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# Equality Bodies and Individual Victims: An Example of Good Practice from the Netherlands

Erica Howard \*

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## Introduction

This article<sup>1</sup> discusses the individual complaints procedure used by the Dutch Equal Treatment Commission<sup>2</sup> and whether this procedure could act as an example of good practice for equality bodies in other countries. The focus on the individual complaints procedure at the Commission was chosen because of the quasi-judicial role—quasi-judicial, because its opinions are not binding as we shall see later—and because it appears to provide a simple, quick and cost-free or low-cost procedure which a victim of discrimination can follow without expensive legal advice. A person who feels that they have been discriminated against can request a formal opinion from the Commission on whether what has happened is indeed a breach of the equal treatment legislation. This can be done via a simple letter or by filling in a form on the Commission's website. Employers and other organisations can also ask the Commission's opinion about their practices or proposed practices and actions. And, if an individual is not sure whether they want to make a formal complaint, they can also telephone, email or write to the Commission and check before they proceed. The Commission aims to deal with a formal complaint

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<sup>1</sup> This paper is based on research done during a period of eight days spent at the Dutch Equal Treatment Commission in 2011 and on the information gathered there and at the University of Utrecht library. This visit was made possible through a grant received from the Research Activities Fund of the Society of Legal Scholars. I would like to thank the Commission for their generous hospitality and cooperation during that time. I also thank the SLS for providing me with this opportunity.

<sup>2</sup> *Commissie Gelijke Behandeling*, hereafter referred to as the Commission.

within six months. The Commission was specifically set up to have a very low threshold and to be accessible for victims of discrimination. But is this always the way it works in practice?

Jacobsen and Rosenberg Khawaja write that “experience has shown that few individuals who feel they have been discriminated against take their claims to court themselves—presumably because legal action is too strenuous, expensive and time-consuming a process to embark on”.<sup>3</sup> This article attempts to answer the question whether the procedure at the Dutch Equal Treatment Commission is an easier, less stressful, less expensive and less time-consuming way of getting satisfaction for a victim of discrimination than going to court. Before this question is addressed, part 1 gives information about the Commission’s history, composition and mandate, to create a background for the individual procedure. Part 2 describes the individual procedure itself, while the concluding part will contain an assessment of this individual procedure and of the question whether this is a satisfactory way of dealing with individual discrimination complaints which can be seen as an example of good practice for other countries.

## 1. Background

### 1.1. History

The Commission was established by Art. 11 of the Equal Treatment Act 1994 (ETA 1994).<sup>4</sup> Art. 12 par. 1 determines that the Commission may, after a written request or on its own initiative, investigate whether discrimination has taken place. The Commission deals with discrimination on the grounds of gender, race, religion, belief, political opinion,

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<sup>3</sup> B. D. Jacobsen, and E. O. Rosenberg Khawaja, *Legal Assistance to Individuals Powers and Procedures of Effective and Strategic Individual Enforcement*, in S. Obura, and F. Palmer, (eds.), *Strategic Enforcement Powers and Competencies of Equality Bodies*, Brussels, Equinet, 2006, 10.

<sup>4</sup> *Wet Gelijke Behandeling*. The legal instruments governing equal treatment, the Regulation on the Procedures and Operation of the Commission and the Regulation on the Legal Position of the Members of the Commission can all be found on the Commission’s website: [www.cgb.nl](http://www.cgb.nl) (accessed 5 April 2012). Where these instruments are not available in English, the Dutch text is used and translated by the author. For a booklet on the Commission in English, see Commissie Gelijke Behandeling, *Equality Law and the Work of the Dutch Equal Treatment Commission*, (undated): <http://www.cgb.nl/english/about> (accessed 5 April 2012).

nationality, sexual orientation, civil status, disability, chronic illness, age, full and part-time work and the permanent or temporary nature of the labour relationship.<sup>5</sup>

Art. 12 par. 2 ETA 1994 states that a request for an opinion can be made by, among others, a person who believes that they are a victim of discrimination and by anti-discrimination organisations. The latter means that group or class actions are possible. Goldschmidt points out:

The importance of this kind of action should not be underestimated. Commencing proceedings is often a very cumbersome and emotional act for individuals, organisations do not have this burden. Moreover, many discrimination cases affect groups of individuals, because they are related to collective agreements or regulations or company practices and it is more effective to challenge the total body of regulations or practices.<sup>6</sup>

After conducting an investigation, the Commission brings out a reasoned opinion as to its findings and can make recommendations (Art. 13). This opinion is not binding on the parties and they can still take their discrimination complaint to court.

An opinion can also be requested by persons or organisations who want to know whether their conduct, practices, policies or regulations are compatible with the equal treatment legislation. The latter includes trade unions, works councils and anybody who is responsible for taking decisions on matters of discrimination. It also includes judges who can ask the Commission for an expert opinion, though this has never been done to date. In its second five-year evaluation report, the Commission suggests that it will point out the possibility to judges because it can not only give expert opinions in the case itself, it can also advise on the necessity of referring cases and the formulation of questions to the Court of Justice of

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<sup>5</sup> Not all of these grounds are covered by the ETA 1994 itself, some are covered by other legislation. But the different pieces of legislation governing these grounds all provide for the competence of the Commission and it is thus not necessary to sum up the different pieces of legislation here.

<sup>6</sup> J. Goldschmidt, *Anti-discrimination Law in the Netherlands: A Specific Legal Patchwork, Normative System and Institutional Structure*, in Y. Wen Li, and J. Goldschmidt, *Taking Employment Discrimination Seriously: Chinese and European Perspectives*, Leiden, Brill, 2009, 255. Goldschmidt was chair of the Commission from its establishment in 1994 until September 2003.

the EU (CJEU).<sup>7</sup> The Explanatory Memorandum to the proposal for the ETA 1994<sup>8</sup> explains the usefulness of having a Commission overseeing the observance of anti-discrimination legislation. Specifically, it states that the act aimed to establish an *easily accessible*, independent commission [my italics].<sup>9</sup> It also explains that it is very important that people who think they have been discriminated against, can, *in a simple manner*, contact a body tasked with monitoring and supervising the laws [my italics].<sup>10</sup> To provide optimal clarity for victims, the proposed Commission is going to incorporate the existing Commission for Equal Treatment between Men and Women. This means that there is only one single equality commission and that victims can contact this body for discrimination on all the discrimination grounds covered by the law.<sup>11</sup> In the organisation of the Commission, attention will be given to a “*low threshold access*”, as is explicitly stated in the Memorandum [my italics].<sup>12</sup> Therefore, the Commission was, from its inception, set up to be easily accessible for victims of discrimination who can, in a simple way, complain when they feel discriminated against.

The Memorandum explains that the opinions of the Commission do not have binding legal effects and that the primary aim of the procedure is to bring the parties together through authoritative and expert advice.<sup>13</sup> The authority and the expertise of the Commission is thus emphasised. Goldschmidt explains that “the fact that the opinions of the ETC [Equal Treatment Commission] are not binding can be justified as a logical consequence of its restricted scope for review. Given that the Commission is only competent to consider compliance with the relevant equality legislation, it is not possible to judge cases on all their merits”.<sup>14</sup> Instead of binding opinions, the Commission is given the power to bring

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<sup>7</sup> Commissie Gelijke Behandeling, *Second Evaluation 1999-2004* [*Het Verschil Gemaakt Evaluatie AWGB en Werkzaamheden CGB 1999-2004*], 2004 98. All evaluation reports are available in Dutch from the Commission’s website.

<sup>8</sup> *Memorie van Toelichting, Tweede Kamer 1990-1991*, 22014, n. 3 [*Explanatory Memorandum, Second Chamber*], [http://ressourcesgd.kb.nl/SGD/19901991/PDF/SGD\\_19901991\\_0006831.pdf](http://ressourcesgd.kb.nl/SGD/19901991/PDF/SGD_19901991_0006831.pdf) (accessed 5 April 2012).

<sup>9</sup> *Ibid.*, 1.3.

<sup>10</sup> *Ibid.*, 6.1.

<sup>11</sup> *Ibid.*, 6.2.

<sup>12</sup> *Ibid.*, 6.4.

<sup>13</sup> *Ibid.*, 6.3.

<sup>14</sup> J. Goldschmidt, *Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Development in the Supervision of Equality Law in the Netherlands*, in *Maastricht Journal of European and Comparative Law*, 2006, vol. 36, n. 3, 329.

legal action with a view of obtaining a ruling that the conduct is contrary to the Equal Treatment Acts (Art. 15). The Memorandum states that, therefore, the Commission offers an extra—*simpler and cheaper* [my italics]—possibility to improve observance of the act.<sup>15</sup>

According to Art. 13 par. 3 ETA 1994, the Commission can, if it believes this is appropriate, forward its findings to Ministers, organisations of employers, employees, professionals or public servants, consumers of goods and services and relevant consultative bodies. The opinions are public and can be found on the Commission's website. Art. 20 ETA 1994 determines that the Commission publishes an annual report and five-yearly evaluation reports. In addition, every year an annotated collection of the most important opinions given that year, edited and written by independent experts, is published. Since March 2011, the respondent is named in the opinion and, although it is too early to see the results of this, the impression at the Commission is that this works as a deterrent for respondents.

### *1.1. Composition and Independence<sup>16</sup>*

Art. 16 ETA 1994 determines that the Commission has nine Commissioners, including a chair and two deputy chairs. In addition, there are at least nine deputy commissioners, who sometimes have more specialised expertise in a specific field. The selection of Commissioners is public and open to all. The Commission itself can make proposals for nominations. All members are appointed for six years by the Minister of Justice in consultation with four other ministers. The independence of the Commission is established through a regulation providing for the Commissioners salary and working conditions. Neither the Government nor any Ministry have the power to give instructions to the Commission and the Commissioners can only be dismissed after a procedure that is similar to that followed for members of the judiciary: only by the Supreme Court and only on specific grounds prescribed by law. The chair and the vice-chairs must have the qualifications required of district judges.

In 2012, the Commission will become part of the Netherlands Institute for Human Rights [*College voor de Rechten van de Mens*].<sup>17</sup> All tasks of the

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<sup>15</sup> *Memorie van Toelichting, Tweede Kamer 1990-1991, 22014, n. 3 [Explanatory Memorandum, Second Chamber]*, cit., 6.3.

<sup>16</sup> *Commissie Gelijke Behandeling, Equality Law and the Work of the Dutch Equal Treatment Commission*, cit.



present Commission will be transferred in full to the new Institute. The mandate of the new Institute will be the same in relation to equality and non-discrimination and the individual complaint procedure will stay as it is for this area. However, there will not be a similar procedure in relation to human rights and the new Institute will not have the competence to deal with individual complaints of violations of human rights as there is a National Ombudsman who does this.<sup>18</sup> The appointment of the chair and the Commissioners for the new Institute will change to make the Institute even more independent. According to Art. 16 par. 1 of the NHRI Act 2011, they will be appointed by Royal Decree on recommendation of the Minister of Justice.

Art. 17 ETA 1994 provides for an office to be set up to assist the Commission in its work. The staff includes legal experts and research assistants. At present the office has a staff of approximately 62 full-time people. Art. 17 of the NHRI Act 2011 contains the same provision.

### *1.2. Mandate*

The most important task of the Commission is the investigation of complaints that discrimination has taken place, on request or on its own initiative. The Commission takes an active role in investigating a complaint and can ask questions, request information and conduct a site visit to perform an investigation. The Commission also provides advice, for example, to ministers and government departments, the legislator and other organisations which play a role in society. Further, it gives information through lectures, training sessions and campaigns.

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<sup>17</sup> See for the history of this Institute and the incorporation of the Commission within it: J. Goldschmidt, *Protecting Equality as a Human Right in the Netherlands. From Specialised Equality Body to Human Rights Institute*, in *The Equal Rights Review*, 2012, vol. 8, 32-49.

<sup>18</sup> See Art. 9-13, Chapter 2, *Investigations and Findings Relating to Equal Treatment*, Wet College Rechten van de Mens [*National Human Rights Institute Act (NHRI Act 2011)*] 24 November 2011, Staatsblad 2011, 573, at <http://www.naarenmensenrechteninstituut.nl/ul/cms/fckuploaded/GewijzigvoorstelwetEersteKamerd.d.19april2011.pdf> (accessed 5 April 2012) and the *Memorie van Toelichting [Explanatory Memorandum]*, 14, at <http://www.naarenmensenrechteninstituut.nl/ul/cms/fck-uploaded/documents/MvT-crm-na-mrd.d.28aug2010.pdf> (accessed 5 April 2012). For more information on the change to a National Human Rights Institute, see also: <http://www.naarenmensenrechteninstituut.nl/10/home/> (accessed 5 April 2012); and, J. Goldschmidt, *Protecting Equality as a Human Right in the Netherlands. From Specialised Equality Body to Human Rights Institute*, in *The Equal Rights Review*, cit.

As mentioned, under Art. 15 ETA 1994, the Commission can bring legal action in its own name with a view of obtaining a ruling that the conduct contrary to one of the equality acts is unlawful and request the court to prohibit such conduct or to give an order that the consequences of such conduct will be rectified. However, the person affected by the unlawful conduct needs to agree to this. The Commission has never made use of this power to date, as it sees this as conflicting with its role as an impartial decision-making body: it would be a combination of the role of investigator and judge (in its opinions) and prosecutor (in its actions in court).<sup>19</sup>

Since 2005, the Commission can refer parties in an individual procedure to an external mediator to find a solution, if they both agree to this. The procedure will be suspended during the mediation. It is aimed at keeping the relationship between the parties and finding a way forward which both parties can agree to. If the mediation is unsuccessful, the procedure will continue. Individuals can also request a referral to a mediator, but, again, the other party needs to agree to this. If mediation in this case is not successful, a complaint to the Commission can be made in the normal way. The Commission only refers to qualified and registered mediators.

## 2. Individual Complaints Procedure

If a person who thinks they have been discriminated against is not sure whether their problem falls within the ambit of the Commission or whether they want to request an opinion, they can contact the Commission via letter, email or telephone. There is, for example, a daily telephone surgery. They will be told whether their problem is covered and if so, what will happen if they file a complaint—for example, it is made clear that the employer/other party will be asked to give their reply to the complaint—and what the Commission can and cannot do. The procedure or the fact that the other party will be informed sometimes discourages people from making a complaint.

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<sup>19</sup> See on this Equinet *Influencing the Law through Legal Proceedings The Powers and Practices of Equality Bodies*, Brussels, Equinet, 2010, 17; J. Goldschmidt, *Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Development in the Supervision of Equality Law in the Netherlands*, in *Maastricht Journal of European and Comparative Law*, cit., 333; and, the booklet, Commissie Gelijke Behandeling, *Equality Law and the Work of the Dutch Equal Treatment Commission*, cit., under *Legal Action by the Commission*.

When an official complaint is filed,<sup>20</sup> both parties will receive a letter with an explanation of the procedure and a request for the necessary information, with a specified time within which they need to reply. According to Art. 19 ETA 1994, the Commission can demand any information from either party or from third parties<sup>21</sup> and non-compliance with this demand within the time specified constitutes a criminal offence. If necessary, the Commission can also take a person who is reluctant to provide the required information to court and the court can then order the defendant to give the relevant information under penalty of a fine.

Both parties can request witnesses and experts to be heard and the Commission can also visit the parties or ask them to visit the Commission. All information from one party is sent to the other party, while information from third parties is sent to both. Both can react to all information received.

Subsequently, a formal Commission session takes place which is open to the public, with three Commissioners, one of which is the case manager, and a legal secretary. Parties can bring a solicitor or other representative/adviser or friend to the meeting, but the costs of these fall on the party bringing them. I sat in on three cases and in two of these the claimant had a legal adviser, while in all three the respondent party was accompanied by an adviser. This is, however, not the norm although the numbers of both parties bringing legal representatives has gone up in 2010. In that year, 22% of claimants had a legal adviser as compared to 14% in 2009 and 16% in 2008. This could be a solicitor, a representative of a legal assistance insurance company, a union representative, or someone from an anti-discrimination bureau or an advocacy organisation.<sup>22</sup> 29% of respondents had a legal adviser with them in 2010 compared to 22% in 2009 and 13% in 2008, mainly solicitors or lawyers from employer organisations.<sup>23</sup> One of the Commissioners mentioned that sometimes the involvement of a legal adviser can be more of a hindrance because the case is made more judicial.

As already referred to, the Commission was set up to have a very low threshold, to be very accessible for victims of discrimination and it thus

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<sup>20</sup> The procedural rules are laid down in the Regulation on the Procedures and Operation of the Commission [*Besluit Werkwijze Commissie Gelijke Behandeling*], 29 July 1994.

<sup>21</sup> With the exception of issues covered by professional confidentiality or where a person would implicate themselves or their immediate family, spouse or partner.

<sup>22</sup> Commissie Gelijke Behandeling, *Jaarverslag 2010 [Annual Report 2010]*, 31. All Annual Reports are available on the Commission's website.

<sup>23</sup> *Ibid.*, 33.

devotes a lot of attention at the session to the facts of the case, with both parties getting ample time to bring forward their side of the story. As Rorive writes, “the hearings are staged in a fairly informal setting and a large place is dedicated to informing the parties on the law and its implications”.<sup>24</sup> When the respondent has a legal adviser and the claimant has not, the Commission spends more time explaining to the claimant the legal rules and why certain questions are asked and this extra attention together with the easy accessibility sometimes gives the respondent the impression that the Commission is on the side of the claimant. This is borne out by the second five-yearly evaluation report, where it is stated that one of the main criticisms is that the sympathy of the Commission is from the start with the claimant, that there is a bias towards him or her.<sup>25</sup> Respondents feel that they are accused and need to defend themselves and that they are not always heard. One commissioner did mention that the procedure is, in the end, somewhat judicial and that, despite the extensive explanations given at the session, claimants (and also respondents) might still not always understand the legal aspects and issues. The explanations also lengthen the duration of the sessions. This is confirmed by Goldschmidt where she writes “although the ETC’s proceedings are informal compared to those in court, people without any legal background still consider them rather formal”.<sup>26</sup> It is also mentioned in the second five-yearly evaluation report where a point of criticism is that the language used is too difficult and judicial.<sup>27</sup> Unless mediation takes place, in which case the procedure is suspended, both parties receive, within 8 weeks, the Commission’s written opinion as to whether discrimination has taken place and, if so, on what ground. This prescribed period is not often breached and if there is a delay, the parties will be informed. Art. 4 of the Regulation allows the Commission to extend the prescribed periods as long as a request is dealt with within a reasonable time period.

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<sup>24</sup> I. Rorive, *A Comparative and European Examination of National Institutions in the Field of Racism and Discrimination*, in K. Boyle, (ed.), *New Institutions for Human Rights Protection*, Oxford, Oxford University Press, 2009, 164.

<sup>25</sup> Commissie Gelijke Behandeling, *Second Evaluation 1999-2004* [Het Verschil Gemaakt Evaluatie AWGB en Werkzaamheden CGB 1999-2004], cit., 88-89.

<sup>26</sup> J. Goldschmidt, *Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Development in the Supervision of Equality Law in the Netherlands*, in *Maastricht Journal of European and Comparative Law*, cit., 329.

<sup>27</sup> Commissie Gelijke Behandeling, *Second Evaluation 1999-2004* [Het Verschil Gemaakt Evaluatie AWGB en Werkzaamheden CGB 1999-2004], cit., 89.

The Commission's opinion contains a finding whether discrimination has taken place and can include recommendations for individual or structural measures which the respondent should take. These recommendations can be made whether discrimination has been found or not. However, as mentioned, the opinion is not binding on the parties and they can still go to court to complain. About 74% of respondents follow the recommendations and this number has been fairly constant over the last five years (74% in 2010 and 2009, 79% in 2008 and 75% in 2007)<sup>28</sup>. The Commission cannot, however, award any compensation and parties would need to go to court to get compensation. According to one of the Commissioners, of the 200 or so cases dealt with each year, about 8 go on to the courts which sometimes come to another conclusion than the Commission. This might not always be because the court disagrees with the opinion. It could be because the courts can deal with much wider issues: for example, the Commission can make a finding that discrimination has taken place when an employee was dismissed, but they cannot say anything about the fairness or unfairness of the dismissal. The latter can only be done by a court.

If the Commission has brought out an opinion and one of the parties then goes to court, the court must take account of the opinion and, if it does not follow this, must give its reasons for not doing so, as is clear from a Supreme Court [*Hoge Raad*] decision in 1987.<sup>29</sup> This case concerned the Commission for Equal Treatment of Men and Women, the predecessor of the present Commission. It was held that, because of the specific expertise of the Commission, sound and compelling reasons must be given for disagreeing with the opinion of the Commission.

That 74% of its recommendations are followed might be connected to the fact that the Commission has an active follow-up procedure in which it monitors the implementation of its opinion. When discrimination has been found and the Commission has made recommendations, the respondent will, within one month of being informed of the opinion, receive a letter asking what has been done to avoid unlawful discrimination in future. If no reaction is received, another letter or a phone call follows. Sometimes, more information is given or an explanation as to how the recommendation could be dealt with or was

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<sup>28</sup> For this information, see the Annual Reports for these years.

<sup>29</sup> *St Bavo-Gielen, Hoge Raad*, 13 November 1987, NJ 1989, 698. See G. Moon, *Enforcement Bodies*, in D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Oxford/Portland, Oregon, Hart Publishing, 2007, 919.

dealt with by others. The Commission tries to involve the claimant in this, but this can only be done with permission of the respondent.

The Commission aims to deal with every case within six months, although a number of Commissioners said that this was not always done and that some cases took a little longer, about 8 to 9 months.

### 3. Assessment of the Individual Procedure

The individual procedure has now been running for more than 15 years and appears to work well. The Commission has the impression that most people who file a complaint with them are satisfied with the procedure. For example, in the second five-yearly evaluation report we can read that external research, done on the request of the Commission, shows that parties are, generally, positive about the way it has dealt with their case.<sup>30</sup> The third five-yearly evaluation report contains information on external research into victimisation, questioning 132 former claimants to the Commission. Despite many of these claimants experiencing victimisation after making their claim, 80% were positive about the procedure, 89% felt that they had done the right thing by going to the Commission and 86% had found it useful to make a complaint. It appears that the fact that the procedure at the Commission satisfies a need for justice, recognition and attention was especially influential in this.<sup>31</sup> The latter is confirmed by quite a few of the Commissioners and legal secretaries I spoke to, who mentioned that claimants usually want to be heard, that they want to have the feeling that someone is listening to them and taking them seriously. Or, as the Commission writes, “an element of the hearing that should not be underestimated is the effect of ‘the day in court’: it is very important to the plaintiff as well as to the defending party to finally be heard”.<sup>32</sup> And, Ammer *et al.*, writing about the impact of equality bodies on individual victims of discrimination, mention that “it is clear that there is a broader and equally important psychological impact. This is recognised in the Netherlands country fiche where the evaluation of the work of the Equal

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<sup>30</sup> Commissie Gelijke Behandeling, *Second Evaluation 1999-2004* [*Het Verschil Gemaakt Evaluatie AWGB en Werkzaamheden CGB 1999-2004*], cit., 93.

<sup>31</sup> Commissie Gelijke Behandeling, *Third Evaluation* [*Derde Evaluatie AWGB, WGB m/v en Artikel 7:646 BW*], 2009, 37-38.

<sup>32</sup> Commissie Gelijke Behandeling, *Equality Law and the Work of the Dutch Equal Treatment Commission*, cit., 5.

Treatment Commission highlighted the fact that complainants felt supported by the recognition of their legal position”<sup>33</sup>.

Through its opinions and other work, the Commission has built up expertise in the application of equal treatment legislation. It has become an authoritative body which has influence in the debate in this area. Ammer *et al.* write that: “the success of the Commission is attributed to its image as an authority on the enforcement and monitoring of equality and non-discrimination legislation”.<sup>34</sup> According to Rorive, “the *Dutch model* of a quasi-judicial body focuses on the need of the alleged victims of discrimination to have access to law. To a large extent, it has recourse to the moral weight of non-binding rulings [...]” [her italics].<sup>35</sup>

But, naturally, the Commission has also come in for criticism. According to one of the Commissioners, some people see the Commission as too woolly, too focused on promoting multiculturalism and too expensive. Some people also accuse it of dealing with silly or unimportant cases instead of with important equality issues<sup>36</sup> or state that it is a “one-issue” organisation dealing with equal treatment only, although it is recognised that its mandate is limited to this.<sup>37</sup> Some politicians and others have called for the abolition of the Commission.<sup>38</sup> A number of issues specifically concerned with the individual complaints procedure are discussed in the following analysis.

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<sup>33</sup> M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch and K. Yesilkagit, *Synthesis Report Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC*, Utrecht, Human Rights Consultancy and Vienna, Ludwig Boltzmann Institut für Menschenrechte, 2010, 287.

<sup>34</sup> *Ibid.*, 172.

<sup>35</sup> I. Rorive, *op. cit.*, 145.

<sup>36</sup> R. Holtmaat, *Een Agenda voor Wetgeving, Beleid en Onderzoek op het Gebied van de Discriminatie Bestrijding en Gelijke Behandeling* [*An Agenda for Legislation, Policy and Research concerning the Fight Against Discrimination and Equal Treatment*], in R. Holtmaat, (ed.) *De Toekomst van Gelijkeheid* [*The Future of Equality*], Deventer, Kluwer, 2000, 264.

<sup>37</sup> *Ibid.*, 266-267; M. Loth, *Synergy of Roleblurring? De Commissie Gelijke Behandeling als Motor van het Gelijkeheidsdiscours* [*Synergy or Blurring of Roles? The Equal Treatment Commission as Engine of Equality Discourse*], in R. Holtmaat, (ed.) *Gelijkeheid en (Andere) Grondrechten* [*Equality and (Other) Human Rights*], Deventer, Kluwer, 2004, 230.

<sup>38</sup> See on this I. Rorive *op. cit.*, 170; A. Terlouw, *Draagt Wetgeving bij aan Gelijkeheid?* [*Does Legislation Contribute to Equality?*] in M. Hertogh, and H. Weijers (eds.), *Recht van Onderop* [*Law from the Bottom Up*], Nijmegen, Ars Aequi Libri, 2011, 362.

### *3.1. A Cost-free, Easy and Quick Procedure*

First of all, is the procedure as simple, easy and cost-free as it is said to be? The procedure is certainly less costly when compared with civil court proceedings, because there are no court fees and legal representation is not necessary. There is also no risk of costs being awarded against a party. However, if people want representation they have to bear the costs themselves. They also have to pay travel costs to the Commission's offices when they attend the hearing. They may be invited or ordered to do so. If parties are ordered to attend, they have to do so and if they do not it can be used in evidence against them. In addition, claimants have to invest time in the process and there are often emotional costs involved as well. But the whole procedure is certainly much less costly than a civil court procedure.

Is the procedure simple and easy to do? Again, compared to a civil court procedure, it is simple and easy, but then, in civil proceedings, parties have legal representation. It has already been mentioned that people find the process rather formal and judicial. One of the Commissioners commented that the burden of proof rules are, for example, quite difficult to understand for the parties. The fact that more parties bring (legal) representation could also indicate that the procedure is not that simple, although there could be many other reasons for this as well. In the end, the Commission deals with equal treatment legislation and thus a certain amount of legal issues are part of the procedures. This is why the Commission spends so much time at the hearing explaining such issues and making sure that parties understand what these are. It also provides information and leaflets on the procedure and what the claimant/respondent can expect.

Is the procedure quick? The Commission aims to deal with all cases within 6 months of receiving the claim, but, even if this is not achieved, the case is still generally dealt with within 8 or 9 months. The Commission is also working towards shortening this period. Equal pay claims especially tend to take more time than other cases.

### *3.2. Low Threshold/Easy Accessibility*

What about the low threshold, the easy accessibility of the Commission? This can be seen as covering two overlapping issues: whether people know about the Commission and what it does; and, whether complaints of discrimination actually reach them.



On the first issue, Holtmaat reported in 2000 that there was a quite considerable lack of familiarity with the work of the Commission and that there was only a limited “elite” group of mainly higher educated people who did or could appeal to them.<sup>39</sup> Elsewhere, Holtmaat reports that the barriers to complaining to the Commission are especially high among people from ethnic minorities.<sup>40</sup> Goldschmidt, writing in 2006, also remarks on the relative ignorance of the general public about the Equal Treatment Act and the role of the Commission in relation to this, “although the familiarity with the law and the Commission has improved since the first five years’ evaluation in 1999”.<sup>41</sup> And, Hertogh and Zoontjes, who did an external evaluation in 2006, report that about 57% of the respondents in their research had heard or read something about the Commission, but that only a few people knew about their tasks and competences.<sup>42</sup> The latter authors come to the conclusion that the equal treatment legislation does not provide sufficient opportunity for people to know about and to pursue their rights and duties.<sup>43</sup> And, Ammer *et al.* report that “in the Netherlands stakeholders feel that the Equal Treatment Commission needs to be more visible [...]”.<sup>44</sup>

On the second issue, whether complaints of discrimination actually reach the Commission, in the second evaluation report it is stated that the Commission presumes that the number of incidences of discrimination is much bigger than the number of complaints that reaches them<sup>45</sup> and that external research showed that only about 3% of the people who said they have experienced discrimination approach them.<sup>46</sup>

Terlouw writes that it is difficult for victims to improve their position through anti-discrimination legislation for three reasons. Firstly, there are

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<sup>39</sup> R. Holtmaat *op. cit.*, 264. Complaints of discrimination on the grounds of race form an exception to this.

<sup>40</sup> R. Holtmaat, *Catalyst for Change? Equality Bodies According to Directive 2000/43/EC*, Luxembourg, OPOEC, 2007, 54.

<sup>41</sup> J. Goldschmidt, *Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Development in the Supervision of Equality Law in the Netherlands*, in *Maastricht Journal of European and Comparative Law*, *cit.*, 329.

<sup>42</sup> M. Hertogh, and P. Zoontjes (eds.), *Gelijke Behandeling Principes and Praktijken Evaluatie Onderzoek AWGB [Equal Treatment Principles and Practices Evaluation Project General Equal Treatment Law]*, Nijmegen: Wolf Legal Publishers, 361.

<sup>43</sup> *Ibid.*, 362.

<sup>44</sup> M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch and K. Yesilkagit, *op. cit.*, 351.

<sup>45</sup> Commissie Gelijke Behandeling, *Second Evaluation 1999-2004 [Het Verschil Gemaakt Evaluatie AWGB en Werkzaamheden CGB 1999-2004]*, *cit.*, 70.

<sup>46</sup> *Ibid.*, 76.

still a number of thresholds to proceeding, including that victims of discrimination often do not complain until the issue escalates beyond what is tolerable; that complaining involves a complicated process of “naming” (the victim must define him/herself as a victim), “blaming” (the victim must address who is responsible for the discrimination) and “claiming” (the victim must start proceedings); and, that victims are afraid of being victimised.<sup>47</sup> A second reason is that despite the requirement of equality of arms, the complainant is not always in an equal position to the respondent. This is because the procedure often involves an individual against an organisation with more knowledge and money to employ legal counsel or to propose a financial settlement; and, because of problems with proving discrimination.<sup>48</sup> And, a third reason why it is not always easy for victims is that, even if discrimination is found, this does not always guarantee an improvement in the victim’s situation.<sup>49</sup>

One Commissioner I spoke to also pointed out that only a few of the total number of victims of discrimination go to the Commission but that there are other organisations like anti-discrimination bureaus which play a role in the assistance of victims of discrimination and which deal with many cases as well. This will be looked at next.

### *3.3. Assistance to Victims of Discrimination*

EU Directives prescribe that Member States designate a body or bodies for the promotion of equal treatment on the grounds of racial and ethnic origin<sup>50</sup> and gender.<sup>51</sup> The competences of these bodies should include providing independent assistance to victims in pursuing their complaints about discrimination. The Commission does not do so because “this was considered to be incompatible with its role as a formal decision-making

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<sup>47</sup> A. Terlouw, *op. cit.*, 352-358.

<sup>48</sup> *Ibid.*, 358-362.

<sup>49</sup> *Ibid.*, 362.

<sup>50</sup> Council Directive of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, 2000/43/EC [2000] OJ L 180/22.

<sup>51</sup> Council Directive of 13 December 2004 Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services, 2004/113/EC [2004] OJ L 373/3 and Council Directive of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast), 2006/54/EC [2006] OJ L 204/23.

body”.<sup>52</sup> Or, as Cormack and Niessen write, “doubts of a body’s independence may be raised if, for example, it is acting as investigator of allegations of discrimination one minute, defending victims the next and adjudicating breaches of legislation after that. [...] It is with these concerns in mind that the Dutch Equal Treatment Commission chooses not to exercise its powers of supporting parties in court [...]”.<sup>53</sup> As mentioned, this is also the reason why the Commission has not made use of its competence under Art. 15 ETA 1994 to bring legal action.<sup>54</sup>

Therefore, the Commission does not perform all tasks prescribed by the EU Directives for equality bodies. However, this does not mean that the Netherlands is in breach of the Directives and that no assistance is provided for victims of discrimination. Compliance with the Directives is ensured by other bodies. There are a number of anti-discrimination agencies<sup>55</sup> and, since 2009, every local authority must have an “*Antidiscriminatievoorziening*” [anti-discrimination facility], which provides independent advice and assistance to persons in pursuing their complaints about discrimination, including assistance in procedures at the Commission or in court.<sup>56</sup> It was found that in 2010, one year after this became law, 97% of local authorities had fulfilled this duty.<sup>57</sup>

### 3.4. Labour Intensive

One of the disadvantages of the system of individual complaints as used in the Netherlands is that it is extremely labour intensive. One

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<sup>52</sup> M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch and K. Yesilkagit, *op. cit.*, 263. See on this also: J. Goldschmidt, *Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Development in the Supervision of Equality Law in the Netherlands*, in *Maastricht Journal of European and Comparative Law*, *cit.*, 324, and G. Moon, *op. cit.*, 373.

<sup>53</sup> J. Cormack, and J. Niessen, *The Independence of Equality Bodies*, in *European Anti-Discrimination Law Review*, 2001, vol. 1, n. 27. See also: I. Rorive, *op. cit.* 171-172.

<sup>54</sup> Loth discusses the tensions between the different functions of the Commission in more detail; *op. cit.*, 221-237.

<sup>55</sup> On anti-discrimination agencies, see: [www.discriminatie.nl](http://www.discriminatie.nl) (accessed 5 April 2012).

<sup>56</sup> Wet Gemeentelijke Antidiscriminatievoorzieningen [Local Authority Anti-Discrimination Facilities Act] of 25 June 2009, *Staatsblad*, 2000, 313, Art. 2, at [www.wetten.overheid.nl](http://www.wetten.overheid.nl) (accessed 5 April 2012). See also M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch and K. Yesilkagit, *op. cit.*, 263 and 378.

<sup>57</sup> Kamerstukken II 2010/11, 31439 n. 18. See *Nederlands Tijdschrift voor de Mensenrechten/NCJM Bulletin [Journal of the Dutch Human Rights Committee]*, 2011, vol. 36, n. 2, 241-242.

commissioner is assigned the case and does an investigation before the case gets to the session with parties. The session is preceded and followed by case conferences of the 3 commissioners involved and the legal secretary. The legal secretary then writes a draft opinion, which will be sent for comment to each Commissioner involved. On average, a case where only one single ground of discrimination is at issue takes just over 14 hours of Commissioner's time and 43 hours from the legal secretary. When more grounds are involved, this amount is higher.

The Commission has recently started a "front-office" pilot project which investigates alternative ways of dealing with a case. This involves the requests for an opinion being scrutinised before the formal investigation begins. In those cases which are outside the ambit of the Commission, the claimant gets a phone call to explain this and is then asked whether a short note to confirm is sufficient. Claimants with complaints falling within the ambit are also phoned and then given information and an explanation of the procedure in detail. Often, people are satisfied with this. Sometimes, claimants only want to air their grievance and are happy when they are given the opportunity to do so. Claimants can also be offered mediation. But in all cases, except where the issue falls outside the ambit of the Commission, the claimant is told that they have a right to get a formal opinion if they want to receive one.

Goldschmidt writes that

The fact that more and more issues have been the subject of an investigation and that the law has been interpreted in thousands of opinions of the ETC means that the body of case law provides an answer to many questions for citizens who want to know whether a certain situation is in accordance with the law: these questions can thus be answered by telephone or email.<sup>58</sup>

This is not only used for the telephone helpline and to deal with general email inquiries, but also in the front-office pilot project. Goldschmidt does point out that this means that the number of opinions decreases.<sup>59</sup>

However, the question can be raised whether spending so much time on individual cases does promote equality in society on a wider scale. As Jacobsen and Rosenberg Khawaja write "it has been the experience of equality bodies that handling individual complaints is a resource-intensive

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<sup>58</sup> J. Goldschmidt, *Anti-discrimination Law in the Netherlands: A Specific Legal Patchwork, Normative System and Institutional Structure*, cit. 256.

<sup>59</sup> Ibid.

process that is not always in proportion to the results achieved on a larger scale”. These authors continue that “some types of discrimination, e.g. systemic discrimination, cannot be combated effectively solely by individual enforcement”.<sup>60</sup>

In relation to the individual procedure, it is true that litigation in an individual case depends on an individual complainant and that solutions are sought which are best for this individual, which could include mediation and settlement. In that case, even if a principled issue of interpretation of the anti-discrimination legislation is at stake, no opinion of the Commission results and there is no wider implication of the case.

On the other hand, it can be argued, firstly, that the individual cases do contribute to the promotion of equality. As mentioned, the Commission has built up an extensive body of case law interpreting and explaining the legislation. This can assist victims in deciding whether to file a case and provide guidelines for employers and goods and services providers.

Secondly, the Commission, whether it finds discrimination or not, can make recommendations in its opinions that certain measures are taken and these include both individual and structural measures. The latter can include that the respondent changes policies, e.g. on access, recruitment and selection, informs employees of existing equality regulations, adjusts the text of job adverts or introduces an equality policy or a complaints procedure.<sup>61</sup> The Annual Reports of the last three years show that many more structural measures are recommended than individual ones—about 40% structural to 8% individual—and that in 27-30% of cases both are recommended.<sup>62</sup>

Thirdly, group or class actions are possible and organisations can ask for opinions. Fourthly, opinions of the Commission are published and, since March 2011, they also mention the name of the respondent, which could have a wider deterrent effect. And, finally, the annual reports contain a section on developments and the annual annotated collection of the most important opinions includes cases that are strategically important because they interpret a key issue of the anti-discrimination legislation.

Furthermore, the Commission also contributes to the promotion of equality on a larger scale via its other tasks, for example, by bringing out advice to civil society organisations, the social partners or to the government. According to Ammer *et al.*, “both the ETC and stakeholders are convinced that advisory opinions contribute greatly to awareness-

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<sup>60</sup> B. D. Jacobsen, and E. O. Rosenberg Khawaja, *op. cit.*, 10.

<sup>61</sup> See Annual Report 2010, 42, on the type of structural measures.

<sup>62</sup> See Annual Reports 2008, 40, 2009, 29 and 2010, 39.

raising and have proven to be an effective tool to improve application of equal treatment standards and legislation”.<sup>63</sup>

Another important task in this respect is the ‘own initiative investigations’ the Commission can do when there is a suspicion that systematic discrimination takes place in a certain organisation or industry.<sup>64</sup> Ammer *et al.* write that “these powers assist in making structural discrimination visible and in developing strategies to fight it”.<sup>65</sup> Apart from these tasks, the Commission also provides information and clarification through training, lectures and campaigns.

Support that the work of the Commission contributes to the promotion of equality can be found in Goldschmidt who writes that “individual cases have resulted in, e.g. amendment of discriminatory regulations, and thus the broader active follow-up policies seem to have a deeper structural impact than mere compliance by individual parties”.<sup>66</sup> She also points out that, without the individual complaints to the Commission, cases of discrimination might never come to light as most claimants would never take their case to a court.<sup>67</sup> And, Ammer *et al.* report that “in the Netherlands 44% of respondents believed that the work of the Equal Treatment Commission has led to a decrease in unequal treatment”.<sup>68</sup>

### 3.5. Non-binding Opinions

The opinions of the Commission are not binding and it cannot impose sanctions for non-compliance. Parties can thus ignore these opinions if they wish to do so. However, the active follow-up policy to monitor compliance which the Commission pursues does mitigate the

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<sup>63</sup> M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch and K. Yesilkagit, *op. cit.*, 389.

<sup>64</sup> An example is the investigation into equal pay in hospitals: Commissie Gelijke Behandeling, *Onderzoek en Oordeel: Gelijke Beloning van Mannen en Vrouwen bij de Algemene Ziekenhuizen in Nederland [Investigation and Opinion: Equal Pay of Men and Women in the General Hospitals in the Netherlands]*, 2011.

<sup>65</sup> M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch and K. Yesilkagit, *op. cit.*, 387.

<sup>66</sup> J. Goldschmidt, *Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Development in the Supervision of Equality Law in the Netherlands*, in *Maastricht Journal of European and Comparative Law*, *cit.*, 327.

<sup>67</sup> *Ibid.*, 330.

<sup>68</sup> M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch and K. Yesilkagit, *op. cit.*, 314.

disadvantage of the non-binding character and the impossibility to impose sanctions to a certain extent.

Parties can also, at the same time as filing a complaint at the Commission or after having received an opinion, make a claim to court for a finding of discrimination or to enforce the opinion. As mentioned, the Dutch Supreme Court has established that the courts must take account of the opinion of the Commission and, if it does not follow this, must give its reasons for not doing so.<sup>69</sup> This is not laid down in law, as Loth points out,<sup>70</sup> and courts do not always follow this.<sup>71</sup> However, in the second evaluation, it was found that in 81% of cases decided in court following an opinion of the Commission, the courts paid serious attention to the opinion and in 61% of cases they followed the opinion. This report also mentions that the number of cases where the judge follows the Commission's opinion is on the increase.<sup>72</sup> Goldschmidt comes to the conclusion that "bearing in mind that less than about 10% of the cases heard by the Commission are taken to court, it can validly be argued that the Commission's procedures avoid court proceedings and that the courts benefit from the investigations made by the Commission".<sup>73</sup>

However, there is a drawback to the fact that the Commission does not give binding judgments: it means that it cannot make a preliminary reference to the CJEU for interpretation or explanation of EU anti-discrimination law and this can be seen as a serious lacuna, especially because very few discrimination cases ever reach the civil courts.<sup>74</sup> This is compounded by the fact that the Commission has, to date, not made use of the competence given in Art. 15 ETA 1994 to take cases to court.

The Commission cannot impose any sanctions so it cannot, for example, award compensation, and it can be questioned whether this is in line with

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<sup>69</sup> *St Bavo-Gielen, Hoge Raad*, 13 November 1987, NJ 1989, 698.

<sup>70</sup> M. Loth, *op. cit.*, 225.

<sup>71</sup> See on this J. Goldschmidt, *Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Development in the Supervision of Equality Law in the Netherlands*, in *Maastricht Journal of European and Comparative Law*, *cit.*, 330; G. Moon, *op. cit.*, 920; I. Rorive *op. cit.*, 164.

<sup>72</sup> Commissie Gelijke Behandeling, *Second Evaluation 1999-2004 [Het Verschil Gemaakt Evaluatie AWGB en Werkzaamheden CGB 1999-2004]*, *cit.*, 95.

<sup>73</sup> J. Goldschmidt, *Anti-discrimination Law in the Netherlands: A Specific Legal Patchwork, Normative System and Institutional Structure*, *cit.*, 256.

<sup>74</sup> J. Goldschmidt, *Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Development in the Supervision of Equality Law in the Netherlands*, in *Maastricht Journal of European and Comparative Law*, *cit.*, 333; G. Moon, *op. cit.*, 921. See on the question whether equality bodies which have been given the power to issue legally binding decisions can refer questions to the CJEU: Equinet, *op. cit.*, 27-28.

the EU Equality Directives which prescribe that sanctions for breaches of anti-discrimination legislation must be effective, proportionate and dissuasive.<sup>75</sup> One of the Commissioners I spoke to thought that a simple opinion that discrimination has taken place is not enough of a deterrent for employers and that an order to pay compensation would work better in that respect. On the other hand, another Commissioner said that, if they are able to give compensation, this would make the situation difficult: they could then not investigate the cases themselves as that would combine the role of investigator/prosecutor and judge. However, the lack of binding opinions and sanctions does not appear to be a problem in practice. Ammer *et al.* conclude that the “soft sanctions in addition to the ETC’s high degree of acceptance as the expert institution for any questions relating to discrimination have proved highly effective and mean that the ordinary civil courts, which can issue binding sanctions, are rarely chosen as a means of redress”.<sup>76</sup>

### *3.6. Questions in Relation to the Future*

With the establishment of the Netherlands Institute for Human Rights imminent, are there likely to be any changes in the above? The Commission in its entirety is absorbed into the new Institute and all its tasks will be transferred. It is important to state that, as De Witte points out, this “amalgamation operation was not inspired by dissatisfaction with the Equal Treatment Commission, which is generally considered to be an active and effective institution”.<sup>77</sup> Within the Institute, there will be a separate department for equal treatment and the mandate in relation to equal treatment will not change.<sup>78</sup> The Institute will still deal with individual complaints about violations of anti-discrimination legislation but it will not be given the competence to deal with individual complaints about human rights violations. Whether this means that the limited mandate of the Commission, where it can only review the equal treatment

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<sup>75</sup> See Art. 15 Directive 2000/43/EC, *op. cit.*; Art. 17 Council Directive of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation 2000/78/EC [2000] OJ L 303/16; and Art. 14 Directive 2004/113/EC and Art. 25 Directive 2006/54/EC.

<sup>76</sup> M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch and K. Yesilkagit, *op. cit.*, 387.

<sup>77</sup> B. De Witte, *National Equality Institutions and the Domestication of EU Non-Discrimination Law*, in *Maastricht Journal of European and Comparative Law* 2011, vol. 18, n. 1-2, 171.

<sup>78</sup> See, Art. 9-13 NHRI Act 2011.



aspects of an individual case, which has been criticised for being too narrow in the past,<sup>79</sup> will be extended so that the Institute can review or take account of the human rights aspects of the case as well, is not quite clear. The Commission has recently held that it can review whether the ETA 1994 is in accordance with international human rights treaties.<sup>80</sup> So the Commission appears to hold itself competent to consider international human rights. As part of the Human Rights Institute, this might become even easier to do.<sup>81</sup>

In relation to the issues analysed here, the cost-free, quick and easy procedure remains the same and thus will still be labour-intensive. There will be no change in relation to assistance to victims of discrimination, as the Commission does not provide this at the moment. The new Human Rights Institute is not tasked to assist victims of violations of human rights either. The opinions on whether discrimination has taken place remain non-binding and the Commission will not be able to impose sanctions. In relation to the easy accessibility of the Commission, there do not appear to be any plans to change this but there could be a danger that, as part of the Institute, the equality work of the Commission will become less visible and, also, that victims of discrimination might get confused as to what the Institute does. Discussions have taken place as to whether the new Institute should have human rights as well as equal treatment in its name but, after consultation, the Government has decided against this.<sup>82</sup> A number of questions will only be answered once the Institute is up and running, like whether it will be able to deal with wider issues; whether the equal treatment focus will be the main one or will be watered down; how the Institute will develop and how its equal treatment department will function in the wider context of human rights.

One more point should be raised here. Ammer *et al.* write that “stakeholders criticised the Equal Treatment Commission in the

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<sup>79</sup> See R. Holtmaat, *Een Agenda voor Wetgeving, Beleid en Onderzoek op het Gebied van de Discriminatie Bestrijding en Gelijke Behandeling*, 266-267; M. Loth, 224; and J. Goldschmidt, *Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Development in the Supervision of Equality Law in the Netherlands*, in *Maastricht Journal of European and Comparative Law*, cit., 332.

<sup>80</sup> Opinion 2011-69.

<sup>81</sup> For more information see A. Terlouw, *De CGB en de Algemene Mensenrechtentoets, The Equal Treatment Commission and General Human Rights Review*, in *Nederlands Tijdschrift voor de Mensenrechten/NCJM Bulletin [Journal of the Dutch Human Rights Committee]*, 2011, vol. 36, n. 6/7, 656-671; and, J. Goldschmidt, *Protecting Equality as a Human Right in the Netherlands. From Specialised Equality Body to Human Rights Institute*, in *The Equal Rights Review*, cit., 45.

<sup>82</sup> See *Explanatory Memorandum, NHRI Act 2011, op. cit.*, 12.

Netherlands on the grounds that so many of its staff have a legal background; some stakeholders believed that a more multi-disciplinary staff composition would improve its functioning”.<sup>83</sup> The new Institute might have to address this issue. And, not only a more multi-disciplinary but also a more diverse and representative staff composition will need to be considered, especially if the Institute wants to comply with international obligations and to attain the A-status granted by the UN to national bodies which fully comply with the Paris Principles.<sup>84</sup> There appears to be a lack of representation from groups like disabled people, ethnic and religious minorities, and so forth.

#### 4. Conclusion

The focus of this article has been on the Dutch Equal Treatment Commission and especially its individual complaints procedure. Part 1 painted a background picture by examining the Commission’s history, composition and mandate, while Part 2 described the individual procedure itself and Part 3 contained an assessment of this procedure and an analysis of the question whether this is a satisfactory way of dealing with individual discrimination complaints and whether this procedure can be seen as an example of good practice for other countries.

The first issue examined was whether the individual complaints procedure was, as is claimed, a cost-free, simple and quick way for victims of discrimination to get satisfaction and the conclusion was that, certainly compared to a civil court action, this is indeed the case. Some costs are involved, especially when parties want representation. The procedure is also fairly easy to use, but parties still find the whole process rather judicial, despite the fact that the Commission spends time at the hearing to explain everything in detail. The procedure is also reasonably quick, and cases are generally dealt with within six months.

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<sup>83</sup> M. Ammer, N. Crowley, B. Liegl, E. Holzleithner, K. Wladasch and K. Yesilkagit, *op. cit.*, 344.

<sup>84</sup> *Principles relating to the Status of National Institutions (The Paris Principles)*, Adopted by General Assembly Resolution 48/134 of 20 December 1993, available at <http://www2.ohchr.org/english/law/parisprinciples.htm> (accessed 5 April 2012). See on this also the Explanatory Memorandum, NHRI Act 2011, 13-14; and, J. Goldschmidt, *Protecting Equality as a Human Right in the Netherlands. From Specialised Equality Body to Human Rights Institute*, in *The Equal Rights Review*, *cit.*, 37 and 39. At present, the Commission has B-status.

Is the Commission easily accessible? It was found that just over half of the general public had heard about the Commission, but that most do not know what it does. There is thus scope for improvement on its visibility and its tasks. There is also evidence that only a small number of discrimination complaints actually reach the Commission. The Commission does not provide assistance to victims in pursuing a claim of discrimination, but there are other organisations, like anti-discrimination bureaus and municipal anti-discrimination facilities, which advise and assist victims.

The individual procedure is labour intensive, but the Commission has been working towards dealing with cases in a more efficient way, via telephone and email enquiries and a front-office pilot project. The individual procedure does, in a number of ways, promote equality on a wider scale. Opinions are published and now name the respondent party, group actions are possible and an extensive body of case law has been built up which provides guidance for victims, but also for employers and goods and services providers. Furthermore, in its opinions, the Commission often recommends that parties take structural measures as well as or instead of only individual measures. Other tasks performed by the Commission also contribute to the promotion of equality on a larger scale.

The opinions of the Commission are not binding and it cannot impose sanctions for non-compliance. However, it has an active follow-up policy to enhance compliance and the opinions are followed up in about 75% of the cases. When a party takes a case to court after the Commission has brought out an opinion, the Supreme Court has held that the court must take account of the opinion and must give reasons if it does not follow this.

When the Institute for Human Rights is set up—this is expected to happen in the latter part of 2012—the Commission will, in its entirety, become part of the new Institute but the individual procedure for victims of discrimination will remain as it is. This is to be welcomed. It is suggested that the individual procedure has, by-and-large, succeeded in what it was set up for: to create an easy accessible, simple, quick and cost-free or low-cost way for victims to complain about discrimination. And, together with the other tasks of the Commission, it has contributed to the promotion of equality in the Netherlands. Or, as Goldschmidt writes, “in its almost 15 years of existence, the ETC has developed into an

authoritative institution in the implementation of equality laws’.<sup>85</sup> The Commission will have to make sure that its visibility and the general public’s knowledge about its existence and what it does is maintained and even increased and that this does not suffer from the incorporation into the new Institute for Human Rights. The establishment of this Institute provides a good occasion to raise awareness.

It is submitted that the way in which the Dutch Equal Treatment Commission deals with individual complaints of discrimination can represent a clear example of good practice for other countries as it provides victims of discrimination with an easier, less stressful, less expensive and quicker way to get a finding of discrimination than taking a case to a court. The Dutch Government set up the Commission to provide this and has, thus, succeeded in its goal. And, although the national political and legal circumstances for an equality body must be taken into account<sup>86</sup> and thus the procedure might not be suitable to be transplanted in its entirety, many aspects like, for example, the information the Commission provides on the telephone, by email, on its website and in leaflets, the way the Commissioners spend time at a hearing to explain (legal) issues, the recommendation of structural as well as individual measures and the active follow-up policy, can be seen as very useful tools for other equality bodies as well. The Commission’s individual procedure can thus definitely be seen as an example of good practice for equality bodies in Europe and beyond.

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<sup>85</sup> J. Goldschmidt, *Anti-discrimination Law in the Netherlands: A Specific Legal Patchwork, Normative System and Institutional Structure*, cit. 259.

<sup>86</sup> See, G. Moon, *op. cit.*, 874.



# Adapt International Network



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