

## **First World LGBT Conference for Criminal Justice Professionals**

### **Theme: “To connect and inspire”**

Final version 4 August 2016 12.00 hours

Date: Thursday 4 August 2016, 13.30-15.00 hours  
Location: Beurs van Berlage, Amsterdam  
Speaker: W.J. (Willem) Nijkerk, LL.M., Public Prosecutor  
Subject: LGBT persons and Dutch Criminal Law  
Key message: The Public Prosecution Service, too, will continue to exert itself for equal rights and liberties for LGBT persons

#### **I. Introduction**

I'm very proud to be here!

Also on behalf of the Amsterdam Prosecution Service and the 80 prosecutors employed there, I would like to extend a warm welcome to you all!

My name is Willem Nijkerk and I work as a senior Public Prosecutor here in Amsterdam. I have done this for many years and I have always enjoyed doing this. I am proud of serving the public interest with my work and especially of doing so in such a beautiful and colourful city as Amsterdam.

In the next one-and-a-half hours I shall tell you about:

(II.) the Dutch Prosecution Service and the part it plays in enforcing equal rights for all people. It does so in conjunction with its National Expertise Centre Discrimination;

I shall tell you about (III.) the way the Netherlands have developed judicially in the field of equal rights.

When doing so I shall point out the significant role played by one Chief Public Prosecutor in how same-sex marriages became possible;

I shall finish with (IV.) Orlando, the consequences of such an attack for the governing of the city of Amsterdam and, in relation to this, LGBT networks with which the Prosecuting Service cooperates.

#### **II. The Prosecution Service**

The Dutch criminal justice system differs in essence from the Anglo-Saxon legal system. Thus, in the Netherlands we do not have jury law. Justice is solely administered by professional judges appointed for life, who are therefore independent. The role of the Public Prosecutor is also wholly different. This is because a Public Prosecutor in the Netherlands has a very active role in tracking down criminal offences: he is even in charge of this. In other words: he is in a so-called relationship of authority with the police. The Public Prosecutor will, for example, determine at an early stage which criminal offences will or will not be investigated by the police. The Public Prosecutor also supervises the investigation. The Prosecutor himself is also a criminal investigator, albeit with many more powers than a police officer.

In the case of a bike theft the investigation usually does not need a lot of supervision, the police are more than capable of doing that. But in more serious cases, which we sometimes refer to as High Impact Crimes, a Dutch Public Prosecutor is far more actively involved. Often the Prosecutor will visit the scene of the crime.

He will join searches of premises and regularly consults with the police to discuss the progress of an investigation. And eventually, a Public Prosecutor will be in court to press charges in criminal cases.

The Netherlands has about 800 Public Prosecutors, distributed across 10 districts and two national departments. Amsterdam has about 80 Prosecutors. Public Prosecutors belong to the judiciary, and are therefore magistrates. This is the reason why in court they sit at a table near the judge on a dais and not beside the defence lawyer and defendant opposite the judge. A Public Prosecutor in the Netherlands serves many interests. Of course these include that of the victim and society as a whole. But also that of the Prosecution Service and that of the defendant.

Put in broad strokes: it is the responsibility of the Prosecution Service to enforce legal order by criminal law. And that legal order starts off with Section 1 of our Constitution that is so significant within the scope of this conference:

*"All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted."*

It is clear that, in The Netherlands, Gay Rights are Human Rights. As a consequence of Section 1 of the Constitution, the Dutch Criminal Code includes a number of sections that make discrimination on the basis of race, religion or belief, heterosexual or homosexual tendencies, or physical or mental disabilities, punishable.

I will restrict myself to stating that these concern in total six specific sections from law<sup>1</sup>.

Prosecution for violation of the prohibition of discrimination has a high priority. Apart from these specific discrimination sections, there are also "general" criminal offences, as we call these, which are committed from a discriminatory angle. For example: physical violence against LGBT persons or vandalism of their properties, because they are LGBT. In his demand against the defendant at the trial, the Public Prosecutor will take this discriminatory aspect into account. As a rule the Prosecutor will demand a higher sentence. I shall come back to this later.

Each of the ten Public Prosecutor's Offices has a discrimination Prosecutor. This is a Public Prosecutor specialized in the criminal tackling of discrimination.

In order to carry out its tasks in the field of tackling discrimination even better, the Public Prosecution Service has had the National Expertise Centre Discrimination at its disposal since 1998. This Centre is specifically responsible for the subject of discrimination. It has two Public Prosecutors and three policy advisers. It is part of the Amsterdam Prosecutor's Office. The purpose of the National Expertise Centre Discrimination is to optimize criminal enforcement with respect to discrimination. This means formulating points of view, advising, making policies, tracking down, prosecuting and reporting. Put more concretely, the Centre carries out the following tasks:

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<sup>1</sup> Sections [137c](#), [137d](#), [137e](#), [137f](#), [137g](#) and [429quater](#) Criminal Code

1. Assessing discrimination cases with respect to their legal substance;
2. Providing information to, advising and stimulating Public Prosecutor's Offices across the country;
3. Coordinating current investigations/prosecution;
4. Establishing, maintaining and organising expertise in the field of discrimination;
5. Keeping a registration system of discrimination cases up to date;
6. Acting as representative of the national Prosecution Service;
7. Organising national consultations of the discrimination Public Prosecutors and Solicitors-General;
8. Contributing to the development of the national Prosecution Service policy with respect to fighting discrimination.

In 2015 the Expertise Centre issued 130 opinions on cases of discrimination.

On an annual basis the Prosecution Service will receive between 100 and 200 cases of violations of the discrimination sections. The far majority of these cases concern violation of the prohibition to make insulting remarks about a group of persons, due to one of the grounds of discrimination: race, religion or belief, heterosexual or homosexual tendencies, or physical or mental disabilities. Often these insults are verbal. Race is the most frequent ground for discrimination, followed by religion (especially anti-Semitism) and in third place homosexual tendency. Most defendants are white males.

This autumn the Expertise Centre expects to publish a report about the so-called crimes under ordinary law committed with a discriminatory aspect.

### **III. Development of equal rights in the Netherlands**

When I was born, in 1969, homosexuality was still forbidden by law. But nowadays The Netherlands, and Amsterdam specifically, have a good reputation in the field of LGBT rights and liberties.

LGBT persons have the same rights as everybody else.

Homosexuality is visible across the entire Dutch society and is accepted in large sections of the Dutch population. There are police officers, judges, Public Prosecutors and politicians who are gay and nobody needs to keep this concealed.

Unfortunately, in recent years, there have been several incidents of hate crimes against LGBT's, making it difficult to tell how tolerant we are at this moment. I will come back at this. But first, let me make a short historical detour<sup>2</sup>:

For the duration of a century, between 1811 and 1911, gay contacts were not punishable in the Netherlands. This was thanks to Napoleon, who had introduced the French Criminal Code here in 1811. This did not include punishability of homosexuality. Prior to that time, from 1730 onwards, there had indeed been waves of fierce persecutions of 'sodomites' as gay men and women were referred to at the time. There were at least 800 trials, the large majority of which were against men. Roughly 200 so-called sodomites were given the death penalty. There is no other place in Europe where persecutions were so vehement. This is not something to be proud of.

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<sup>2</sup> Source: "Save me from the lunacy of law. Homosexuality and criminal law in the Netherlands" by Gert Hekma.

In 1911 the prohibition of homosexuality under Section 248bis was included in the Criminal Code in the Netherlands. This Section remained in the law until 1971. The Section made gay contacts between adults and minors (with an age limit of 21 years) punishable. The purpose of the act was to protect under-age boys against homosexual men of age. The maximum prison sentence amounted to four years. In the sixty years that the Section applied, five thousand homosexuals were brought before the court on the basis of this Section, the large majority of whom were male. Over half of these defendants were found guilty. Three quarters of them were sent to prison for an average term between three to six months. The number of cases peaked between 1947 and 1965.

This punishability had of course great consequences for personal lives. The vice squad compiled card indexes and photo albums of presumptive homosexuals. Employers, parents and landlords were informed about somebody's homosexuality.

Frequently, this resulted in dismissal, cancellation of rent or disrupted family relations. The vice squad would picket urinals and in front of houses. They would collect information from family or acquaintances and raided gatherings in living rooms, if they suspected the presence of minors. Prosecution continued right up to the end. There were still ten criminal cases tried in the first four months of 1971. Again, this is not something to be proud of.

On 12 May 1971 Section 248bis was abolished.

In 1977 the first major gay demonstration took place, the predecessor of Pink Saturday. Nowadays Pink Saturday has changed into a parade more intended to show the diversity of gays, lesbians, bisexuals and transgenders. And thus to increase understanding.

In 1987 the first gay monument in the world was unveiled here in Amsterdam, at the Westermarkt. It is at walking distance from where we are now. If you have not yet visited it, I would like to recommend your doing so.

And if you do, you might as well visit the house close by of perhaps the best known victim of discrimination: Anne Frank's.

In 1991 discrimination on the basis of homosexuality was made punishable in the Criminal Code. This means that there is a period of 20 years between the abolition of the prohibition of homosexuality and the introduction of the penalization of discrimination on the basis of homosexuality.

In 1996 the first Canal Parade was held.

In 1998 the Gay Games were held in Amsterdam, for the first time outside of America. The opening was done by the mayor of Amsterdam. An estimated number of roughly 200,000 visitors came from all over the world. This was a record number that has never been exceeded since.

And then, very importantly, as of 1 April 2001 as the first country in the world: opening marriage to persons of the same sex (Act on opening marriage). This is also, somewhat unjustly, referred

to as gay marriage. The first four weddings were celebrated shortly after midnight on 1 April 2001 by the Amsterdam mayor himself, here in the capital.

The realization of this act had been preceded by years of lobbying by, among others, Boris Dittrich, former judge, member of Dutch Parliament, and speaker at this conference and by Henk Krol, founder of the Gaykrant. But perhaps the most significant role in realizing this act, was performed by an old colleague of mine: the former Chief Public Prosecutor in Breda, Jan Wolter Wabeke. And again I shall make a small detour, this time to this man<sup>3</sup>.

In 1982 he became a Public Prosecutor and subsequently he held, among other positions, that of cantonal judge, Solicitor-General and Chief Public Prosecutor. Nowadays he is justice with the The Hague Court of Appeal.

Wabeke has been with his husband since 1977. From start on they opted for complete candour, also in their working environment. His partner was always introduced as such to members of the judiciary, police, mayors, lawyers and relations at the Department for Justice. Obviously, in those first years they would often encounter awkward reactions, surprise or even opposition. It is more important that specifically those in charge with the Prosecution Office, left his career possibilities entirely open, without holding back.

Under these circumstances Wabeke dared to involve himself in the debate about full equal rights for gays and lesbians. He then decided to promote marriage, which was then still referred to as a cornerstone of society, as a right to be granted to that group. He regarded offering that possibility, of opening civil marriage to combinations other than man/woman, as a most important opportunity for acceptance and integration and equal rights.

For this purpose he drafted as early as 1987 a possible amendment of the Civil Code and also a scenario for twelve years of actions, procedures and lobbying. In 2001 this resulted in a legally universal marriage, also thanks to the support of politician Boris Dittrich. Since then a legally universal marriage has been gradually fanning out all over the world.

Ladies and gentlemen, I am proud to say that this man, Jan Wolter Wabeke, this colleague Prosecutor, has played such an important role.

After 1 April 2001, 16 countries in the world followed the Dutch concept with some form of civil marriage to combinations other than man/woman.

The development of equal rights has not yet been completed. Last month the Dutch Minister of the Interior announced that discrimination of transgenders will be explicitly prohibited by law. At this point it is still unclear when that amendment will be realized, but again it is a step in the right direction.

Nevertheless, ladies and gentlemen, we're not there yet!

A year ago I participated in a debating night within the scope of Gaypride 2015. I was shocked by the stories of LGBT persons present, about floods of abuse, threats and even violence. This seems to be on the rise again over the past few years. LGBT persons indicate that they feel less at ease to walk hand in hand on the streets or to kiss each other in public. And this is something that upsets me as a Prosecutor and that I am not proud of as a citizen of Amsterdam.

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<sup>3</sup> source: email by J.W. Wabeke dated 13 July 2016 and [www.janwolterwabeke.nl](http://www.janwolterwabeke.nl)

At the request of the Ministry of Education, Culture and Science, opinions of and towards LGBT persons have been investigated. Last May the first LGBT-monitor<sup>4</sup> was published. The most important conclusions are as follows.

Dutch public opinion towards LGBT persons is largely positive, but the life situation of LGBT persons is worse than that of heterosexual citizens in the areas of work and safety. The perceived and actual safety of LGBT persons, especially lesbian and gay persons, compares negatively with heterosexuals. Although the differences are often not large, they are consistent across all areas. Lesbian and gay citizens less often experience social cohesion in their neighbourhood. And feel less safe both in their own neighbourhood and in public places (e.g. where young people gather or on public transport).

They experience more lack of respect from strangers and from staff of private companies and government agencies. They have more experience of violence, and especially of threatening behaviour. Bisexual citizens experience more problems especially in relation to the subjective safety in their personal sphere. They feel less safe at home and more often encounter lack of respect from acquaintances. They are also more often victims of cyber-bullying.

Between 2012, 2013 and 2014 there was a number of small developments in perceived safety, and these are largely the same for LGBT and heterosexual persons. The differences in victimhood and perceived safety between these groups are not due to socio-demographic or socio-economic characteristics.

Let's go back now to the role of the Prosecution Service. How does the Prosecution Service handle cases of insult, threat and violence against LGBT persons? Those in charge of the Prosecution Service at a national level have laid down rules for this<sup>5</sup>. These rules for the careful treatment of discrimination cases, apply both to Public Prosecutors and the police.

Criminal law offers an outstanding possibility to hold people accountable in public and to punish them. Discrimination cases often attract a lot of attention from the media. By doing so, they offer the Prosecution Service a good opportunity to bring into the open how the criminal justice system contributes to tackling the problem of discrimination. And sometimes, we as Prosecutors, seek that publicity, I shall come back to this when discussing a specific case.

One more fundamental question is whether criminal law can solve discrimination in society. In my opinion criminal law is not able to do so, just as little as criminal law can prevent other offences from being committed. However, punishing certain forms of discrimination does send a clear message both to possible perpetrators and to possible victims. The message being that discrimination is not tolerated and is punished. And this also indicates the relevance of bringing discrimination cases, which can fulfil this warning function, out in the open. However, many other agents in the social sphere should of course also take their responsibility in dealing with discrimination.

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<sup>4</sup> Sociaal en Cultureel Planbureau: LGBT Monitor 2016. Opinions towards and experiences of lesbian, gay, bisexual and transgender persons. ISBN 978 90 377 0787 8 Also available online: [http://www.scp.nl/Publicaties/Alle\\_publicaties/Publicaties\\_2016/LHBT\\_monitor\\_2016](http://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2016/LHBT_monitor_2016)

<sup>5</sup> "Instruction Discrimination by the Council of Solicitors-General" (2007A010), soon to be replaced by a more recent instruction.

I said I would come back to so-called general criminal cases with a discriminatory aspect. When doing one's job as a Prosecutor it is important to see precisely what is in the matter in a concrete case. In the Netherlands we often quote in relation to this subject 'the stone through the window'. This may mean different things depending on the context of the case. Fortunately, it is often 'just' boyish mischief and an 'ordinary' case of vandalism. But sometimes there is much more behind it. It is important for the police and the Prosecution to recognize when that stone through the window is not a prank, but for instance a deliberate attempt at bullying a gay couple to move away from the neighbourhood. It is sad to say this still happens also in the Netherlands, and also here in Amsterdam. Harassing and bullying LGBT persons occur far too often and sometimes even lead to people moving away. The Prosecution Service acts against this in cooperation with the police and the municipality.

And if this becomes a case that is brought before the court, the Prosecution Service will demand a higher sentence, sometimes even double, if the action concerned was deliberate.

In order to prosecute these kinds of general criminal cases with a discriminatory aspect properly, it is important that the police pay attention to this at an early stage of the investigation. If this does not happen, chances are that this aspect is insufficiently put forward in the police record and then the increased demanded sentence will not be granted by the court. It is important for the police to have a keen eye for this when the offence is reported to the police; not all victims might be aware themselves of the possible discriminatory aspect of the events. The police should ask probing questions on this. In Amsterdam we are happy and grateful for the existence of the police network 'Pink in Blue'. The police officers of that network have been trained specifically and are thus used to ask probing questions with respect to these issues and to recognize discriminatory aspects. The Prosecution Service also frequently consults with 'Pink in Blue' and this helps in representing the correct context of cases.

During trainings given to Prosecutors and police officers, indications of discriminatory aspects are explained and why it is important to clarify these. Such an indication might be found in circumstances related to the victim: the person belongs to a minority group (for instance an ethnic, religious or sexual minority), or is related to a person belonging to a minority. A concrete example of this would be assault of two men walking hand in hand, and who can thus be recognized as gay, which might be an indication that this is the reason why they were 'selected' by the perpetrator.

I shall now come back to a case I announced earlier. This concerns an example of a case that really happened, of assault against two gay men<sup>6</sup>.

Two gay men were sitting in a park here in Amsterdam a couple of years ago. The perpetrator approached them and asked if they were gay. When one of the men confirmed this, the perpetrator yelled: 'Fucking gays' and 'I will show you what we do with gays'. Subsequently he kicked one of the men in the head, and started kicking and beating the other man as well. When the police arrived, the perpetrator insulted the police and violently resisted arrest. He was convicted in first instance but lodged an appeal. On appeal he was sentenced to four months in prison, of which two months were suspended.

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<sup>6</sup> Court of Appeal Amsterdam, the Netherlands, December 15, 2011, no. 23-003278-11, National Jurisprudence Number (LJN): BU8317

In the Netherlands, there is no provision in formal law for the judge to refer to in case of bias motivation. However, the specific circumstances of the case can be a reason for the judge to impose a higher penalty.

In this case, the words used by the perpetrator were prosecuted as insults. As this could easily be proven, it also served as the basis for the judge to impose a higher penalty because of bias motivation.

Before the proceedings in court started, we issued a press release stating that a case of violence against homosexuals was to be brought before the court, that we take this kind of crime seriously, and that a Public Prosecutor will demand a higher sentence if there is a bias motivation. The Public Prosecutors, both in first instance and in appeal, have stressed the importance of combating crimes with a bias motivation committed against homosexuals.

The Court of Appeal mentioned in the verdict that the perpetrator committed serious crimes. He attacked the victims without any provocation, only because of their sexual orientation. He attacked them in an aggressive way in public. The court judged the actions, motivated by discriminatory views, as such that must provoke the most severe condemnation. The court further mentions that it considers the penalty imposed by the district court too low and that it will double the penalty imposed.

When the suspect was to be prosecuted in first instance, the Public Prosecutor in this case contacted the victims. He asked them if they agreed with the use of the case to generate publicity about the zero tolerance policy of the Public Prosecution Service when it comes to bias motivated crimes. The Public Prosecution Service chose this case for publicity because the evidence was clear, and the goal was to signal to society, both to potential victims and to potential perpetrators, that bias motivated crimes are taken seriously by the Public Prosecution Service and will be punished severely. The victims consented, on the condition that their names would not be made public. As this would not have been done anyway, the Public Prosecutor promised the victims that they would remain anonymous outside the courtroom.

Subsequently, a press release about the case was issued, and the events of the prosecution and the conviction were covered by several newspapers and other media. In second instance, the same thing happened.

Generating publicity in cases where it is likely that there will be a conviction, has become the standard method in Amsterdam and has since been employed in several cases.

The national head of the Public Prosecution Service, Mr. Herman Bolhaar, has reiterated the circumstances of the case on several occasions aimed at promoting the fight against discrimination or at helping to strengthen LGBT persons when they are confronted with difficult situations, and to gain their trust.

This case is nowadays used as a case study for Public Prosecutors who specialize in prosecuting discrimination cases.

#### IV. Orlando

I should like to conclude my contribution to this conference by referring to the terrible attack on LGBT persons in club Pulse in Orlando on 12 June this year. Orlando, 7.300 kilometres or 4.500 miles away from Amsterdam. So far away and yet so close by. It goes without saying that such an attack also affects the Dutch, including the entire Amsterdam Law Enforcement. Immediately on the day following the attack, two meetings were organized with a large number of representatives from the Amsterdam LGBT community at the initiative of the mayor of Amsterdam, together with the superintendent of police and the Chief Public Prosecutor. To listen. To hear what such an attack does to the LGBT community. To share experiences, but also worries and fears.

To discuss extra measures to have a large event such as Europride 2016 continue to take place without trouble. Or, in other words, safely.

Both Amsterdam LGBT interest groups, organisers of LGBT events and parties and owners of LGBT cafes and clubs were present. I will mention the names of a couple of them, just to show you that in the Netherlands, there are lots of organisations and nightlife spots for LGBT persons, with a great variation among them, that exist quite in the open and can sit down with the municipality, the police and the Prosecution Service:

-COC (Dutch Society for the Integration of Homosexuality)

-HVO Querido (an organisation that renders assistance and services to people who have difficulty living on their own, are homeless or have other problems)

-National Network of Bisexuals

-ProGay (official organiser of the Gay Pride)

-Paradiso (venue for pop music and culture)

-Eagle/Dirty Dicks (gay fetish bar)

-Gaybars Montmartre, De Trut, Bar CHEZ

I attended the second meeting and was struck by the huge commitment. The wish to have ordinary life continue as much as possible, despite the fear that an attack such as happened in Orlando could take place here, too. These kind of network meetings connect and inspire.

Ladies and gentlemen, I would like to conclude.

We have come a long way. Until 45 years ago homosexuals were prosecuted in the Netherlands. For the mere fact that they fell in love with persons of the same sex. The government regarded that as a crime. The purpose of that law was to protect underage boys. In Dutch criminal law, sex between adults and minors still is forbidden because of protection of the minors. But there is no longer a distinction between homosexual acts and heterosexual acts. The Dutch government has been improving the position of homosexuals from the 90's in the last century onwards. By penalizing violence and hatred against homosexuals. All over the world the acceptance of LGBT persons is on the up and up.

But there is still a lot left to be done. According to The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) homosexual acts are punishable in 73 countries. In a number of those the penalty for this is even capital punishment. And even in the Netherlands intolerance towards LGBT persons seems to be on the rise again. We will not accept being set back in time, however. In these unsettling times it is essential to sit down and talk with each other and continue doing so. Networks are necessary. This is proven time and again. They connect and inspire! In

that respect the Amsterdam Prosecution Service is delighted with various networks within the Amsterdam police: Pink in Blue, the Moroccan network, Jewish network, Antillean and Surinam network. In this way we can help and reinforce each other.

And as a Public Prosecutor in Amsterdam, I will do whatever I can, to strive for equal rights, liberty and safety for LGBT persons.

It was a great honour for me to be able to address you here. I wish you a good continuation of this conference and a wonderful time in colourful Amsterdam.

Willem Nijkerk

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