

Research integrity procedures in the Netherlands

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Ladies and gentlemen, friends,

It is my great honour to address the third Interuniversity Symposium on Research Integrity.

I would like to take this opportunity to compare some procedural aspects of the LOWI's proceedings with the procedures of the Flemish Commission for Research Integrity – the VCWI – by looking at a number of LOWI opinions. I will concentrate on four topics:

1. the admissibility of the request
2. the official language of communication
3. the calling in of experts, and
4. compliance with the duty of confidentiality.

Admissibility

Who may submit a request?

In Flanders, request for a second opinion may be submitted by the institution, by the individual who made the original complaint, or by the individual whose integrity is being questioned. This differs considerably from the LOWI's procedures. In principle, only the original Complainant or the original Defendant may ask the LOWI to review a decision. The relevant institution may not petition the LOWI on its own; by definition, the institution is the Defendant in the LOWI proceedings. I will return to this topic later.

Deadline

In Flanders, the deadline for submitting a request for a second opinion to the VCWI is thirty days after notification of the first opinion issued by the institution's Committee on Research Integrity, or CWI. The LOWI Regulations, on the other hand, state that a request is admissible if it has been submitted within six weeks of the *date* on which the Board's decision, or preliminary decision, has been issued.

Strikingly, the VCWI Regulations take the CWI's opinion as the starting point, whereas for the LOWI it is the decision, or preliminary decision, based on that opinion as issued by the Board of the institution. That has far-reaching consequences. In the Netherlands, the Board of the institution is always the Defendant in the proceedings, even though the Board has the chairperson of the CWI – and, frequently, other members of the CWI – accompany it to the hearing. If I understand correctly, then the CWI's opinion is the basis of the VCWI proceedings and the Board of the institution can itself ask the VCWI to issue a second opinion on request. I am certain that the Dutch universities would find this an attractive option. Their Boards find their role as Defendant problematic, and some even call it inappropriate. I'm not entirely convinced of that, however. The proceedings in the Netherlands are based on the Dutch General Administrative Law Act, or Awb, which dictates that the

decision of an institution must be the subject of the proceedings, not the opinion of the advisory body in the proceedings. I would be curious to know how many institutions in Flanders have in fact requested a second opinion.

If I interpret the regulations correctly, then the thirty-day period following the CWI's notification means that the VCWI also bases its deadline on the date on which the CWI opinion was issued. We too find that the easiest approach. But despite this seemingly straightforward provision, it was still difficult to determine a petition's admissibility in several cases. Pursuant to the Awb, a number of universities state in their provisional decisions that any appeal must be submitted to the LOWI six weeks after the decision has been *sent*. Quite some time may pass between the issue date of a decision and the date on which it is sent. In principle, the LOWI excuses missed deadlines when the reason is an erroneous reference to a legal remedy. But to determine whether the petition has been submitted in accordance with that erroneous reference, the LOWI asks the Petitioner to provide evidence of the precise date of receipt of the decision, and to forward the postmarked envelope that contained the decision. The envelope is especially important in determining the admissibility of the petition (LOWI opinion 2017-09). There is a good chance that the envelope has already been discarded, however. So all things considered, there are good reasons for taking the date of the decision as the start of the admissibility period.

The fact that the admissibility of a petition depends on the Board's decision is even more problematical if the Board – after hearing the CWI's opinion – does not take a decision. Pursuant to the LOWI Regulations, the Board's refusal to issue a decision has the status of a decision only if that refusal is *in writing*. If the Board does not take a decision, the LOWI's hands are tied (see opinion 2017-11) and the Petitioner will have to turn to the courts. [How does the VCWI deal with such a situation?]

The LOWI often receives requests to reconsider a previous opinion. When a Petitioner submits a request to reconsider an opinion or a repeat petition, the LOWI ascertains whether any new facts or circumstances (so called *nova*) have arisen that would cause it to revise its opinion. Opinion 2016-16 concerned e-mails that the Petitioner submitted to the LOWI long after the relevant LOWI proceedings had ended. The e-mails were supposed to cast reasonable doubt on the objectivity of the Defendant's scientific judgement, but they dated from *before* the LOWI had issued its opinion and were already in the Petitioner's possession. The e-mails could therefore not be regarded as new facts or circumstances. It was the Petitioner's fault that this evidence had not been submitted during the LOWI proceedings.

Finally, the LOWI is exclusively complaints-driven. Contrary to Article 10 of the VCWI Regulations, the LOWI does not have any general authority to issue an opinion on its own initiative or at the request of institutions. And I think that's a shame, although I am interested to hear whether the VCWI makes frequent use of this general authority. The general authority to issue opinions on its own initiative must be kept separate from the authority to initiate investigations of alleged violations of research integrity. I would object to the latter, because I think such investigations should not be part of the LOWI proceedings in second instance but should be within the competence of the Boards of the institutions (in cooperation with the CWI, analogous to the Complaints Procedure), that have the authority to do so. How is that in Flanders, where the CWI plays a decisive role in the

original proceedings? Is the CWI authorised to initiate an investigation by itself, on its own initiative?

Official language of communication

The official language of communication is another frequent topic of discussion. I see no specific provision in this regard in your regulations or procedures. The LOWI adheres to the case-law approach that Dutch is the language of oral and written communication in administrative proceedings. Parties are allowed to submit documents in English, specifically if communication in English is more efficient and the parties' interests are not disproportionately harmed. In practical terms, this is when one of the parties does not speak Dutch. To ensure that the petition and the parties' arguments are properly conveyed, it is important for them to communicate in the language in which they are best able to express themselves.

Not everyone is happy with this policy, however.

In opinion 2017-07, the Petitioner submitted his request in English. The LOWI asked the Petitioner several times to submit a translation of his petition, because the proceedings would be conducted in Dutch, given that – according to official records – the Petitioner was a native Dutch-speaker, as were the other Parties. Allowing English as the language of communication would not be efficient in this particular case.

The Petitioner insisted on submitting his request in English 'so that international experts and readers could apprise themselves of his complaint'. He further claimed that it was not up to the LOWI but rather up to the Petitioner to determine which official language of communication was most efficient.

The LOWI deemed the petition inadmissible because it did not comply with the submission requirements.

Opinion 2017-12 concerned the official language of communication at the hearing. Up to that point, the Petitioner had submitted all written documents in English, while the other Parties had submitted their documents in Dutch. That had also been the case during the proceedings at the institution. After receiving its invitation to the hearing, the Petitioner asked the LOWI whether the hearing could be conducted in English. Although Dutch is the customary official language of communication during hearings, the LOWI asked the other parties whether they had a preference. They objected to conducting the hearing in English because 'research integrity is sensitive matter' and 'Anglo-Saxon connotations often lead to confusion when applied to Dutch intentions, especially when precision is required in definitions'.

The LOWI decided to hold the hearing in Dutch. As compensation, the Petitioner was allowed to respond in English. The Petitioner agreed with this decision.

Experts

Like the VCWI, the LOWI is also independently authorised to call in experts when it lacks the necessary expertise. Parties generally do not object when the LOWI decides to call in experts to advise. Initially, it is up to the LOWI to select the experts, but if it is unable to find someone with the relevant expertise, it can ask the parties to propose candidates. Discussions concerning experts mainly focus on the legal position of the parties: Are they given the opportunity to respond to the

expert's report? Is a second opinion permitted? Are the parties given the names of the experts who have been consulted? The LOWI will not report the names of the experts if the experts themselves so request. In the interests of transparency, the parties in some proceedings nevertheless indicate that they want to know who the expert is. Although that is understandable, there are disadvantages to this. There may only be a small number of experts available in certain knowledge domains. If the LOWI is unable to promise anonymity, it may be more difficult to get experts to cooperate and thus more difficult for the LOWI to advise a Board. There have also been situations in which Petitioners or Interested Parties were hostile to or harassed experts. One Petitioner also initiated legal proceedings in an attempt to find out the experts' identity.

As far as I have been able to determine, the VCWI's Regulations and Procedures are silent on the subject of the expert's anonymity, whereas this is a hot topic in the Netherlands, for example in opinion 2016-12. In that case, the Petitioner asked the LOWI to reveal an expert's name. The Petitioner felt this was necessary because the expert's opinion would play a role in any new proceedings. Anonymity meant that the Petitioner could not defend himself against the expert's pronouncements. The LOWI still rejected the petition because the expert had requested anonymity, and rightly so.

Another Petitioner attempted to find out the names of the experts by initiating legal proceedings under the Public Access Act (Wet openbaarheid van bestuur, Wob). The courts decided against the Petitioner because, unlike the Royal Netherlands Academy of Arts and Sciences – where the LOWI is housed – , the LOWI is not an administrative body and the Public Access Act therefore does not apply. Even though the LOWI operates in 'the bosom of the Academy', to borrow the terminology of the VCWI Regulations, we are entirely autonomous.

Compliance with the duty of confidentiality

Finally, there is the matter of compliance with the duty of confidentiality. The Flemish Regulations are strict about confidentiality: 'Experts and witnesses must sign a statement of confidentiality before being questioned or before they are given case-related information. The statement of confidentiality must also be signed by the parties who have submitted a case to the VCWI for its opinion.' The LOWI lacks a signed statement of this kind. The Regulations only state that the parties 'shall be subject to a duty of confidentiality with regard to all information they learn about the case' from the date that a petition is submitted until the date on which the Board takes a final decision. After the final decision, the parties must also continue to show restraint.

The duty of confidentiality is crucial during the proceedings. Premature disclosure of an accusation that a researcher has violated the principles of research integrity may damage that researcher's reputation. Confidentiality is also required if the LOWI is to do its job effectively. This does not stop some parties from 'going public' with their complaints before a decision has been taken. Increasingly, the Internet and social media play a prominent role in this context. How is confidentiality to be enforced, then? Both the Flemish and the Dutch Regulations are silent on this point.

In opinion 2017-05, the university Board decided to discontinue complaints proceedings because the Petitioner had ignored an injunction to remove his complaint from YouTube and the Internet.

According to the Petitioner, this decision was unfair because the university's Complaints Regulations did not provide explicitly for the discontinuation of proceedings on infringement of the duty of confidentiality. The LOWI also insisted that the Petitioner removed the relevant publications before it reviewed the case, and set a deadline for such removal. The Petitioner complied. The LOWI admitted that the text of the confidentiality provision in the Complaints Regulations was somewhat confusing. However, the Board and the CWI had explained the substance and scope of the relevant provision to the Petitioner in writing and also explained how the Petitioner had violated the duty of confidentiality. Consequently, the Petitioner could not reasonably question the intent of the duty of confidentiality, and should have complied with the injunction. I admit it: this was an emergency measure. It would be better to have a stricter confidentiality provision that also describes the consequences of non-compliance.

In opinion 2016-14, the LOWI concluded that the Petitioner's representative, an attorney, had violated the duty of confidentiality by agreeing – after the petition had been submitted to the LOWI – to an interview with a national newspaper, mentioning the LOWI procedure in it and by subsequently publishing said interview on his firm's website. The representative claimed that the research institute had itself infringed the duty of confidentiality by issuing a press release. The LOWI rejected this argument: the research institute published the press release before it had learned of the petition being submitted to the LOWI. In addition, a good employer must respond to public accusations that staff members have violated the principles of scientific integrity.

Opinion 2015-11 identified another loophole in the provision as it now stands. The Petitioner disclosed his accusations before he submitted a petition to the LOWI. Strictly speaking, the confidentiality provision had not been infringed; after all, it only goes into effect once the petition has been submitted. Nevertheless, the LOWI ruled that the Petitioner had shown improper conduct by disclosing his accusations and then initiating complaints proceedings immediately afterwards.

In opinion 2016-01, concerning a 'self-plagiarism' case that had already attracted considerable publicity, the university Board decided to publish the entire report of its provisional decision without anonymising it. The Board also enforced its provisional decision immediately. Since the investigation of the Petitioner's publication conduct was already common knowledge, the LOWI later ruled that there was no reasonable purpose to publishing an anonymised version of the decision, although a summary of the report would have sufficed. Boards customarily wait to take, and publish, a final decision until the deadline for appealing to the LOWI has passed without a petition being submitted, or until the LOWI's opinion has been issued. This guarantees that the LOWI's opinion will serve a meaningful purpose. One important aspect of this controversial provisional decision was that the Board had decided to publish its report in non-anonymised form. If the LOWI had issued an opinion contrary to this decision, the premature enforcement of the decision would make it impossible to implement it.

Final remarks

I have sketched a number of important procedural issues, drawn some comparisons, and indicated how we might learn from one another. I found it very instructive to study the VCWI Regulations. They have taught me a great deal, and at just the right moment, when we are reviewing our own regulations. Thank you for this.