted in the Penitentiary Principles Act (*Penitentiaire beginselenwet*) and prisoners have a system of rights of complaint and appeal at their disposal, a system of legal protection for prisoners that is unique in the world. For a long time, the Netherlands was the example country with regard to treatment of prisoners and prison conditions. Dutch prison circumstances, however, have become and will increasingly become more austere, as a result of severe cuts in the prison budget.⁹⁸ (...)

It should be noted that from the outset in 1977, subsidized legal aid was available in the proceedings before the Complaints Committee on the basis of article 54 (4) of the Penal System (Framework) Act.

2.4 Perimeter of the legal aid regarding penitentiary proceedings

The notion of the proceedings before the Complaints committee is that the execution of detention has to take place in a humane way.⁹⁹ As mentioned above, the right to legal assistance does not necessarily mean that a lawyer will be assigned free of charge. The LAB will only assign a lawyer in more complex cases. The LAB has described its policy in Instruction Z080:¹⁰⁰ in general, a lawyer will not get a certificate, because in complaints proceedings, the prisoner is presumed to be able to litigate independently: there are standard forms that the prisoner can use to file the complaint and he/she can seek assistance from the social worker in the prison or the Legal Services Counter.¹⁰¹ However, in case of complicated factual circumstances, in cases of legal complexity or in cases of substantial interest, a lawyer can get a certificate. Legal complexity can be assumed in cases in which noncompliance with procedural requirements is claimed. Examples of cases of substantial interest are those in which the personal integrity of the prisoner has been affected significantly, such as placement in the isolation cell, exclusion of participation in certain activities, camera-observation in the cell, interference of privacy or physical integrity (body searches etc), restrictions as to contact with the outside world, restriction regarding medical or mental treatment, disciplinary sections etc.¹⁰² As a rule, for an appeal before the Council for the Administration of Criminal Justice and Protection of Juveniles against the decision of the Complaints Committee, a lawyer will get a certificate. In all cases, the lawyer can only get a certificate if he/she has been registered with the LAB as specialized in criminal law (see 3.2 below).

⁹⁷ C. Kelk, *Recht voor gedetineerden (een onderzoek naar de beginselen van het detentierecht)*, Alphen aan den Rijn: Samsom 1978.

⁹⁸ See Masterplan DJI 2013-2018 d.d. 13 June 2013, which aims to reduce the prison budget by €271 million in the period 2013-2018.

⁹⁹ J. Serrarens, 'Chapter 8: Complaint procedures', in: M.M. Boone & M. Moerings (eds.), *Dutch prisons*, Den Haag: BJU Legal Publishers 2007, p. 209.

¹⁰⁰ <<https://kenniswijzer.rvr.org/werkinstructies-toevoegen/strafzakennietverdachten/z080-geschillen---klachtzaken-gedetineerden.html>>

¹⁰¹ See 1.3 above.

¹⁰² See the appendix for the Z080 instruction.

The above makes clear that the assignment to a suspect in pre-trial detention with the purpose of pre-trial assistance,¹⁰³ will not automatically include assistance regarding penitentiary proceedings. This means that an additional certificate for the same lawyer (or another lawyer) in penitentiary proceedings will have to be requested.¹⁰⁴

Litigation that falls outside the scope of the complaints proceedings (mainly: interim relief proceedings against general policy decisions) can also be eligible for an assigned lawyer by the LAB, but there is a large margin of appreciation for the LAB. There is very little caselaw on this topic, a reason to explore this further in the report on workstream 3.

It can be concluded that there are no statutory limits to the possibility of receiving legal assistance in penitentiary proceedings. First of all, all pre-trial prisoners will have access to a lawyer for pre-trial assistance and one will always be assigned to them unless the suspect or pre-trial prisoner does not want so. Prison litigation lies outside the scope of pre-trial assistance, but the pre-trial defence lawyer can still provide basic advice. With respect to penitentiary litigation, a first distinction should be made between the complaints proceedings of the PPA and other litigation. The PPA specifically allows legal representation and the LAA holds that a lawyer can be assigned free of charge. However, the LAB has a policy that prisoners are, as a rule, self-reliant and should be able to enter into the complaints proceedings alone. A lawyer will only be assigned in more complex and/or significant complaints.

2.5 Scope of the compensation

In general, if a lawyer gets assigned for prison litigation, he will get 3 points (see §2.9 below), which is a 'lump sum'. So, it is up to the lawyer to decide how he spends his time.

2.5 Eligibility to legal aid

See §2.4 above (please note that in the original format for the report on workstream 2 the numeration is faulty)

2.6 Choice of the lawyer

The prisoner can choose his own lawyer, as long as this lawyer is on the list of the LAB and is a criminal law specialist (see chapter 3 of this report). Also, as mentioned before, the lawyer that has already been assigned for pre-trial assistance can ask for an additional assignment. While there is not much literature on this subject, it is our understanding that prison litigation is not a widely preferred field of expertise among defence lawyers and as such it is not uncommon that the defence lawyer that has already been assigned for pre-trial assistance can be reluctant to assist his or her client in the penitentiary proceedings. Again, this will be investigated in more depth in the report on workstream 3.

Where past legislation (Article 54 (4) of the Penal System (Framework) Act) provided in the possibility for the chair of the Complaints Committee to assign a lawyer to the applicant, the PPA does not hold that specific provision. The applicant will have to find a lawyer himself and the lawyer will have to apply for the certificate. It is likely, though, that the visiting officer of the Supervisory Committee will assist a potential applicant in this regard.

2.6 Application for legal aid

¹⁰³ Usually, Instructions regarding S040/050 will be applicable: <<https://ken-niswijzer.rvr.org/werkinstructies-toevoegen>> (last accessed 23 October 2018).

¹⁰⁴ We did not find any relevant case law regarding appeals against refusals to allow for a certificate in Z080 cases.

A lawyer wishing to provide his or her services under the legal aid scheme, will have to take the initiative to get the certificate.¹⁰⁵ His or her client cannot do this. For the LAB to be able to assess the request for a certificate, the request will have to be substantiated, for example with a copy of the decision against which the prisoner wishes to file a complaint. In the past, a lawyer would have to apply for each certificate in advance of the proceeding, which meant that the LAB had to verify and approve each application. In recent years, the LAB has changed its workflow by introducing the so-called High Trust system, which is based on 'transparency, trust and mutual understanding'.¹⁰⁶ Lawyers who have the High Trust certificate are expected to act in compliance with the LAA and can simply apply for a certificate digitally. They will get the certificate automatically. Verification will take place afterwards, using random samples. If more than a certain percentage of the certificates is found to be applied for unjustified, the lawyer will lose his High Trust certificate and will have to apply through the old-fashioned way. We will elaborate on this in the report on workstream 3.

As we have stated above, participating in the legal aid scheme is not obligatory, clients can choose to pay for their lawyer themselves.

2.7 Evaluation and granting of applications for legal aid

The LAB will decide on the application for a certificate (see §2.4 above). The LAB is a so-called Zelfstandig Bestuursorgaan (ZBO, *autonomous administrative authority*), which makes it a 'bestuursorgaan' (*administrative body*) under Article 1:1 of the General Administrative Law Act (*Algemene Wet Bestuursrecht, Awb*). A refusal to grant a certificate qualifies as a 'decision' under the General Administrative Law Act (Article 1:3) and therefore, each interested party (*belanghebbende*, Article 1:2) can enter into administrative proceedings provided (Article 8:1 in conjunction with Article 7:1): objection proceedings (*bezwaarschriftprocedure*) before a review committee¹⁰⁷ followed by administrative appeal (*beroep*) before an independent administrative court.¹⁰⁸

2.8 Remuneration of legal aid lawyers

When assigned, a lawyer will get a remuneration of 3 points for a complaints procedure, which in 2018 amounts to 3 x €105,61=€316,83.¹⁰⁹ This is a fixed amount. Remuneration for loss of time and travel expenses if the litigant is in detention can also be possible (but only if the lawyer has to travel more than 60 km), as is remuneration for expenses for an interpreter.¹¹⁰ There is also a small fixed amount for administration costs.

For a comparison, see the table below, taken from the annex of the Legal Aid Payments Decree 2000. This table shows that 3 points is the bare minimum a lawyer will get for any kind of assignment. Please note that compensation for exceptionally heavy caseload is possible, with a burden of proof for the lawyer.

¹⁰⁵ Legal Aid Board, *Legal Aid in the Netherlands – a broad outline*, 2017, p. 16. <https://www.rvr.org/binaries/content/assets/rvrorg/informatie-over-de-raad/12835_legalaid-brochure_2017.pdf> (last accessed 1 October 2018).

¹⁰⁶ Legal Aid Board, *Legal Aid in the Netherlands – a broad outline*, 2017, p. 18. <https://www.rvr.org/binaries/content/assets/rvrorg/informatie-over-de-raad/12835_legalaid-brochure_2017.pdf> (last accessed 1 October 2018).

¹⁰⁷ Chapter 7 of the General Administrative Law Act (*Algemene Wet Bestuursrecht, Awb*). Also see the Reglement behandelng bezwaarschriften RvR (*Regulation on processing notices of objection LAB*), *Stcrt.* 2011, 12269. And the Reglement Commissie voor Bezwaar (*Regulation on review committee LAB*), *Stcrt.* 2011, 12268.

¹⁰⁸ Chapter 8 of the General Administrative Law Act (*Algemene Wet Bestuursrecht, Awb*).

¹⁰⁹ Article 3 Besluit vergoedingen rechtsbijstand 2000 (Bvr) (*Legal Aid Payments Decree 2000*).

¹¹⁰ Article 2(2/b) and 26 Bvr.

Criminal proceedings, for suspects	p.
– first instance before sub district court	5
– youth criminal proceedings	6
– drinking and driving	5
– first instance before district court, single judge division	6
– first instance before district court, three judge division	8
– super expedited proceedings	4
Criminal proceedings, non-suspects	
– extradition act (<i>Uitleveringswet</i>)	9
– surrender of persons act (<i>Overleveringswet</i>)	6
– enforcement of Criminal Judgments (<i>Transfer</i>) Act (<i>wet overdracht tenuitvoerlegging strafvonnissen/Wots</i>)	8
– psychiatric Hospitals (Compulsory Admissions) Act (<i>Wet bijzondere opnemingen in psychiatrische ziekenhuizen/Bopz</i>)	4
– immigration detention	4
– hospital order (<i>Tbs</i>)	7
– disputes/complaints prisoners	3
– claim of injured party (<i>vordering benadeelde partij</i>)	5
– complaint against decision not to prosecute (<i>beklag niet-vervolgning</i>)	5
– demand for a confiscation order (<i>ontnemingsvordering</i>)	3
– execution conditional sentence (<i>tenuitvoerlegging voorwaardelijke straf</i>)	3
– objection against DNA-profile (<i>bezwaarschrift DNA-profiel</i>)	3
– other cases related to criminal proceedings (<i>overige strafzaken</i>)	4

Specific remunerations have been set for the Duty Lawyers.¹¹¹ The remuneration for coming to the police station and consulting before the first police interrogation is 0,75 points. Assistance during the interrogation is 1,5 points (or 3 points in more serious crimes) and consultation after the hearing is 0,75 points.

As has been mentioned above, a heated discussion is taking place at the moment about the remuneration for legal aid. A state-appointed commission has written a critical report in which it recommends that much more money should be made available for legal assistance in general (and as such, also for criminal litigation).¹¹² Lawyers claim that the quality of legal assistance is in serious danger if more money does not become available. The government does

¹¹¹ Article 23 LAPD.

¹¹² Report by Commissie-Van der Meer: *Andere tijden. Evaluatie puntentoekenning in het stelsel van gesubsidieerde rechtsbijstand*, 2017. Also, see <<https://www.fairtrials.org/news/dutch-lawyers-unite-against-cuts-legal-aid> and <https://www.liberties.eu/en/news/legal-aid-system-netherlands-change/13369>> (last accessed 15 November 2018).

not seem to be willing to spend more money on the legal aid scheme. These debates are going on in full force at the moment. We hope to provide a 'state of the art' on the debate by the time the project comes to its conclusion.

2.9 Support to non-native speakers

As a rule, penitentiary proceedings and the arrangement of an interpreter are free of charge for the litigant. According to article 65 PPA, assistance by an interpreter will be provided for. Article 45 of the Prison Rules provides for detailed arrangements: as a rule, the director of the penitentiary institution will have to pay for the interpreter. The chair of the Complaints committee can also rule that relevant written information should be translated.

2.10 Exemption of costs for the legal aid beneficiary

As stated above, there are no costs for the beneficiary.

2.11 Financial consequences of the failure of the proceedings for the legal aid beneficiary

If, in penitentiary proceedings, the complaint is rejected, there are no financial consequences for the litigant. As stated above, a conviction in the criminal case can lead to the obligation for the convict to reimburse the subsidized legal assistance regarding the criminal trial, but not to reimburse the subsidized legal assistance regarding the penitentiary proceedings.

2.12 Opportunities in case the legal aid beneficiary is not satisfied with his counsel

In criminal cases, the suspect can ask for another lawyer (article 44 CCP). In penitentiary proceedings the legislation does not seem to be conclusive on this part. There is also a system of disciplinary law for lawyers: the client can file a complaint which will be dealt with by a disciplinary court. Lawyers can receive cautions and warnings, can be (conditionally) suspended and can be deleted from the list of lawyers altogether.¹¹³ A client who is unsatisfied with his counsel can also issue a claim for civil damages.¹¹⁴ However, these proceedings cannot lead to the remedy that a case should be reopened.¹¹⁵

Concluding remarks

Access to a lawyer has not been a big problem in the past decades in the Netherlands, although it has taken quite a long time before adequate legal assistance before and during the police interrogations came into effect. Outside of the scope of pre-trial support, the Dutch complaint and appeal procedures for prisoners has been unique within Europe.¹¹⁶ The legal aid scheme has always meant that lawyers had to operate on a tight budget, but in the past decade

¹¹³ J.E.B. Coster van Voorhout, *Ineffective legal assistance. Redress for the accused in Dutch criminal procedure and compliance with ECHR case law* (diss. Utrecht), Leiden: Brill Nijhoff 2017, published on <<https://dspace.library.uu.nl/bitstream/handle/1874/347164/CosterVanVoorhout.pdf>>, p. 92.

¹¹⁴ J.E.B. Coster van Voorhout, *Ineffective legal assistance. Redress for the accused in Dutch criminal procedure and compliance with ECHR case law* (diss. Utrecht), Leiden: Brill Nijhoff 2017, published on <<https://dspace.library.uu.nl/bitstream/handle/1874/347164/CosterVanVoorhout.pdf>>, p. 92-93.

¹¹⁵ J.E.B. Coster van Voorhout, *Ineffective legal assistance. Redress for the accused in Dutch criminal procedure and compliance with ECHR case law* (diss. Utrecht), Leiden: Brill Nijhoff 2017, published on <<https://dspace.library.uu.nl/bitstream/handle/1874/347164/CosterVanVoorhout.pdf>>, p. 340, p. 349.

¹¹⁶ P. Jacobs & A. van Kalmthout, 'The Dutch complaint and appeal procedure for prisoners in the light of European standards', in: G. Cliquennois & H. de Suremain, *Monitoring penal policy in Europe*, London: Routledge 2017, p. 54-69.

or so, with a lot of budget cuts since the economic crisis in 2008, the situation has become worrisome, with people claiming that the rule of law is being undermined because of a decline in the quality of legal aid.¹¹⁷ A rather harsh climate towards suspects of criminal offences have led to plans emerging in which, for example, a convict would have to pay for the criminal proceedings he/she underwent.¹¹⁸ Although most of these plans have been abolished, one specific measure has been implemented: since 2017 a convict who is deemed of sufficient financial sustainability will have to reimburse the remuneration of the legal aid he received. The exact effects of this new measure cannot be described yet (see §2.2 of this report), but it has already been pointed out that there are aspects to the legislation that do not seem to be thoroughly thought through and that that can be to the detriment of the quality of the defence. This is exemplary for a potentially decreasing tendency: the public and the government in the Netherlands seem less and less willing to provide for the elementary ingredients for a proper defence. For now, the prison litigation legal aid scheme does not seem to be touched by these new measurements.

¹¹⁷ D.V.A. Brouwer, 'Terugvordering van de kosten van rechtsbijstand', *Strafblad* 2017, 16, p. 256-265, P.P.J. van der Meij, 'Voor een dubbeltje op de eerste rang?', *Strafblad* 2016, 49, p. 343-349.

¹¹⁸ For example legislative proposal 34067, which proposed that convicts would have to pay a personal contribution in the costs of the proceedings against him/her and in the costs of victim care. This proposal has ultimately been withdrawn.

3. ORGANIZATION OF BARS AND LAWYERS' ACTION IN DETENTION

3.1 Regulations of bars' involvement in legal support to prisoners

The Netherlands Bar (*Nederlandse orde van advocaten*, NOvA) describes its activities as follows:¹¹⁹

'THE NETHERLANDS BAR

The Netherlands Bar (*Nederlandse orde van advocaten*, NOvA) is the professional organisation of the legal profession.

The NOvA was established by the Act of Advocates (*Advocatenwet*) with effect from 1 October 1952. All lawyers in the Netherlands jointly form the NOvA. The NOvA is established by law but does not receive any government funding. All costs incurred by the NOvA are being paid for by the lawyers through an annual financial contribution to the Netherlands Bar. As a result, the NOvA is completely independent of the government.

The Netherlands is judicially divided into eleven judicial districts (regions), the jurisdictions of the courts. The lawyers in a judicial district form the (local) bar within the judicial district where the lawyer holds office. Each local bar is chaired by a council of the local bar (*raad van de orde*) and a local bar president. A local bar president is chosen by the lawyers in the judicial district. The local bar president is responsible for the supervision of all lawyers in the judicial district.

The general council (*algemene raad*, AR) is supported by the office of the NOvA. The office carries out policies and prepares proposals which are of importance to the legal profession.

The NOvA is headed by a secretary general. The secretary general is in charge of the daily management. The general management is a task of the general council.

The office consists of four departments: Communications, Finance and Organization, Policy and Regulations and Supervision. The office employs approximately 60 employees.

The NOvA draws up regulations and rules for the legal profession. The adoption thereof is done by the board of representatives (*college van afgevaardigden*). The 54 deputies of the board are all chosen by lawyers in their own judicial district/region.

Bar registration

The bar registration (*tableau*) contains all lawyers who may exercise their profession within the eleven judicial districts (regions) in the Netherlands. This national list is being maintained by the bar registration. The list includes the office name, business address, phone numbers, data of the lawyer such as name, date of birth and e-mail address, and other practical information. Lawyers are registered after having been sworn in or after admission if they meet all requirements. Disbarment can take place at own request, by a decision of the disciplinary board or after the expiration of a conditional registration.

(...)

Act on Advocates

The Act on Advocates governs the profession of lawyers. Under this law, the lawyer is compulsory part of the NOvA. On the basis of this Act, the NOvA may lay down rules

¹¹⁹ <<https://www.advocatenorde.nl/english>> (last accessed 23 October 2018).

for the professional practice, such as the financial administration and compulsory professional insurance. The lawyer is required to undergo continuous training on a yearly basis and is monitored thereon by the central monitoring of the regulations for continuous training.'

The above quote does not specify that each client has the possibility to file a complaint about his or her lawyer with the local bar president, who in turn can decide (also at the request of the applicant) to enter into disciplinary proceedings and put the complaint before the local Board of Discipline (*Raad van discipline*), with possibilities for appeal before the Disciplinary Appeals Tribunal (*Hof van discipline*).¹²⁰

3.2 Lawyers specialized in detention/penitentiary law

The Act of Advocates as such does not provide in additional rules regarding specialization in specific fields of law. The bar itself does provide in a general training for lawyers, of which criminal law is also a part, and also the bar provides in a minor and a major in criminal law. But the bar does not provide courses towards further specialization in the field of criminal law and/or penitentiary law. However, in the 1970s the bar has set up a foundation for legal practice in criminal law (*Stichting Strafrechtspraktijk*¹²¹), which has been providing courses for lawyers specializing in criminal law. As from 1990, the foundation does so in cooperation with the Willem Pompe Institute for criminal law and criminology¹²² of Utrecht University. Recently, the Amsterdam Vrije Universiteit (VU Amsterdam) has also started a similar course. Completing one of these courses is one of the most important conditions for a lawyer to join the Dutch Association for Defence Counsel (*Nederlandse Vereniging voor Strafrechtadvocaten*, NVSA). Also, in order to be a member of this association, lawyers must spend a significant portion of their time (500 hours a year) on criminal law cases. There is also a Dutch Association for young defence counsellors (*Nederlandse Vereniging van Jonge Strafrechtadvocaten*, NVJSA).

The bar expects all lawyers to keep up their skills and seek further training each year. The NV(J)SA and the LAB expect a part of this further training to be in the field of criminal law. Although there is no legal requirement for lawyers to be a member of the NV(J)SA in order to represent a suspect in criminal litigation and/or in cases concerning the conditions of criminal detention, the legal aid scheme does encompass the requirement that lawyers are specialized in criminal law: the LAB will only assign a lawyer in criminal cases (and in penitentiary litigation) if they are registered as specialized in criminal law. For this registration, a lawyer has to meet requirements laid down by the LAB in the 'Conditions of registration':¹²³ the lawyer must *inter alia* have successfully completed the criminal law part of the vocational training for lawyers, must have relevant work-experience in criminal law litigation, must at least do 15 criminal law cases per year, must at least earn 12 'training points' per year and must at least take one 'current affairs-course' on criminal law each two years. If a lawyer wants to participate in the so-called duty lawyer service (*piket*), additional requirements apply regarding the experience in working as a duty lawyer. It is obvious that these requirements have a huge impact on those lawyers wanting to be active in criminal law, as most of them are likely to be dependent on the subsidies provided by the LAB (most suspects cannot pay for a lawyer themselves).

As such, criminal law can be considered to be a serious specialization in the Netherlands. The same cannot be said about penitentiary litigation, though. For example: the LAB does not make

¹²⁰ See Article 46 et seq. Counselact (*Advocatenwet*).

¹²¹ <<http://stichtingstrafrechtpraktijk.nl/>> (last accessed 23 October 2018).

¹²² <<https://www.uu.nl/en/organisation/utrecht-university-school-of-law/about-the-school-of-law/departments/willem-pompe-institute-for-criminal-law-and-criminology>> (last accessed 23 October 2018).

¹²³ Inschrijvingsvoorwaarden advocatuur 2018 (artikel 6a): <<https://www.rvr.org/binaries/content/assets/rvrorg/advocaten/over-aanvragen/inschrijven/inschrijvingsvoorwaarden/inschrijvingsvoorwaarden-advocatuur-2018.pdf>> (last accessed 23 October 2018).

any specific distinction regarding penitentiary proceedings. Any lawyer specialized in criminal law will be eligible for remuneration and additional training is not required.

3.3. Practical arrangements for carrying out legal assistance missions

Within police stations, the National regulation on care of arrestees (*Landelijk reglement arrestantenzorg*) applies, which holds the ground rule that lawyers should be able to visit their clients, under regular supervision and with due regard to the local rules of the police detention facility. The lawyer will have to contact the local police station where his client is held to make arrangements.¹²⁴ The supervision mentioned above does not mean that the conversation between the lawyer and his client is monitored; they are allowed to speak in private.

Below we will give detailed information on the legislation that is relevant for pre-trial prisoners in penitentiary institutions. Similar legal provisions have been made for police cells.

Article 45 CCP holds:

'The defence counsel shall have free access to the suspect who has been deprived of his liberty by law and may confer with him in private and exchange letters with him which may not be inspected or read by others, under the required supervision and subject to the internal rules and regulations, and such access may not cause any delay in the investigation.'

The supervision mentioned in article 45 CCP is not aimed at the conversation between the lawyer and his or her client, but rather at the prevention of escape, the safety of the lawyer and possible abuse of the right to exchange letters etc. However, this privileged contact between the detainee and his lawyer is not absolute since special legal powers are attributed to the Dutch intelligence agency to monitor under special conditions lawyer-client communications.¹²⁵ This refers in particular to the communications of suspects of terrorist crimes, as described in a recent report of Amnesty International on human rights violations in Dutch high-security prisons.¹²⁶

The PPA (article 37-39) holds that the legal assistance provider has access to the prisoner within the timeframes and at the locations set by the house rules. There are specific house rules for each prison. Those house rules follow the model as outlined in the annex to the Regulation for model house rules for penal institutions (*Regeling model huisregels penitentiaire inrichtingen*), which, in article 3.8.2. holds the following:

'Under direction of the institution you can receive visits from your legal assistant (lawyer) from Monday to Friday, during office hours, under the condition that this visit has

¹²⁴ Article 3.8.2 *Landelijk reglement arrestantenzorg* (National regulation on care of arrestees).

¹²⁵ Article 25 of the 2002 Law on the Intelligence and Security Services (*Wiv 2002*) provided an exception for the services to use their special powers to tap, receive, record, and listen in to conversations of actors with privileged status (such as lawyers) for national security purposes, but only after prejudicial authorization of an independent oversight body (*Tijdelijke regeling onafhankelijke toetsing bijzondere bevoegdheden Wiv 2002 jegens advocaten en journalisten* (Temporary rule for an independent review of special powers *Wiv 2002* regarding lawyers and journalists), 16 December 2016. On 11 July 2017, the Dutch Senate adopted a new Law on the Intelligence and Security Services (*Wiv 2017*), which will go into force in January 2018. Pursuant to Article 30(3), obtaining information relating to the confidential communication between a lawyer and client is only allowed after permission is granted by the Court of The Hague. Based on Article 66 of *Wiv 2017* [previously Article 38, sub 1 of the *Wiv 2002*], the intercepted information can also be shared with the prosecution for purposes of criminal investigation or prosecution, but permission from the Court of The Hague is required if the shared information comprises confidential communications between an attorney and a client.

¹²⁶ Amnesty International Netherlands and Open Society Foundations, *Inhuman and unnecessary. Human rights violations in Dutch high-security prisons in the context of counterterrorism*, October 2017.

been announced at least one day prior to the visit. If you want to receive your lawyer during the part of the day in which you are scheduled for labour, this is not possible unless the case is urgent and/or the director decides that you will not participate in the labour for that part of the day. In that case, you will not be eligible for pay for that part of the day¹²⁷

Article 3.9.2 of the model holds that the prisoner is free to make telephone calls to his lawyer, but that he has to pay for the calls himself. The calls will be unsupervised (with the exception of verification that the caller is indeed the lawyer). In practice this can be a problem, as not all institutions have phones specifically designed for contact with the lawyer (and regular phone calls can sometimes be supervised). The Netherlands Bar and the Custodial Institutions Agency have signed an agreement that allows for a system in which phone calls from lawyers can never be recorded.

Article 4.5.3 of the model, together with the *Ministerial regulation privileged mail detainees* holds that mail by post and correspondence with the lawyer can be exchanged unsupervised. In practice, a 'double envelope' procedure is advised, in which the lawyer sends a sealed envelope to the administration of the penitentiary institution, with the request to deliver said envelope to the prisoner.

The house rules also prescribe that the lawyer will have to comply to safety checks of his body and of his paperwork.

Article 38, para. 7 PPA holds that safety measures can be taken to the benefit of the lawyer. This may mean that there is visible visual surveillance or that there is a glass wall between the lawyer and his client. Conversations cannot be supervised aurally (e.g. with microphones) as that would be to the detriment of client-lawyer privilege.

It can be concluded that the house rules can provide for quite some practical hurdles for a lawyer to visit his client, these hurdles will be investigated in more depth in the report on workstream 3.

There are no legal possibilities for the legal assistance provider to visit the prisoner in his cell and/or to inspect accommodation facilities in case of proceedings related to material conditions of detention. The conversation with the legal assistance provider will always take place in designated areas in the prison, not in the cell of the prisoner. We have the impression that it is virtually impossible for the legal assistance provider to check and see for himself how material circumstances in the cell are. Again, this is something that we hope to get more clarity on in our empirical research.

¹²⁷ U kunt onder regie van de inrichting, mits dit minimaal één dag van tevoren tijdens kantooruren is aangemeld, op iedere werkdag tijdens kantooruren bezoek van uw advocaat ontvangen. Indien u bezoek van uw advocaat wilt ontvangen gedurende het dagdeel of de blokperiode dat u voor de arbeid bent ingedeeld, kan dit niet, tenzij de zaak een spoedeisend karakter heeft en/of de directeur besluit dat u gedurende het dagdeel of de betreffende blokperiode niet aan de arbeid deelneemt. In dat geval heeft u geen recht op loon over dat dagdeel of die blokperiode.

4. ROLE OF NGOS, LEGAL CLINICS AND NATIONAL MONITORING BODIES OF PRISON CONDITIONS (if providing legal advice)

4.1 Ability for these organisations to intervene in prison and to provide legal advice

Members of *inter alia* the Supervisory Committee, the National Ombudsman and the Council for the Administration of Criminal Justice and Protection of Juveniles are qualified as privileged persons and have the right to enter the prison, to visit the prisoner and to talk to him at all times (see Introduction under i). Representatives from NGO's that are not mentioned in the law as privileged persons have the same possibilities to contact the prisoner as other persons from the outside world (as described in the Introduction). NGO's do not play an active role in assisting prisoners in prison litigation in the Netherlands.

After ratifying the UN Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and the formal designation of six established institutions, a National Preventive Mechanism (NPM) was created in the Netherlands. The NPM has the right to access the prison and to talk to prisoners in private, similar to its Council of Europe equivalent, the CPT. At the time of the NPM's designation, four associate observers were appointed: the Commission of Oversight for Penitentiaries, the Commission of Oversight for Police Cells, the Commission of Oversight for Military Detention and the National Ombudsman. However, the National Ombudsman withdrew from the NPM network in 2014. While it did not itself resign from the NPM network, the Council for the Administration of Criminal Justice and Protection of Juveniles, an NPM member, also expressed concerns with respect to the autonomy and functioning of the NPM.¹²⁸ The current NPM consists of the Inspectorate of Justice and Security (*Inspectie Justitie en Veiligheid, IJenV*) and the Inspectorate Health Care and Youth (*Inspectie Gezondheidszorg en Jeugd*). The Dutch NPM is criticized because of the lack of independency of the Inspectorates involved, its lack of a proactive attitude and the fact that annual reports are merely composed of activities that even without the existence of the NPM would have been employed.¹²⁹ The NPM annual reports are published on the websites of the different NPM-partners.

During its hours, legal consultation hours can meet the prisoner in person and talk to him confidentially, although the *de facto* confidentiality of the conversation will depend on the specific location of the conversation. Practice of the legal consultation hours in Utrecht shows that most often the students talk to the prisoner in a private meeting room, although sometimes it is only possible to meet the prisoner in a general space, which of course diminishes the level of confidentiality that can be reached during the conversation. The possibility to access the prison and to talk to the prisoners depends on the authorization of the prison. In general, at least in Utrecht, the prisons of Nieuwegein and Nieuwersluis have shown to be very cooperative in this respect.

4.2 Dissemination of legal documents

The disseminating of legal documents by above mentioned organisations will have to be authorized and facilitated by the prison concerned. In addition, members of the Supervisory Committee and legal consultation hours may provide legal stipulations and jurisprudence to prisoners.

¹²⁸ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of the Kingdom of the Netherlands d.d. 16 March 2016.

¹²⁹ P. Jacobs & A.M. van Kalmthout, 'Toezicht op vrijheidsbeneming in Nederland. CAT in de zak?!', *NJB* 2015, nr. 12, p. 752-756.

4.3 Legal action in court

The possibilities for legal action as mentioned in the earlier parts of this report (the complaints and appeal procedure, civil proceedings, a request with the National Ombudsman) all require active participation by the prisoner.

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