

pro facto

Evaluation of the Act on the position and supervision of the
legal profession (Wet positie en toezicht advocatuur)

Management summary

Groningen, 5th of August 2020

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The research was commissioned by the Scientific Research and Documentation Centre (WODC) and conducted by Pro Facto, an office for public and legal research, advice and education, and the Department of Constitutional Law, Administrative Law and Public Administration at the University of Groningen.

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Management summary

Background and research method

The legal profession fulfils an important and special role and position in the constitutional state. The Dutch Act on Advocates (*Advocatenwet, AW*) guarantees the special position of the lawyer. Various recommendations and research reports at the end of the last and the start of this century showed that supervision was insufficient and needed modernization and improvement, partly due to the growth of the legal profession and the increasing internationalization in recent decades. After a complex legislative process, this finding ultimately led to the *Act of 1 October 2014 amending the Act on Advocates, and some other laws relating to the position of the legal profession in the legal order and reviewing the supervision of the legal profession (Act on the position and supervision of the legal profession (Wet positie en toezicht advocatuur, Wpta))*, which amended the Act on Advocates and some other laws as of 1 January 2015.

At the core of the legislative amendment is the review of the supervisory system. The Wpta also provides for the codification of the core values as an assessment framework for the professional practice of lawyers, a limited adjustment of disciplinary rules and a number of other changes.

The main research question is:

Does the system of supervision introduced by the Act on the position and supervision of the legal profession function in accordance with its objectives, how do other legislative amendments, including the disciplinary rules, work and do they contribute to the quality of the legal profession?

Three smaller studies were conducted in order to be able to answer the main question:

1. Policy theory reconstruction
2. Process evaluation
3. Evaluation of objectives-achievement

For the research, a literature and document study was carried out, interviews were conducted with forty key information sources, a case law study was carried out and an attempt was made by means of a digital survey to obtain a picture of how the supervision

and discipline rules operate from the point of view of lawyers. The draft conclusions and recommendations were presented to a meeting of experts.

Policy reconstruction

Background

The main reason for the introduction of the Wpta was that a number of studies at the end of the previous and start of this century, supported by the Dutch Bar Association (NOvA), identified the need to modernize and improve the supervision of the legal profession. The supervisory system had apparently lagged behind various developments in the legal profession, such as the expansion of the profession and increasing internationalization, as is shown, for example, in the consultative referendum report '*De toekomst van de nationale rechtsstaat*' (The future of the national constitutional state) published in 2005. In addition, in 2006 the Van Wijmen Commission also called for the reform of supervision, complaints and disciplinary rules in the interests of consumers/litigants. Partly in the light of these reports, the government was convinced that supervision took place very much behind closed doors, was difficult to identify, was mainly reactive in nature and that the independence of the supervision was insufficiently guaranteed. This prompted reflection on the modernization of the supervisory system. This reason was further reinforced in 2008 by the observation of the Joldersma parliamentary working group that incidents had occurred within the legal professions, such as the involvement of notaries in fraudulent real estate transactions and the use of third-party accounts by lawyers for purposes other than those intended. The professional organization representing the legal profession, the Netherlands Bar Association (NOvA), also saw the need to improve supervision of the legal profession and had, on its own initiative, commissioned Doctors van Leeuwen to analyse the problems and the proposals for improvement.

The legislator and the NOvA agreed on the need to review the supervisory system, which would strengthen, professionalize and modernize the system. The question of which means should be used for this has led to much debate. In particular, the establishment of a supervisory board with members appointed by the Crown, who - instead of the local bar presidents - would become responsible for supervising the legal profession, was met with considerable resistance. This resistance was mainly based on the concern that the special position of the profession would be insufficiently guaranteed: (government) supervision would become too close to the legal profession. Ultimately, the minister appeared willing to amend the bill, whereby the supervisory board was given the role of system supervisor and the local bar president was designated as the legal supervisor of compliance with the Act on Advocates and the Money Laundering and Terrorist Financing (Prevention) Act (Wwft). The amended proposal received support from both parliament and the Dutch Bar Association.

Instruments

The most important features of the new supervisory system are that the supervision of lawyers' compliance with the Aw and the Wwft will lie with the local bar president, who will have access to the supervisory instruments under the General Administrative Law Act (Awb). As a new body, the supervisory board will supervise the supervisory tasks of the local bar presidents.

It follows from the legislative history that the legislator sets the following requirements for proper supervision of the legal profession: the supervisory system - with as the main actors the local bar presidents and the supervisory board - should be independent, transparent, uniform and effective. These requirements are in line with the six principles of 'good

supervision' in the *Tweede Kaderstellende visie op Toezicht* (Second Framework Vision for Supervision). These requirements have been detailed in part in statutory provisions.

Objectives

The objectives of the Wpta have been reconstructed below based on the legal history. The review of supervision must create a balanced and modern supervisory system that meets the above requirements regarding independence, transparency, uniformity and effectiveness (objective). Together with the codification of the core values, this supervisory system should contribute to the quality and integrity of and confidence in the legal profession (intermediate objective). Finally, this brings us to the highest objective, which is to achieve a proper administration of justice. The legislator has not operationalized these objectives and has provided only a limited explanation. This makes it difficult to carry out the objective-achievement evaluation, all the more so because exactly what the legislator's aim is, is not clearly stated in practical terms.

Process evaluation

With regard to the process evaluation, we examined which changes in practice led to the amendment of the law. The process evaluation focuses on the governance structure of the supervisory system, the effectiveness of the supervision provided by the local bar presidents and system supervision in practice and the functioning of the disciplinary rules.

Governance structure

From the description (Chapter 3) and the analysis (Chapter 6) it appears that there is a complicated system of different actors, each providing part of the necessary checks and balances within the system. The position of the different bodies and their mutual relationship should be strengthened with regard to independence, transparency and effectiveness, as the current system poses a number of problems. A number of recommendations have been formulated to resolve these problems.

For example, while the position of the local bar president as the sole supervisor within his or her district contributes to the effectiveness of the supervision, the method of electing the local bar president and the mandating of supervisory activities to members of the council of the bar is problematic. The local bar president is chosen by the lawyers he or she supervises and the council members themselves are also subject to supervision. This is undesirable from the point of view of independence, even though system supervision by the supervisory board provides a counterbalance to counteract improper influence. A statutory replacement scheme for the local bar presidents is needed. The following recommendations are made based on the above considerations:

Recommendation 1 to the legislator: Provide a different method for electing the local bar president by amending Article 22, second paragraph of the Aw.

Recommendation 2 to the local bar presidents: When actually exercising supervision (whether or not mandated), stop relying on other members of the council of the bar.

Recommendation 3 to the legislator: Provide a legal basis for replacing the local bar president for the performance of his or her supervisory duties.

There are also problems with regard to the financing of supervision. The current method of financing supervision is at odds with the requirement of independence, because the budget is determined by the annual meeting, as a result of which the supervised lawyers can exercise (improper) influence on the level of the supervision budget. Moreover,

apportionment differs widely between the districts, which is not compatible with the requirement of uniformity.

The council of the local bar has developed - partly unforeseen - into a strong consultative body for the local bar presidents in which a uniform supervisory policy is established and local bar presidents coordinate supervisory activities. The legislator had deposited the power to adopt supervisory policy with the supervisory board; in practice, the supervisory board has left the drawing up of (uniform) supervisory policy to the local bar presidents/council of the local bar, because it believes that they have primary authority to formulate policy. However, the complication here is that the council of the local bar does not have a formal legal position and does not have the authority to determine policy rules; the local bar presidents as competent administrative bodies must do this individually. This detracts from the requirement of uniformity and effectiveness. The following recommendations emerge from these considerations:

Recommendation 4 to the legislator: Withdraw the authority of the supervisory board to adopt policy rules (Article 45h of the Aw).

Recommendation 5 to the legislator: Designate the council of the local bar as a body as referred to in Article 17a of the Aw. In any case, grant the council of the local bar the power to adopt policy rules for the performance of the tasks by the local bar presidents, namely the supervision of the Aw, the Wwft and the handling of complaints. See if the council of the local bar can be charged with other tasks. Ensure that the powers of the supervisory board also extend to the council of the local bar.

The formalization of the council of the local bar also offers opportunities to rearrange the supervisory system in a number of areas, for example with regard to the financing of supervision and the decision-making process regarding the use of supervisory resources, the support structures and the appointment of the local bar presidents.

The supervisory board as system supervisor is composed of the general council and two Crown members. The composition of the supervisory board is positively valued. The role of the general council contributes to the effectiveness of system supervision because of their expertise and knowledge of the profession. Nevertheless, it has been found that the combination of functions associated with the position of the general council is not compatible with the requirements of independence and transparency. This leads to the conclusion that the role of the general council in the supervisory board ensures insufficient segregation of duties between system supervision and policy formulation/management, while at the same time provides added value for the functioning of the supervisory board. This conclusion leads to the following recommendation:

Recommendation 6 to the legislator: Delete the provision in Article 36a of the Aw that the president of the general council is chairman of the supervisory board. Determine that a member appointed by royal decree acts as chairman of the supervisory council. Assign the authorization to appoint members in article 45b of the Aw to the supervisory board and no longer to the president of the general council.

Finally, it has been established that the statutory procedure regarding the appointment of Crown members is not fully reflected in practice. In practice, the General Council nominates one candidate for the appointment, while the Aw prescribes a list of three candidates. It is also worth mentioning that the supervisory board itself has no formal position in

nominating new members. The following recommendations have been made to improve this procedure:

Recommendation 7 to the general council: Require that when Crown members are recommended to the minister, three nominations are given.

Recommendation 8 to the legislator: Consider whether the supervisory board itself can be given a stronger position in nominating new Crown members. This requires an amendment to Article 36a, second paragraph Aw.

How supervision operates in practice

The research shows that supervision provided by the local bar presidents has improved in terms of content. An important development in recent years has been that the supervisory culture has shifted from pastoral to proactive, partly because supervision is more risk-driven than before and more action is taken in response to signals. It can be concluded that after the entry into force of the Wpta, supervision has continued to develop. The system supervision by the supervisory board, introduced by law, has played an important stimulating role in this. Examples of this include the various policy rules that have been adopted, which benefit the uniformity of supervision, and the introduction of new supervisory instruments, which benefit the proactivity and therefore the effectiveness of supervision. The Awb supervisory instruments introduced with the Wpta also made a modest contribution to the effectiveness of supervision.

Nevertheless, some problems have also emerged. For example, considerable differences have been noted between districts with regard to the use of the instruments and the attention paid to supervisory priorities. It has also been established that the handling of complaints and the submission of objections by local bar presidents does not present a uniform picture. Moreover, the file inspection during the office visits focuses very little on the substantive quality of the services provided by the lawyer. And from a transparency point of view, it is regrettable that the annual reports do not or hardly discuss the effectiveness of the supervisory efforts made, i.e. the social effects. Finally, it has been established that the local bar presidents make little or no use of the enforcement powers available to them under the Awb and that they do not apply this instrument effectively. The researchers conclude that supervision can develop further in terms of uniformity, effectiveness and transparency and have formulated the following recommendations:

Recommendation 9 to the local bar presidents/ the general council: Develop and improve supervision, with a specific focus on the following issues:

- The uniform and effective use of the financial instruments and the instruments available under the Awb and Wwft;
- A uniform working method for dealing with complaints and submitting objections by local bar presidents;
- How the file inspection takes place;
- The obligation to participate in quality assessments;
- The use of the Awb instruments, for example through the development of a two-way theory;
- Where possible draw up uniforming policy rules.

Recommendation 10 to the supervisory board: Consider the extent to which the supervision provided by the local bar presidents and the council of the local bar shows the desired improvements with regard to the above points.

With regard to the role of the supervisory board, it appears that the supervisory board has fulfilled an important and indispensable boost function in professionalising and strengthening the supervision provided by the local bar presidents. It has hardly had to make any use of the enforcement instruments available to it; lighter, informal interventions have proved sufficient to steer supervision in the desired direction. Systemic oversight by the supervisory board largely complies with the relevant requirements of the legislator and has met expectations. The supervisory board will have to continue to fulfil this role in the future (see recommendation 10).

In the opinion of the researchers, the supervisory board has a legitimate wish to have access to the supervision files kept by the local bar presidents. In addition to the existing supervisory activities, this insight can serve as a reality check, which can strengthen system supervision. The local bar presidents should provide these individual supervision files - with due observance of the duty of confidentiality - to the supervisory board on request, on the basis of Article 45j, second paragraph of the Aw. It is recommended to develop and use this monitoring tool in the coming period.

Recommendation 11 to the supervisory board: Discuss with the council of the local bar how individual supervision files can be provided to the supervisory board on the basis of Article 45j, second paragraph of the Aw.

How the disciplinary rules operate

The Wpta is not intended to make substantial changes to disciplinary or procedural law, partly because a Framework Act on disciplinary procedural law was being prepared at the time of the first original bill. However, several changes have been made to the Wpta with the aim of ensuring that complaints that could also be settled by a complaints and disputes committee and minor complaints no longer end up in a disciplinary court. It is not possible to determine with certainty on the basis of statistics whether that objective has been achieved.

What is clear is that the local bar president plays a crucial role prior to disciplinary proceedings. In practice, the one-stop shop idea expressed by Article 35 Aw is reflected in the role of the local bar president in investigating the complaint, mediating between a client and a lawyer and informing the client about the disciplinary procedure. The introduction of court fees appears to have some influence on the decision-making of the complainants about whether or not to proceed with the complaint to the disciplinary boards. An increase in the amount is not considered desirable, as this affects the accessibility of the disciplinary procedure. By submitting a complaint, the complainant (above all) serves the public interest.

However, it is considered problematic that the possibilities to act against an abuse of the right to complain are flawed, which leads to a great burden on the capacity of the disciplinary tribunals and on the capacity of lawyers, while such complaints do not contribute to the monitoring and promotion of the quality of professional practice. This consideration has led to the following recommendation:

Recommendation 12 to the legislator: Consider the desirability of introducing the option of ordering complainants to pay the costs of the proceedings in the event of abuse of complaints.

The codification of the core values has had added value for disciplinary cases. The core values are reflected in disciplinary decisions in particular in the motivation of the measure to be imposed.

The options for imposing a fine or imposing special conditions in the event of a conditional measure are used by each disciplinary committee on average several times a year. The compensation may amount to a maximum of € 5,000 on the basis of Article 48b, first paragraph Aw. In some cases, this is perceived as too low a maximum. For example, a link could be sought with the € 10,000 that the Disputes Committee for the Legal Profession can impose. It is recommended to examine the desirability of this proposal:

Recommendation 13 to the legislator: Consider the desirability of adjusting the maximum compensation to be awarded upwards, for example to € 10,000.

Under Article 48ac Aw, the lawyer can also be ordered to pay the legal costs. The basis for lawyers being ordered to pay the legal costs appears to be related to the Act on the Costing of Supervision and Disciplinary Proceedings for Legal Professions and the extent to which lawyers are protected against minor complaints or misuse of the right to complain by complainants.

The current system for publishing disciplinary rulings or the imposed measures functions satisfactorily.

Evaluation of the achievement of objectives

The question whether the higher objectives envisaged by the legislator, namely increasing the quality, integrity and confidence in the legal profession and thus achieving a proper administration of justice, have been achieved in practice is hard to answer for various reasons. A major reason is that the annual reports of the local bar presidents and the council of the local bar are very unforthcoming about the extent to which the supervisory actions have led to these objectives being achieved. The process evaluation did, however, lead to a number of findings from which the extent to which the objectives have been achieved can be derived.

With the Wpta and the developments and cultural changes since 2012, a balanced and modern system has been established that certainly meets the requirements of independence, transparency, uniformity and effectiveness better, despite some shortcomings that have been identified. It is plausible that this system change and the associated cultural change have also contributed to the quality and integrity of the legal profession.

The researchers acknowledge that it is a difficult task to map out the effectiveness of the supervisory actions. This is even more the case for assessing whether these supervisory actions have led to an increased quality and integrity of the legal profession. Nevertheless, the researchers see opportunities to gain more indicative insight into these effects and have therefore formulated the following recommendation:

Recommendation 14 to the local bar presidents/council of the local bar: In the accountability, pay more attention to the question of whether the (preventive) supervisory actions and the chosen priorities lead to more abuses coming to light and whether lawyers comply with the standards better and faster.

Conclusion

The research shows that supervision and the supervision culture has developed in a positive direction in recent years, but that further improvements are possible and necessary. To this end, recommendations have been made, which together define the supervisory tasks within the Dutch Bar Association more sharply, and to better, and therefore more independently, position the supervision provided by the local bar presidents and by the supervisory board. The effect of this sharpened, future-proof governance structure can contribute to improved and more effective supervision by the local bar presidents and the supervisory board and can thus lead to abuses in the legal profession being dealt with more effectively. The researchers do emphasize, however, that it is important to seek support from the parties involved and to exercise due care in any changes to the legal structure of the supervisory system.

The inner motivation to supervise should not be lost through structural changes. The formal and informal involvement of the various actors, such as the local bar presidents, the increasingly institutionalized and professionalized council of the local bar, the supervisory board and the Dutch Bar Association, is an important indication of the importance that they all attach to the professionalization of the supervision of the legal profession.



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