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## **EUROPEAN SOCIAL CHARTER**

10<sup>th</sup> National Report on the implementation of the  
European Social Charter

submitted by

### **THE GOVERNMENT OF THE NETHERLANDS**

- Follow-up to Collective Complaints 90/2013, 86/2012, 47/2008
- Complementary information on Article 7§9 (Conclusions 2015)

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**CYCLE 2017**



# **THE EUROPEAN SOCIAL CHARTER**

## **The Netherlands' Twenty-ninth Report**

Simplified report 2016

## **Report**

made by the Government of the Netherlands in accordance with Article C of the Revised European Social Charter, on the measures taken to give effect to the accepted provisions of the European Social Charter.

This report does not cover the application of such provisions in the non-metropolitan territories to which, in conformity with Article L they have been declared applicable.

In accordance with Article C of the revised European Social Charter, copies of this report have been communicated to:

- Netherlands Trade Union Confederation (FNV)
- National Federation of Christian Trade Unions in the Netherlands (CNV)
- Trade Union Federation for Professionals (VCP)
- the Confederation of Netherlands Industry and Employers (VNO-NCW) and MKB Nederland

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# **I Information on the follow-up given to the decisions of the European Committee Social Rights relating to the collective complaints**

## **1. Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, decision on the merits of 20/10/2009, violation of Articles 31§2 and 17§1.c.**

In the reports submitted by the Netherlands on 29 October 2015 (28th report) and on 20 November 2014 (27th report), the Dutch government explained that children unlawfully present in the Netherlands are provided with shelter for as long as they are in its jurisdiction. The Dutch government is therefore of the opinion that the situation is in conformity with Article 31§2 and Article 17§1.c.

The ECSR's final second report on the non-accepted provisions of the ESC of the Netherlands (June 2016) lists the DCI-complaint in the category 'complaints where the Committee has found a violation which has not yet been remedied'. However, in Conclusions 2015 (pages 36, 62) the Committee recalled that the follow-up as regards the complaints DCI, CEC and FEANTSA will be made in Conclusions 2016.

The Dutch government therefore fails to understand why the DCI-complaint is not mentioned in the same category in the final second report as the CEC and FEANTSA complaints, i.e. 'complaints where the Committee has found a violation and where progress has been made but not yet examined by the Committee'.

## **2. European Federation of National Organisations Working with the Homeless (FEANTSA) v. the Netherlands, Complaint No. 86/2012, decision on the merits of 02/07/2014, violation of Articles 31§2, 13§§1 and 4, 19§4(c) and 30**

### Access to shelter

As described in the previous ESC-report (2015) the State Secretary for Health, Welfare and Sport has requested the Netherlands Institute of Mental Health and Addiction (Trimbos Institute) in 2015 to carry out a re-assessment of the access to shelter to gain insight in the results of the actions aimed at improving access to shelter in practice. The results show that access to shelter has improved considerably. However, it has not yet improved enough. Therefore the State Secretary has sent the local results of the re-assessment to the municipal councils and has asked for a reaction. These reactions are expected in autumn 2016. The State Secretary will follow the developments closely.

In 2016, the Netherlands' Ministry of Health, Welfare and Sports gained information from the municipalities responsible for shelter about the most important developments in the sector. The group of homeless people due to economic reasons is increasing. Families and young adults are part of this group. Municipalities are adjusting the traditional forms of shelter to the needs of this specific group, which consists mainly of housing and financial aid and not primarily of care. This is done in different ways, taking the local situation into account. Examples are the development of motels specifically for this group, offering support in shelters that are adjusted to their needs and by arranging agreements with housing corporations about the housing available for this group.

### Quality

As requested the Association of Netherlands Municipalities (VNG), the Federation of Shelters and other stakeholders have developed a set of quality standards for community shelter services, with specific standards for children and young people. Municipalities and providers of care are positive about this set of quality standards. In the next period this set can be used as input for the arrangements between municipalities and providers of care about the support that is to be provided to the target group.

### Monitoring

As a matter of principle all local and regional authorities responsible for shelter keep track of information about the number of requests for shelter and the number of clients moving in and out of shelter. This is important to note, since regional authorities are responsible for providing shelter and care to the homeless, under the control of the city councils. They keep track of this information in different forms, which is why it is not possible to simply aggregate these local numbers to a national one. Therefore, in partnership with the VNG the possibilities for improving aggregated information on shelter and homelessness will be explored in 2016.

Regarding all other relevant information, the Netherlands' government refers to the ESC-report 2015.

### **3. Conference of European Churches (CEC) v. the Netherlands, Complaint No. 90/2013, decision on the merits of 01/07/2014, violation of Articles 13§4 and 31§2**

In the resolution of 15 April 2015 on the CEC-complaint, the Committee of Ministers explicitly refers to the limitation of the personal scope of the European Social Charter.<sup>1</sup> It thus endorses the position adopted by the Netherlands during the procedure that aliens who are not lawfully residing within the territory of a State Party, do not fall within the scope of the Charter. It is also worth noting that the resolution adopted by the Committee of Ministers does not include a call to comply with the ECSR's report but only a neutral request to report on 'any possible developments' regarding this issue. This underlines the fact that neither the report by the ECSR nor the resolution of the Committee of Ministers give rise to an obligation to provide unlawfully residing aliens with accommodation and other services unconditionally.

In the report submitted by the Netherlands on 29 October 2015 (28th report) the Netherlands' Government provided an English translation of the letter of 22 April 2015 to the House of Representatives.<sup>2</sup> This letter explains the system which is in place to provide shelter to aliens with and without legal stay. The current system ensures that no alien is forced to live on the street. Furthermore, the letter explains that the Netherlands' Government, in cooperation with municipalities, seeks to improve the effectiveness of its return policy within the current system. The central government and the municipalities are negotiating an administrative

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<sup>1</sup> Operative paragraph 3 of the resolutions.

<sup>2</sup> Amnesty International submitted comments on the 28th report of the Netherlands to the European Committee of Social Rights, which comments were forwarded to the Government by letter of 13 April 2016 from the Council of Europe. The Government does not share Amnesty's comments that the system of reception facilities for aliens without lawful stay is insufficient, as the Government explains in the current report.

agreement on the reception facilities for unlawfully residing aliens. The administrative agreement should set out the implementation of the “pre-VBL phase”, as this preliminary phase is called in the letter of 22 April 2015. The “regular” restrictive accommodation (VBL) facilities already provide shelter to unlawfully residing aliens. In the VBL facilities, they receive assistance in arranging for their departure. These facilities also provide food, medical care and other services. A condition to staying in a VBL facility is that the person concerned must make a genuine effort to arrange for his or her departure. This condition does not apply in special circumstances, e.g. if it transpires that the person concerned cannot be held responsible for his/her refusal to cooperate on account of his/her mental state (see discussion of domestic case law below). No persons have as yet been admitted to the restrictive accommodation due to these special circumstances.

#### *Domestic case law*

In addition to this, the Netherlands’ Government refers to domestic case law of two highest Netherlands’ administrative courts on shelter for unlawfully residing aliens.

On 26 November 2015 both the Central Appeals Court and the Administrative Jurisdiction Division handed down rulings on the reception of unlawfully residing aliens.

The Administrative Jurisdiction Division’s judgment concerns the question of whether the State Secretary can oblige aliens to cooperate in their departure from the Netherlands as a condition for being allowed to stay in a VBL.<sup>3</sup>

The Administrative Jurisdiction Division held that neither article 8 of the ECHR nor the case law of the European Court of Human Rights (ECtHR) gives rise to a general obligation on the State to provide reception for an adult alien residing lawfully or unlawfully in the Netherlands. Referring to the case law of the ECtHR, the Administrative Jurisdiction Division observed that in exceptional cases the State may be compelled under articles 3 and 8 of the ECHR to provide accommodation for adult aliens residing unlawfully in the Netherlands.

The Administrative Jurisdiction Division concurred with the State Secretary’s view that the consequences of an adult alien’s choice to refuse to declare him/herself willing to cooperate in his/her departure – namely that the State Secretary then refuses to allow access to a VBL – is in principle his/her own responsibility if the person in question is residing unlawfully in the Netherlands and under section 61, paragraph 1 of the Aliens Act 2000 has a duty to leave the Netherlands of his/her own accord. However, from the point of view of due care, the State Secretary has to bear in mind that exceptional circumstances may apply which mean that he may not, a priori, attach the condition of cooperation in departure to the offer of accommodation. Such exceptional circumstances are present if it transpires that the person concerned cannot be held responsible for his/her refusal to cooperate on account of his/her mental state.

The Central Appeal Court’s judgment concerns the question of whether the municipality of Amsterdam is permitted to refuse to grant reception facilities to unlawfully residing aliens and

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<sup>3</sup> Administrative Jurisdiction Division, 26 November 2015 (case no. ECLI:NL:RVS:2015:3415).



refer them to a VBL for accommodation.<sup>4</sup> In the judgment discussed in the previous paragraph, the Administrative Jurisdiction Division ruled that unless exceptional circumstances are present, attaching conditions to the provision of accommodation is not in breach of positive obligations under the ECHR and the European Social Charter to provide shelter. Consequently, in the view of the Central Appeals Court, the municipality of Amsterdam is not obliged to provide shelter under the Social Support Act. The Court pointed out that it is up to the State Secretary to decide, in line with the assessment framework as set out in the judgment of the Administrative Jurisdiction Division, whether in an exceptional case access to a VBL should be granted without imposing the condition of cooperation in that person's departure from the Netherlands.

On 29 June 2016 the Administrative Jurisdiction Division held that the municipality of Amsterdam is not under a legal or international obligation to provide shelter to unlawfully residing aliens when the State Secretary of Security and Justice already offers accommodation in a so-called liberty restricting measure (VBL) facility.<sup>5</sup>

#### *ECtHR case law*

Furthermore, on 28 July 2016 the European Court of Human Rights (ECtHR) published its decision in *Hunde v. the Netherlands* (17931/16)<sup>6</sup>. This case concerned a complaint from a failed asylum seeker under Articles 2 and 3 of the ECHR about the denial of shelter and social assistance. The applicant further complained that the requirement to cooperate in his own deportation in order to receive social assistance as an irregular migrant amounted to treatment contrary to his human dignity. The ECtHR declared the complaint manifestly ill-founded and inadmissible.

The ECtHR does not regard the fact that admission to a VBL is subject to the condition that an applicant would cooperate in organising his departure to his country of origin, as such, as incompatible with Article 3 ECHR. The ECtHR reiterates that there is no right to social assistance as such under the ECHR. To the extent that Article 3 requires States to take action in situations of the most extreme poverty – also when it concerns irregular migrants – the ECtHR notes that the Netherlands authorities have already addressed this in practical terms, e.g. the possibility to seek admission to a VBL and/or the possibility of applying for a “no-fault residence permit”. The ECtHR concludes that it cannot be said that the Netherlands authorities have fallen short of their obligations under Article 3 ECHR by having remained inactive or indifferent.

#### *Conclusion*

In light of the above and given the existing reception options which are available to unlawfully residing aliens, the Government believes that it acts in conformity with its human rights obligations.

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<sup>4</sup> Central Appeals Court, 26 November 2015 (case no. ECLI:NL:CRVB:2015:3803).

<sup>5</sup> Administrative Jurisdiction Division, 29 June 2016 (case no. ECLI:NL:RVS:2016:1782 and ECLI:NL:RVS:2016:1783).

<sup>6</sup> European Court of Human Rights 5 July 2016, *Hunde v. the Netherlands*, 17931/16 (case no. ECLI:CE:ECHR:2016:0705DEC0001793116).

## **II For the accepted provisions concerning thematic group ‘Children, families and migrants’ (articles 7, 8, 16, 17, 19, 27 and 31): the information required by the European Committee of Social Rights in the event of non-conformity for lack of information (Conclusions 2015):**

**Article 7.9: To provide that persons under 18 years of age employed in occupations prescribed by national laws or regulations shall be subject to regular medical control**

### **ECSR-conclusions 2015**

The Committee takes note of the information contained in the report submitted by the Netherlands.

In its previous conclusion (Conclusions 2011), the Committee noted that there was no general mandatory medical examination for workers under 18 years of age and therefore concluded that the situation was not in conformity with Article 7§9 of the Charter. The Committee notes from the report that there have been no changes to this situation during the reference period. It therefore maintains its conclusion of non-conformity on this point.

As regards the situation in practice, the report indicates that in 2011, 20 collective agreements specified an age for undergoing periodic work-related medical examinations. In only four collective agreements, young workers under 18 are mentioned as a category eligible for medical examination. The report adds that in the construction sector, the social partners have an agreement for regular medical control for all workers. However, the report states that there are no data available on the actual use of the regular medical examination by young workers under 18 years of age.

The Committee recalls that, in application of Article 7§9, the law must provide for a compulsory full medical examination on recruitment and regular check-ups thereafter (Conclusions XIII-1 (1993), Sweden). The intervals between check-ups must not be too long. In this regard, an interval of two years has been considered to be too long by the Committee (Conclusions 2011, Estonia). Given that there are no data available on the use made by young workers of the opportunity to undergo medical examinations, nor on the intervals between medical check-ups, the Committee maintains its conclusion that the situation is not in conformity with Article 7§9 of the Charter on the ground that it has not been established that regular medical examination of young workers is guaranteed in practice.

#### *Conclusion*

The Committee concludes that the situation in the Netherlands is not in conformity with Article 7§9 of the Charter on the grounds that:

- there is no general mandatory medical examination for workers under 18 years of age;
- it has not been established that regular medical examination of young workers is guaranteed in practice.

## **Reaction of the Netherlands**

Article 7§9 of the ESC demands that persons under 18 years of age employed in occupations prescribed by national laws or regulations shall be subject to regular medical control. In the 23rd ESH-report (2010) the Netherlands has reported on the implementation of Article 7§9 of the ESC. Supplementary information was provided in November 2014.

In reaction, the ECSR concluded that this implementation is not in conformity with Article 7§9 of the ESC.

The Netherlands contests this conclusion. The Netherlands is of the opinion that, although having no general mandatory medical examination for workers under 18 years of age (non-conformity ground 1) and although their medical examination is not guaranteed in practice (non-conformity ground 2), we nevertheless fully meet the requirements of Article 7§9 ESC. The Netherlands does not agree with the implicit conclusion of the Committee that Article 7§9 ESC does require a general mandatory medical examination for workers under 18 years of age. According to the Netherlands the paragraph only requires to execute regular medical check-ups for employees *if they are employed in occupations prescribed by national laws or regulations*. This means *when they are performing work that is potentially dangerous or unhealthy*.

In the Netherlands it is not prescribed by national legislation or regulations for which occupations medical control is necessary. This because it is not the *occupation* that determines whether the work is dangerous or unhealthy, but the *kind of work*. And not the *medical examination* is guaranteed in practice, but *health and safety of young employees are guaranteed*. The Netherlands' approach to occupational safety and health for young workers, which goes *further* than what Article 7§9 ESC demands, is outlined below.

We discern two groups of young workers.

### **Young workers from 0 to 15 years.**

Instead of allowing young workers from 0 to 15 years to perform potentially dangerous or unhealthy work and monitoring them by regular medical checks, there is for this age group simply a ban on performing work that is (potentially) dangerous and/or unhealthy. On Article 3:2 of the Netherlands' Labour Hours Act (Atw) two regulations are based: one for children from 0 to 12 years (BOVK) and one for children from 13 to 15 years (NRK), stipulating in detail which kind of work is allowed. In general, in both cases the only work that is allowed is 'labour of light character', which is defined in Article 1:1 NRK as 'activities that are not too heavy, not dangerous and without health risk'.

(Children from 0 to 12 years may not work at all, with one exception, i.e. labour of light character that is related to an artistic or cultural performance. This is allowed only for a limited number of days per year and only on the basis of an individual exemption supplied by the Netherlands' Labour Inspectorate. Children from 13 to 15 years may perform also other kinds of work, as long as it can be considered 'labour of light character' and performed outside school hours, like baby-sitting, car-washing or helping in a supermarket or restaurant). This approach is more far-reaching and more effective than medical checks afterwards, since it is a preventive approach. Given this, the Netherlands is of the opinion that for young workers from 0 to 15 years we completely meet the requirements of article 7§9 of the ESC. Since this group of young workers will never perform work that is potentially dangerous or

unhealthy, there is no reason to establish a mandatory regular medical examination for this group. Their health and safety are ensured in a better way.

### **Young workers of 16 and 17 years.**

Theoretically, young workers of 16 and 17 years of age may be involved in potentially dangerous or unhealthy work. In practice however, this is, in the Netherlands, not the case. The vast majority of this group consists of school-going youngsters, for whom a paid job is just a part-time job-on-the-side or for whom the work is part of their vocational training (in a week theoretical lessons are alternated with practical work). Whatever the content of the job, it is as a rule part-time work, performed during a limited number of hours per week. In addition, the safeguards already mentioned in our previous report are applicable, based on the Dutch OSH-legislation. First of all the Working Conditions Decree (Arbobesluit) forbids several kinds of work to be performed by working youth under the age of 18 years, like working with toxic compounds.

In other cases it demands that the work may only be executed under supervision (Articles 4.46, 4.105, 4.106, 6.27, 7.39 or 9.36, Arbobesluit). In addition to that, when young workers of 16 and 17 years of age are employed, the employer is obliged to perform an extra risk assessment, focused on the risks specifically connected with this age group, like risks following from lack of experience or knowledge (Article 1.36, Arbobesluit). If this assessment reveals this kind of risks, Article 1.37, Arbobesluit requires that supervision by older and more experienced colleagues is organised in such a way that any danger is prevented. If that is not possible, the work may not be performed. And, finally, if the work is performed under sufficient supervision, the employer is obliged to offer adequate medical check-ups (Article 1.38, Arbobesluit). In addition, it should be mentioned that over a long period of time we have not received any signal that the health or safety of youngsters under the age of 18 years is being jeopardised as a result of occupational activities.

### Conclusion

*The Netherlands is convinced that the health and safety of young workers under 18 years is efficiently ensured and that we fully comply to the requirements of Article 7§9 ESC.*