



**OMBUDSMAN**

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## **FINAL REPORT**

(Article 21 sub 1 National Ordinance Ombudsman)

**Complainant:** Social Economic Council (SER)  
**Date complaint filed:** 22 Augustus 2019  
**Complaint no.:** 2019/0259

**Minister of General Affairs,** [REDACTED] (Min AZ)

**Complainee:** Secretary General, Ministry of General Affairs, [REDACTED] (SG AZ)

### **Summary of Complaint:**

By letter dated 1 August 2019 the SER addressed the Min AZ concerning a delay in review of a proposed amendment to the National ordinance of SER by the department of Legal Affairs and Legislation (JZ&W), despite several requests to the SG AZ to provide insight into said legislation. The SER claims the withholding of insight into their legislative products by the SG AZ is, in contravention of the applicable Service Level Agreement (SLA) and laws, hindering the SER from functioning as an independent body. They requested the Min AZ to give JZ&W an instruction so that they may receive their legislation.

The SG AZ responded by letter of 14 August 2019 stating that an investigation was done on the legislation submitted by SER. In his letter he explained why the review of SER's amendment to their national ordinance took so long and provided the latest review as an attachment.

The SG AZ continued the letter with an outline of the results of another legislation: *'lbham tot vaststelling van de geldelijke voorzieningen van de leden, hun plaatsvervangers en van de secretaris van de SER, in verband met de wijziging van de salaris van de secretaris'*.



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The SER in turn responded by letter of 16 August 2019 refuting the factual presentation of the different legal trajectories by the SG AZ, they specifically disputed the title of the national decree, claiming that by doing so the SG AZ gave the impression that the SG SER is trying to change the national decree for his personal gain. The SER believes that the SG AZ is trying to bring the integrity of the SG SER and by extension the SER in question. The SER requested the SG AZ to substantiate his claims with evidence or to provide the SG SER and the SER with an apology by 21 August 2019.

Upon filing his complaint with the Ombudsman on 22 August 2019 the SER alleged that the SG AZ, by documenting these false statements, is attempting to intentionally cast doubt on the integrity of the SG SER. The SER requested that the Ombudsman start an investigation into the allegation of the SER that the SG AZ with his actions gave the false impression that the SG SER is trying to amend the national decree for his own personal gain.

**Conclusion:**

The core task of the Ombudsman is the investigation of *Propriety* applied by government bodies and government agencies in their relationship and dealings with the public. The scope of *Propriety* goes beyond the law; it reflects the norms expected from government in executing the laws, policies and established procedures. Government is expected to be open and clear, respectful, involved and result oriented, honest and trustworthy.

***The complaint filed concerned 2 main questions:***

- A) Did the SG AZ discredit the credibility of the SG SER and the SER by his statements in his letter dated 14 August 2019 to the Chairman of the SER?*
- B) Is the SG AZ structurally undermining the independence of the SER?*

**A) Did the SG AZ discredit the credibility of the SG SER and the SER by his statements in his letter dated 14 August 2019 to the Chairman of the SER?**



**Landsverordening SER (Lvo SER)**

Considering:

- The confirmation letter d.d. 18 February 2019 from the SER to Min AZ with a few signatures, cannot objectively be seen as more than a confirmation of receipt; it cannot serve as a corroborative document of the approval of the proposed amendment by the Min AZ.
- The intervals between the 1<sup>st</sup> and the 3<sup>rd</sup> review took one (1) month or less while the last review between 1 April and 14 August 2019 took 4.5 months to be returned to the SER. While the Ombudsman understands the explanation provided pertaining to why legislative review may vary in time, the timeframe of the 4<sup>th</sup> review took very long. The Ombudsman will refrain from making judgement on the length of time it takes for the legislative review because the Ombudsman considers the reason given for the variation in timeframe to be plausible and such an analysis of this goes beyond the scope of the investigation. However, notice is taken that JZ&W provided the SG AZ with the 4<sup>th</sup> review to pass on to the SER since 22 May 2019<sup>1</sup>. This is a period of 4.5 months. The standard of *promptness* has not been observed.
- The list of reasons mentioned by the SG AZ as to why the 4<sup>th</sup> review wasn't returned to the SER earlier are noted. It is well known, that legislative capacity is limited and that JZ&W has had bouts without a department head. However, the reasons listed should not come at the expense of the SER. The department should be regulated in such a way that provides for continuity. The SER was entitled to proper updates from JZ&W. The standard of *Adequate organization of services* has not been observed
- No response was received from the Min AZ to the complaint letters of the SG SER dated 1 & 16 August 2019. The Ombudsman notes that the Min AZ as the politically responsible minister for both the SG AZ and the SER should have stepped in immediately as serious allegations were levied against the SG AZ and by extension

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<sup>1</sup> According to JZ&W the review was returned to the SG AZ on 22 May 2019 however in the letter of SG AZ d.d.14 August 2019 he states that he received it from JZ&W on 22 June 2019. No corroborative document was provided to substantiate the correct date.



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JZ&W. The situation called for swift de-escalation measures to be taken as contention between critical institutions that are by law intricately connected to the Min AZ and that undoubtedly has to work together would not serve functioning of the ministry and by extension the government. By not taking up the duty (of care) as the responsible minister only further exacerbated the situation (increasing the dependency of the SER). Furthermore, the SER and the SG AZ was not afforded the opportunity to be adequately heard/express themselves by the politically responsible authority. The standard of *Fair play* has not been observed.

- The Min AZ also held a duty as the responsible minister for the SG AZ against which strong allegations were levied to immediately act and address the issues, the inaction did not allow for the SG AZ to object and it allowed the allegations to carry on against the SG AZ. The SG AZ advised the Min AZ on two occasions about the situation and the Min AZ did not address the complaint (in an efficient manner) causing the issue to escalate. The standard of *Fair play* has not been observed.

**Lbham pertaining to financial provisions of (substitute) board members and the ‘Secretaris’**

Considering:

- Both parties were aware of the formal procedure for legislative review and yet did not follow the official procedure thereby bearing the risk of not following the proper procedure: the SER did not obtain approval from the Min AZ to their proposal therefore increasing the likelihood of the legislative procedure being delayed/not running smoothly and JZ&W accepted the request without requiring ministerial approval.
- By accepting the request for legislative review, assigning a legislative lawyer and setting expectations JZ&W created a responsibility on their part to keep the SER informed about the ongoing procedure. Considering the limited capacity at JZ&W, was all the more reason to enforce the formal procedure until such time as informal



requests could be handled. The standards of *adequate information provision* and *promptness* have not been observed.

- There is no evidence of the request to amend this LBHAM submitted by the SER to JZ&W for review, the only evidence of the request is the email thread that started with the legal advisor to the SER confirming the request, the legislative lawyer and the assigning case number.
- In email correspondence, titled '*Renumeratie Plv-leden*' between 4 April 2019 to 14 June 2019 the SG SER is requesting updates from JZ&W to no avail. Upon calling JZ&W he is referred to the SG AZ.
- Subsequently, the SG SER emails SG AZ on 17 June 2019 and is informed on 18 June 2019 that the SG AZ will obtain the information and then provide an update. The SG SER follows up with SG AZ on 12 July and again on 30 July 2019. The standards of *promptness*, *adequate information provision* and *correct treatment* have not been observed.
- To date of this FR the Min AZ has not responded to the proposal letter of the SER requesting to amend the remuneration of their substitute board members. Together with the non-response of JZ&W and SG AZ this constitutes a severe lack of communication and professionalism. The standards of *promptness*, *adequate information provision* and *correct treatment* have not been observed.

### **Request equal remuneration 'Secretaris' of the SER**

Considering:

- Formal procedure to (and accept a) request legislative review not followed by the SER (and JZ&W).
- By accepting the request for legislative review, assigning a legislative lawyer and setting expectations JZ&W created a responsibility to keep the SER informed about the ongoing procedure. Seeing that the department was running on limited capacity, was all the more reason to enforce the formal procedure until such time as informal



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requests could be handled. The standard of *adequate information provision* has not been observed.

- The proposal to the Min AZ was submitted on 22 March 2019 and without approval the request for legislative review was submitted by the legal advisor of the SER to JZ&W on 3 April 2019 with draft amendments attached. On 27 May 2019 the SER learnt that the Min AZ denied the request for the remuneration of the substitute board members, however the SER did not retract the legislative request.
- The remuneration of the SG SER is found in two different national decrees, namely Lbham Function book SER and Lbham pertaining to financial provisions of (substitute) board members and the ‘Secretaris’, therefore, any amendment of the remuneration scale of the ‘Secretaris’ would require an amendment to both of the abovementioned laws.

### **Analysis letters JZ&W, SG AZ and SG SER**

Considering:

- the draft laws to amend the salary scale of the ‘secretaris’ were submitted by the legal advisor of the SER on 3 April 2019 to JZ&W and contained a variation of the phrases ‘*aanpassing scatering Secretaris SER*’.
- The memo from JZ&W to SG AZ when referencing the draft laws contained the phrase ‘*in verband met de wijziging salaris behorende bij de functie van secretaris van de SER op basis van het gelijkheidsbeginsel*’ specifically in reference to ‘*Landsbesluit, houdende algemene maatregelen, tot wijziging van het Landsbesluit, houdende algemene maatregelen, van de 14 december 2017 tot vastelling van de geldelijke voorzieningen van van de leden, plaatsvervangende leden en van de secretaris van de SER*’. The phrase ‘*aanpassing scatering*’ was also used in reference to the amendment of the function book.
- It is not unusual for legislative lawyers in conducting the legislative review to change the draft title to one they believe is more suiting for the draft law.



- Considering the abovementioned it cannot be concluded that the SG AZ made up a fictitious or an incorrect addition *‘in verband met de wijziging van de salaris van de Secretaris’* of the law as it was clear that he was referencing the draft law that was submitted to JZ&W on 3 April 2019 by the legal advisor of the SER.
- The reaction of the SER d.d. 29 May 2019 was related to the request of amendment of the salary scale of the function of the ‘Secretaris’ of the SER and this requires a change of both Lbham remuneration of the (substitute) members and the ‘Secretaris’ of the SER and Lbham formation plan which contains the function book as an attachment. The SER’s statement that the reaction only concerns one Lbham is incorrect.
- The *‘Landsbesluit, houdende algemene maatregelen, tot wijziging van het Landsbesluit, houdende algemene maatregelen, van de 14 december 2017 tot vaststelling van de geldelijke voorzieningen van van de leden, plaatsvervangende leden en van de secretaris van de SER’* also regulates the remuneration of personnel of the secretariat namely the ‘Secretaris’ in article 1, paragraph 4. Therefore, both lbhams need to be changed simultaneously or else the laws will contain a contradiction.
- The sharing of information between P&O and JZ&W is not considered sharing of personal information. In addition, the request was not of a personal nature; the SER has since acknowledged this.
- The Ombudsman could not ascertain if the SER sent the request to 2 departments but the request was sent to JZ&W and the Min AZ and did not inform JZ&W of the denial decision.
- In the memo of 13 August 2019 from JZ&W to SG SER the draft amendment pertaining to the request to amend the remuneration of the substitute board members was not mentioned, despite a legal advisor confirming receipt of the request to handle this law on 4 April 2019.
- SG AZ alleges that despite the request being turned down for the scale increase he continued to request for updates on the law, lastly on 13 August 2019, however in the email SG SER did not specifically reference the proposal for salary increase, rather he





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requested an update on the *'Landsbesluit inzake geldelijke voorziening van de leden, hun plaatsvervangers en de secretaris van de SER'*. Therefore, the conclusion that the SG AZ drew could not objectively be established by the Ombudsman.

- During the hearing the SG AZ could not provide an update on the remuneration of (substitute) board members and trying to get clear definite answers from JZ&W on the meeting that was to take place with the Min AZ including why it did not take place, did not yield much information. This alludes to a lack of proper (tracking) of administration; the same legislation being handled concerned 2 different trajectories and this was possibly cause for misunderstanding in the communication in this case. The standards of proper *active and adequate information gathering* and *adequate organization of services* have not been observed.

**Considering the abovementioned the Ombudsman cannot conclude that the SG AZ's statements in the letter were incorrect and that the SG AZ intended to give the impression that the SG SER is trying to change the law for his personal gain.**

### **B) Is the SG AZ structurally undermining the independence of the SER?**

The SER is an independent advisory body and should be able to function -unencumbered- as such. The qualification that is usually given by the government administration that the independence of the SER is not equal to the independence of the High Councils of State is inaccurate. The basis for this thought process cannot be found in legislation nor literature. The High Councils of State and the SER, as an advisory body, have been delineated with specific and separate roles by the Constitution and regulatory laws, however in terms of their independent function vis-à-vis government, the institutions are equal in the eyes of the law.

#### **1. 'History of discord' letter dated 12 February 2013 from SER to the Min AZ**

The letter confirms that the two individuals in question were not always in agreement. However, it is not unusual for two professionals to have dissenting opinions. With reference to the communication protocol, the Ombudsman notes that the fact that the SER wanted all





government correspondence, including emails with instructions and/or directives, sent directly to the Chairman can be considered unusual and a cumbersome manner of communicating.

The Ombudsman also notes that the SG SER is not consistent with the application of the protocol, considering that in an email dated 3 September 2019 from the SG SER to the department of JZ&W said department was informed that legislation is sent directly to the secretariat (read SG SER) and not the Chairman.

With reference to the proposal of the SER, based on the presented draft decree, whereby communication from the Min AZ comes directly from (the cabinet of) the Min AZ and not via the SG AZ, thereby circumventing the role of the SG, the Ombudsman notes that this is not compatible with the *'Landsverordening inrichting en organisatie Landsoverheid'*<sup>2</sup> (National ordinance structure and organization of national government). The SG AZ is the senior advisor to the Min AZ and is ultimately responsible for the day-to-day management of the ministry. This includes the operational management and the results of the departments. It would therefore not be prudent to circumvent the position of the SG AZ, especially where the department heads are concerned. Consequently, the Ombudsman cannot establish undermining by the SG AZ with this example.

## **2. Dismissal of senior policy advisor**

As far as the Ombudsman has been able to determine, based on the newspaper article, the Min AZ's senior advisor conveyed an accurate statement. There was no national decree for the suspension of the SER senior policy advisor in existence, because the Min AZ did not sign it for procedural reasons. The national decree for the dismissal of the SER senior policy advisor, on the other hand, was indeed already in draft on the date of the publication of the Today article on 8 August, 2014, as the SER alleges. However, the excerpt in the news article refers to the date 2 June, when the SER senior policy advisor met with [REDACTED]. The SER dismissed the senior policy advisor on 12 June, ten days later, therefore the draft decree for

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<sup>2</sup> AB 2010, GT no. 6.



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the dismissal could not be in existence on 2 June. In other words, the newspaper article is clearly referring to the suspension (decree) and not the dismissal decree. The SER seems to be confusing the two decrees.

Notwithstanding the aforementioned, a news article with second hand account of a conversation cannot serve as an objective document to confirm what [REDACTED] said or not. Therefore, the Ombudsman can not establish undermining by the SG AZ with this example.

### **3. 'Budget placement' letter dated 9 January 2014 from SER to the Min AZ**

In a letter underscoring their independence d.d. 9 January 2014 the SER objects to the decision to be placed directly under the budget of Ministry of General Affairs. The SG AZ responds to this letter, almost 2 years later, by letter of 23 September 2015 in which he states that his response was drafted in close consultation with the Ministry of Finance. According to the SG AZ, the services that the SER requires from government, based on the SLA, falls directly under the authority and direction of the Minister of General Affairs whose financial management is carried out by the ministry's designated financial controller. The SG AZ explained that this means, for example, that payments will be executed according to the same rules and procedures as all other government departments. As it pertains to the independence of the SER the Ombudsman concludes that this interpretation by the SG AZ (and the Ministry of Finance) was inaccurate. The SLA actually underscores the independence of the SER in several considerations and articles. Furthermore, article 3 of the SLA states that: 'the departments of the Ministries of General Affairs and Finance will endeavor to execute the decisions of the SER with priority, provided that there are apparent reasons for such and these are in reference to the SER's independent functioning'. In practice this has meant - as a rule - that decisions, for example payments on behalf of the SER (and the High Councils) would be handled with the necessary priority. This also shows that the handling of the matters of SER do not fall under the same rules and procedures as other departments within government.



This interpretation does allude to a potential infringement of the independence of the SER, however the SER did not provide further information to corroborate how the independence of the institution was adversely affected by the budget change and that payments, for example, were no longer executed with precedence. What can be established however is that the SG AZ did not initiate or request the budget chapter change nor did he seek to maintain it, the same could be said for the Min AZ, the Ministry of Finance and Parliament. All three, in this case, carry their responsibility to ensure the independent functioning of the SER in accordance with article 23 Lvo SER. Although the situation with the budget has now been corrected and therefore not relevant to the current establishment of undermining, the Ombudsman observes that the chapter assignment of the SER in the budget should in no way (negatively) influence the independent functioning.

The SLA also confirms this. Moreover, the entire budget change request and (re)placement does not only point to an inaccurate/difference interpretation of the SER's independence by the SG AZ, but for the Ministry of General Affairs and the Ministry of Finance and Parliament. The (possible) structural infringement is therefore across the board.

#### **4. Ongoing challenges**

With reference to the ongoing challenges of the SER that date back to December 2012, the following. Should [REDACTED], who was appointed SG AZ<sup>3</sup> since 2014, have been more proactive in facilitating the changes to the Lvo SER and the Lbham pertaining to financial provisions of (substitute) board members and the 'Secretaris', especially considering that he was involved and aware of the challenges of the SER, albeit in a different capacity, from the inception of the institution?

The Ombudsman observes that the reasons that the SG AZ provided for the non and/or cryptic responses to the SER legislative products are grossly inadequate. The draft Lvo SER was in the SG AZ possession for nearly two months. The draft decree pertaining to the

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<sup>3</sup> With the departure of the department head of JZW, the SG AZ has also been the acting head of JZ&W since medio/late April 2019.



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financial provisions of (substitute) board members and the “Secretaris” was in JZ&W’s possession for three months. The SG AZ insufficiently responded to the inquiries of the SG SER despite numerous email requests for status updates.

Regardless if the SG AZ was concerned with the alleged poor quality of the submitted draft laws and wanted to meet to discuss the further progress of same, he had multiple opportunities to inform and explain the SG SER of this.

Not responding to emails due to being overseas and having an over-full agenda is unacceptable, especially for the senior position of SG of the Ministry of General Affairs and being acutely aware of the history and challenges of the institution. The reason that the SG AZ was fulfilling two functions is also unsatisfactory. This was more reason to timely inform the SG SER of the reason for the delay of the finalization of its legislative products.

The Ombudsman therefore concludes that in addition to the violation of the standards of adequate organization of services, promptness and correct treatment as previously explained, there was an overall lack of professionalism particularly on the part of the SG AZ, as a result of his delayed responses, however, there is insufficient evidence to warrant an abuse of power and/or structural undermining justification.

Essentially, with the exception of the fourth review, the Lvo SER was being worked on diligently by JZ&W through the first three reviews. As far as the Lbham pertaining to financial provisions of (substitute) board members and the ‘Secretaris’ is concerned, while the SG AZ can be impugned for not adequately responding to the inquiries of the SER, the furtherance and finalization of same was largely dependent on the input and approval of the Min AZ<sup>4</sup>, who remained in the information/ communication loop and did not express any concerns that the matter was not being handled with the necessary expediency.

Based on the entire investigation and the documentation that SER provided to show undermining of its independence, the Ombudsman concludes that the documentation shows a

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<sup>4</sup> This was less than 3 months before the fall of the second Marlin-Romeo cabinet on 9 September 2019.



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misunderstanding/misinterpretation of the independence of the SER on a broader level, across, ministries and Parliament. After all, the duty to ensure the independent functioning of the SER in accordance with article 23 of the Lvo SER is allotted to the relevant minister and Parliament. Therefore, it is not (only) SG AZ duty to ensure the independent functioning of the SER but all the aforementioned parties. The administrative support of the government has to be executed in accordance with the law and SLA. The SLA was clearly established with due consideration for the independence of the SER.

The political responsibility for the SER lays with the Min AZ and thus accountability for the (in)action by the SG AZ and the departments as well. It is difficult to ascertain a pattern of structural infringement as different services of government requires a different timeline and evaluated on case-by-case basis. But the main point was definitely that the issues with the SER and government existed since its inception in 2012, before [REDACTED] was SG and he cannot be attributed with the same level of influence as the advisor of the PM. Because by the same deduction the SG AZ at the time would've been responsible. The Ombudsman concludes however, that a recommitment to the upholding of the independence of the SER is necessary, as a continuation in this manner will undoubtedly give rise for serious concern for infringement.

### **Final/general observations of the Ombudsman**

The Ombudsman observes that Min AZ has not responded to the questions posed as part of the investigation, despite being very active and committed to a resolution during the hearing of 17 December 2019. Non-response to queries by the Ombudsman constitutes a violation of article 19 of the National ordinance Ombudsman.

The Ombudsman observes that the SG AZ expressed concerns about the Ombudsman specifically requesting JZ&W to answer questions pertaining to the investigation. The SG AZ is reminded of article 18, paragraph 2 and 19 paragraphs 1 and 2, of the National ordinance Ombudsman. In his response to question 1 d.d. 20 January the SG AZ specifically stated that JZ&W could best answer the questions and did not provide definitive answers, therefore



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JZ&W was requested to provide the requested information. Despite stating to the SER on 18 June 2019 that confirmation would be sought with the legal advisor pertaining to the meeting that was to be held with the Min AZ, to date this meeting and information about the continued delay with this request from SG AZ, nor JZ&W could be provided.

The Ombudsman notes that the responses received from JZ&W d.d. 15 June 2020 is reason for concern. It behooves the department of Legal Affairs & Legislation to display more professionalism than to answer questions of the Ombudsman in a dismissive manner. This response reflects poorly on the leadership of the department, the SG AZ and the Minister of General Affairs. This is unacceptable.

The Ombudsman would like to make note that during the investigation that at times both parties' responses were emotionally charged. The Ombudsman would like to underscore the importance (especially in our small community) of exercising due diligence when levying allegations against each other.

In closing, the Ombudsman notes that the challenges the SER is facing with government has been and still is the experience of the different advisory bodies, including the High Councils, tasked with supporting the functioning of this young democracy. The important role of these advisory bodies must be understood, respected and their independent functioning protected. Currently, the SER is functioning without a board which means the government is void of critical advice on social-economic matters (especially in these times), this has happened once before<sup>5</sup>. It should be noted that the General Audit Chamber and Council of Advice are presently functioning without a (Vice)Chairman. This lack of timely decision-making jeopardizes the continuity and authority of the advisory bodies.

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<sup>5</sup> In 2017 the SER was rendered ineffective for a period of 6 months due to the lack of appointment of a new board, The Daily Herald, 10 October 2017, 'SER calls government to urgently appoint its board members'.



**Judgement:**

- 1) Did the SG AZ discredit the credibility of the SG SER and the SER by his statements in his letter dated 14 August 2019 to the Chairman of the SER?
- 2) Is the SG AZ structurally undermining the independence of the SER?

In regards to the 2 main questions investigated pertaining to the complaints against SG AZ are unfounded. However, the investigation did uncover impropriety pertaining to the handling of the procedures as it pertains to the SER within the Ministry of AZ. In addition, the Ombudsman established that there is an overall lack of understanding of the independence of the SER within government and Parliament.

The following standards have been violated: Promptness, Adequate organization of services, Fair play, and correct treatment.

Considering the investigation and the findings in this report, the Ombudsman recommends as follows:

**Recommendation(s):**

- Ensure that the salary of the SG SER is regulated in one legislation namely '*Landsbesluit, houdende algemene maatregelen, van 4 mei 2012 tot regeling van de inrichting en de organisatie van het secretariaat van de Sociaal-Economische Raad*' (AB 2012, no. 17).
- Government and in particular the Minister (Ministry) of AZ must respect the Independence of the SER and actively seek ways and means to ensure such e.g., revisit all services between government and SER, revisit/draft the policies to effectuate smooth execution, reinforce the policies, increase awareness within the Ministry/Parliament.





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- The SG AZ should consider assigning a liaison within the Ministry of AZ to ensure that the requests of the SER are dealt with expeditiously.
- Equip JZ&W in a manner in which they can provide prompt and adequate services to all departments and agencies.

By letter dated 22 September 2020 the Min AZ expressed that some recommendations are in line with the Governing program 2020-2024, as well as the National development vision, namely the recommendations to: strengthen the government apparatus, ensuring effective & impartial behavior and the increase of capacity. The Min AZ stated however that due to financial constraints the Ministry is unable to follow all recommendations currently but aims to have these matters prioritized next year. The Ombudsman will be updated on a strategic plan that is in development to tackle the issues identified and other pending matters within the Ministry. The Min AZ also reported that the recommendation to assign a liaison to deal with requests of the SER has been implemented.

By letter dated 16 October 2020 the SER described the working relationship experienced with the liaison so far as pleasant, effective and efficient and is based on professionalism, integrity and respect. The SER also stated that the SER's independent functioning would be included in the Min AZ's Strategic plan for the Ministry and looks forward to seeing the plan. The Ombudsman requests a status report on the recommendations within six (6) months from the date of this letter, however no later than 1 July 2021.



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**Elucidation:**

**Intervention:**

**2 September 2019:** By means of an Intervention proposal the Ombudsman requested that the Min AZ sit with both parties to address the matter by no later than 9 September 2019.

**2 September 2019:** The Min AZ responded to the Intervention proposal by stating as follows: *“I consider this a very important matter and requested the SG of AZ to find a solution but this attempt yielded poor results. I am off island however in order to comply with the date given I will ask the Minister of Justice to intervene between both parties as I am absent returning on September 9th. If the Minister is unavailable, I will ask Minister Smith of MECYS”.*

**4 September 2019:** The Bureau Ombudsman informed the Min AZ of the following: *“Considering the authoritative and procedural role that the Ministry of General Affairs fulfills in this matter, the Ombudsman considers it imperative that the Minister of General Affairs hears both parties. This will result not only in the necessary clarity on the contention but also on both parties role in relation to the Minister. The Ombudsman has granted an extension for the Minister of General Affairs to conduct the meeting until 16 September 2019. The Minister of General Affairs is requested to inform the Ombudsman on the outcome of said meeting”.*

**5 September 2019:** The Min AZ informed the Ombudsman as follows. *‘The meeting is already in place. Upon my return I will follow up and update accordingly’.*

**19 September 2019:** The Bureau Ombudsman requested the Min AZ to provide an update as soon as possible however no later than **24 September 2019**. If no response is received by said date the Ombudsman will proceed with an official investigation.



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### **Investigation:**

**18 October 2019:** The Ombudsman proceeded to investigate this complaint further by means of a hearing with all parties. Prior to the hearing the Ombudsman requested a response to the questions posed in a Notification of Complaint within two (2) weeks from the date of the letter, however no later than 4 November 2019. The questions read as follows:

1. *What is the legislative procedure pertaining to draft legislation of the SER? (provide supportive documents)*
2. *Provide a copy of the disputed draft national decree 'latham tot vaststelling van de geldelijke voorzieningen van de leden, hun plaatsvervangers en van de secretaris van de SER.....' with the proposed amendments.*
3. *Provide a copy of the letters dated 27 May 2019 (DIV 8855/19A) and 29 May 2019 (SER 19/DCB/010).*

**8 November 2019:** A reminder to respond to the NOC questions was sent.

**12 November 2019:** The (caretaker) Min AZ and SG AZ provided a response to the NOC questions by letter including attachments.

### **Hearing**

**6 December 2019:** A Convocation of hearing was sent to the Min AZ, SG AZ and Complainant to be held on 17 December 2019 at the office of the Ombudsman. The purpose of the hearing was to gather information.

**17 December 2019:** A hearing took place at the office of the Ombudsman.

### **Synopsis of Hearing<sup>6</sup>**

The following summary could be taken from the hearing:

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<sup>6</sup> See Synopsis of hearing d.d. 17 December 2019; 201900259.



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1. There is no special process for legislative review for legislation of the SER. The formal procedure is that approval from the minister is first obtained before requesting legislative review from JZ&W, but in practice requests come directly to JZ&W and some requests, depending on different factors, are handled without such approval from the Min AZ.
2. The timeframe for legislative review depends on different factors such as priorities of government, human capacity, complexity of the case etc.
3. Besides making the agreement with the SER to pullback the meeting from going to Parliament, no further action was taken by Min AZ on the complaint of the SER.
4. As the minister with dual (political) responsibility for the SER and JZ&W approval is needed for the SER to proceed with legislative amendments and JZ&W requires permission from the Min AZ to proceed with legislative review. As stated in point 1 the latter does not always take place in practice.
5. There is a certain level of unclarity and difference of opinion regarding the (extent of) independence of the SER (in theory and in practice) among the Min AZ, SG AZ and the SER.
6. Considering the ongoing issues, the SER has been having with the Ministry/SG AZ since 2012 the SER wishes to adapt the working relationship with the Ministry AZ dealing directly with the Min AZ and the departments, through an appointed person excluding the SG AZ.
7. The SG AZ is the administrative head of the departments and advisor to the Min AZ, this role cannot be circumvented legally or practically (by request).
8. The Min AZ is supported by SG AZ, departments, advisory bodies etc. in the decision-making process.
9. During the time that the SER fell under the budget of Min AZ the contention escalated as the SER felt that they were being hindered from making purchases as an independent institution. SG AZ stated that he followed the advices from finance and the procedure according to the SLA.



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10. Three legislative products were under review by JZ&W 1) the national ordinance of the SER 2) the national decree containing general measures on the structure and composition of the SER (including the function book) regarding adjustment of the salary scale of the function of the 'Secretaris' of the SER and 3) national decree containing general measures regulating the remuneration of substitute board members and the 'Secretaris'. The request for amendment concerned the remuneration of substitute board members.
11. At the point of the hearing no update had (still) not been provided to SER on the draft national decree to amend the remuneration of the substitute board members. According to the overview from JZ&W the cases were closed since 15 August. The SG AZ would provide an update on the status of the decree.

**19 December 2019:** The Ombudsman sent follow up questions to all parties to be answered by no later than 5 January 2020. The questions were as follows.

### SER

*1a) In what format was the amendment to LBHAM (AB 2017, no. 43) concerning the compensation for the substitute members submitted for review (proposal letter or draft legislation or both)? b) To whom was this submitted? c) If so, when was it submitted to Legal affairs? d) Provide supporting documents confirming such (email with attachment or stamped copy).*

*2a) Kindly provide all existing protocols/agreements between SER and Government including the SLA and the communication protocol referred to in SER document 13/GR012 dated 12 February 2013. b) Provide supporting document referred to as A2335/15 in SER document SER/19/GR044 dated 31 January 2020. c) Provide example(s) of SG AZ 'claiming total authority of the SER budget'.*



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3a) Provide supportive documentation whereby the statement in the Today newspaper of 8 August 2014 claiming that SG AZ told ██████████ that 'there is no national decree in existence or on its way to suspend him' can be verified.

4) Questions pertaining to scale increase request. a) To which departments was this request submitted and on what dates? b) In which format was this request submitted (letter proposal or draft legislation) c) Was this submission to the pertinent department(s) done before or after the response of the Minister dated 27 May 2019? d) After the response, was JZW notified that they could hold-on on further reviewing such legislation (if they were requested to review)?

5) Pertaining to the scale increase request, doesn't this also require amendment of article 1, paragraph 4 of the Lbham (AB 2017, no. 43)?

6) Pertaining to the statement 'P&O needed to refrain from sharing personal information'. a) Seeing that the request was submitted by SER and not on personal title of the SG how can this be considered to personal information? b) Explain in what way is sharing of information between P&O and JZ&W concerning matters related to their departments considered unjustified.

7) Was the SER aware that the SG AZ submitted a letter and draft memo to the Minister on 20 August 2019 concerning the complaints of SER?

### **SG AZ**

Questions requiring answers from JZ&W are to be directed to them by the SG and answered specifically.

7) In email correspondence between 4 April and 30 July 2019 it appears that the SG SER was seeking an update on the draft national decree containing general measures for the compensation of substitute board members. In said correspondence Legal Affairs referred to a meeting that was necessary with the Minister of General Affairs. a) Why was this meeting



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*necessary? b) What was the purpose of this meeting? c) Why didn't JZ&W provide a concrete reason for a delay in providing an update? d) Why did it take so long for JZ&W to refer SG SER to SG AZ?*

*8) What is the update on the draft national decree containing general measures for the compensation of substitute board members?*

*9) In the hearing of 17 December 2019, you stated that legislation from SER doesn't have preference ('spoed'); that it depends on the priorities at the time. However, in your response dated 20 January 2020 you stated that requests of High Councils and Advisory bodies are considered as urgent. Indicate which statement is correct.*

*10a) In answering the question, why the request for scale increase was brought into the letter of 14 August 2019 from SG AZ to SER, you referred to an email sent by SG SER on 6 August 2019. Provide this email. b) Reference is made to you requesting a status update from Legal Affairs and also to a possible misunderstanding. Are you stating that you were incorrectly informed by Legal Affairs?*

*11) Which two legislative products were submitted by the legal advisor of the SER on 3 April 2019. Provide copies of the email and attachments.*

*12) Why did Legal Affairs start reviewing/drafting the legislative product pertaining the scale increase without official approval and not the compensation of the substitute board members?*

*13) You stated that even after the Minister turned down the request for a scale increase by letter of 27 May 2019, the SER continued to seek updates pertaining to this request. You referred to an email from the SER of 13 August 2019. Provide a copy of this email.*

*14a) What was the cause of the delay in moving SER from under the budget of the Ministry of General Affairs? b) Did the SG AZ delay financial requests from SER despite SER having*





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*approval from the Board? c) What was the cause of delay/hold up pertaining to financial requests from SER?*

*15) Is the statement made in the Today newspaper of 8 August 2014 that you told Mr. Alberts that 'there is no national decree in existence or underway'?*

*16) Was any Legal Affairs staff instructed not to speak/communicate with SER?*

*17) Provide all emails and attachments pertaining to the correspondence that took place between Legal Affairs and P&O concerning the legislative products from SER on or around 17 April 2019.*

### **Minister of General Affairs**

*16) What operational and/or legal agreements can be made moving forward to facilitate a better working relationship between the 3 parties?*

**31 December 2019:** The SG SER provided the Ombudsman with a response to the follow up questions posed by letter dated 19 December 2019.

**14 January 2020:** SG AZ requested and received an extension to provide his response by no later than 20 January 2020.

**20 January 2020:** SG AZ provided the Ombudsman with a response to the questions posed by the Ombudsman dated 19 December 2019.

**30 January 2020:** The Ombudsman sent additional questions to all parties for response by no later than 8 February 2020.

**10 February 2020:** SG AZ provided a partial response to follow up questions posed by the Ombudsman on 30 January 2020.



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**11 February 2020:** The SER provided a partial response to follow up questions posed by the Ombudsman on 30 January 2020.

**24 February 2020:** As it was not feasible to reconvene a hearing due to conflicting agendas the Ombudsman informed all parties that a PFR would be drafted.

**11 March 2020:** The Bureau Ombudsman requested a response /clarification to (outstanding) questions/answers from all parties by 19 March 2019.

**13 March 2020:** The SER provided the Bureau with the requested information. No response was received by Min AZ or SG AZ.

**23 March 2020:** Due to the Covid-19 pandemic all going concern was put on hold until further notice.

**30 March 2020:** Additional information was requested from the SER, which was provided that same day.

**8 June 2020:** All parties were notified that the investigation has been resumed and all parties were afforded one (1) week to provide missing information.

**15 June 2020:** JZ&W provided the Bureau Ombudsman with incomplete responses to questions posed to said department.

To date of the PFR no response was received from Min AZ to a follow up question posed by the Ombudsman on 19 December 2019, despite being reminded of such and incomplete/no responses from the SG AZ to follow up questions posed on 30 January 2020, 11 March 2020 and the reminder on 8 June 2020.



**1 September 2020:** Preliminary Findings Report and the Synopsis of hearing was sent to all parties with the request to provide a response.

**22 September 2020:** The Min AZ provided a response to the PFR as follows:

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[Redacted text block]

[Redacted text block]

[Redacted text block]



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[Redacted text block]

**22 September 2020:** The SG AZ provided a response to the PFR as follows:

[Redacted text block]



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**16 October 2020:** Having requested an extension the SER provided a response to the PFR:

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**Findings:**

**Independence SER**

The SER is one of the permanent advisory bodies on legislation and governance established by national ordinance in accordance with article 79, first paragraph, of the Constitution. The task of the SER is to provide advice to government on important matters of a social-economic nature.<sup>7</sup> Although established by law, the SER is not an independent government agency (ZBO<sup>8</sup>) however the SER is an independent advisory body. Article 23 of the National ordinance SER establishes in paragraph 1 that: ‘Parliament in agreement with the Council and the relevant minister shall provide the Council with all facilities necessary for the proper and independent<sup>9</sup> execution of its tasks.

Paragraph 2 determines further that the Chairman of the Council is responsible for the management. The SER, like the High Councils, is however technically financially dependent on the government. While the Lvo SER dictates its independence, like the High Councils, the

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<sup>7</sup> Article 2 of the National ordinance SER.

<sup>8</sup> ‘Zelfstandig bestuursorgaan’.

<sup>9</sup> The independence of the High Councils of State is similarly regulated in their respective national ordinances. In fact, the wording is fairly identical, all articles in the respective national ordinances use the same key phrase: ‘Parliament in agreement with the [Council, Audit Chamber, Ombudsman] and the relevant minister shall provide the [Council, Audit Chamber, Ombudsman] with all facilities necessary for the proper and independent execution of its tasks’.



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budget of the SER is ultimately dependent on Parliament/Government.<sup>10</sup> This is especially the case for lower legislation such as LBHAMs that do not require Parliament's input and thus totally falls under the purview of a minister. A certain level of financial dependency is thus present, in particular regarding amendments with financial consequences. Due to this vulnerability the SER (and the High Councils) and the relevant minister/Parliament must constantly be aware and guard against (in)directly infringing on the independence of the SER (and the High Councils). Hence the reason why in agreements with government, in which it is decided that government will provide certain services, the independence of the SER (and the High Councils) is emphasized.

The fact that the SER was established through article 79 of the Constitution and not mentioned specifically, like the High Councils, does not take away from the fact that their national ordinance prescribes that they operate independently and it is Parliament and the Min AZ's duty to facilitate such.

While underscoring the independence of the SER as an independent advisory body that must operate completely independent from government's bureaucracy, a Service Level agreement<sup>11</sup> (SLA) was signed with the Government of Sint Maarten sometime after December of 2012<sup>12</sup>.

Due to the small size of the secretariat of the SER, it was determined that the secretariat was not equipped to adequately handle the execution of all decisions pertaining to its personnel, financial and material management. Consequently, the execution of the aforementioned

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<sup>10</sup> This is not the case with the SER of the Netherlands, which is financially independent of the government. The necessary financial resources are provided by the business community ('Algemeen Werkloosheidsfonds').

<sup>11</sup> The High Councils of State entered jointly into a SLA with the government of Sint Maarten in April of 2011. The content, considerations and conditions of the SLA with the High Councils is largely identical to the SLA that the SER signed.

<sup>12</sup> It is not clear when the SER's SLA was signed. In the list of action points from a meeting between the Min AZ's office and the SER of 5 December, 2012, it was mentioned that the SLA was still in the process of being signed. However, article 7 of the Service Level Agreement states that it went force from 1 August 2012 for an indefinite period.





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decisions would be carried out by the relevant government departments, on behalf of the SER.

In practice this means, for example, that in terms of personnel management, the Personnel Affairs Department of government would support the SER in the recruitment and selection process of candidates. As it relates to finance, this means, for example, that payments to third parties would be carried out via the government Finance/ Treasury administration, on behalf and per the instructions of the SER.

#### **'Landsverordening SER (Lvo SER)'**

The Lvo SER is the national ordinance that regulates the SER. This national ordinance outlines the tasks, organizational structure including the composition of the (substitute) board members and secretariat, operating procedures and authorities of the SER. According to article 3 and 4 of said ordinance the SER can consist of a maximum of 9 board members and must have an equal amount of substitute board members appointed by national decree. Article 11 establishes the function of the '*secretaris*' (known as the SG SER) as head of the secretariat of the SER. Article 11a Lvo SER establishes that the organizational structure is established in a national decree containing general measures (Lbham). According to article 22 Lvo SER the financial provisions for the (substitute) board members and the '*secretaris*' are also established by a national decree containing general measures (Lbham).

#### **Amendment to "Lvo SER"**

The draft amendment to the Lvo SER was submitted to JZ&W by email on 18 December 2018. According to this the email from the SER to JZ&W the procedure to amend the Lvo started during a meeting with the SER and Parliament in November 2018. A letter from the SER was submitted to the Min AZ on 18 February 2019 confirming the agreements that were decided upon pertaining to the amendments during a meeting of 14 February 2019 between the Min AZ and the SER.



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This draft legislation went back and forth a total of 4 times for review by JZ&W.<sup>13</sup> The 4<sup>th</sup> request was submitted via SG AZ<sup>14</sup> for review on 1 April 2019<sup>15</sup> and a reminder on 20 May 2019<sup>16</sup>. The turnaround time for the 4<sup>th</sup> review took 4.5 months as the results of the 4<sup>th</sup> review were submitted to the SER on 14 August 2019. The intervals between the 1<sup>st</sup> and the 3<sup>rd</sup> review took one (1) month or less while the last review took about 4.5 months (1 April 2019 to 14 August 2019).

Before receiving the results of the 4<sup>th</sup> review on 14 August 2019, the SER addressed their concerns to the Min AZ in a letter of 1 August 2019 citing structural delay concerning the Lvo SER by SG AZ and that the delay is hindering the independence of the SER. The following actions took place thereafter: SG AZ sent a letter to Min AZ, d.d. 13 August 2019 (with draft letter for the SER), advising the Min AZ to request that the SER substantiate their statements in their letter of 1 August 2019. On 14 August 2019 a letter and the 4<sup>th</sup> review of Lvo SER was provided to the SER, in turn the SER reacted by letter of 16 August 2019. On 20 August 2019 SG AZ provided Min AZ with a memo reacting to the letter from the SER d.d. 16 August 2019. The Min AZ did not address the concerns of the SER (as advised by the SG AZ).

The SG AZ indicated in his response to the SER d.d. 14 August 2019 that he had received the 4<sup>th</sup> review from JZ&W on 22 June 2019<sup>17</sup> and listed several reasons why this review could not be immediately forwarded to the SER despite repeated requests to do so: the SG AZ and the legislative lawyer being off island, -full agenda and -the intention to schedule a meeting with the SER about the quality of their legislative products and the review procedure. Also, -

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<sup>13</sup> For details see paragraph in this report entitled 'Memo JZ&W 13 August 2019'.

<sup>14</sup> With CC to the (former) department head (██████████).

<sup>15</sup> Email d.d. 1 April 2019, SG SER to SG AZ, vierde toets dossier Lvo tot wijziging van de Lvo SER.

<sup>16</sup> Email d.d. 20 May 2019, SG SER to SG AZ, Reminder 'vierde toets dossier Lvo tot wijziging van de Lvo SER'. In CC to the (former) legal advisor (██████████).

<sup>17</sup> According to a memo from JZ&W to SG AZ 13 August 2019 the 4<sup>th</sup> review was received by SG AZ on 22 May 2019.



the SG AZ held a double function at this time as acting head of JZ&W and -the procedure for submitting legislation to JZ&W not being followed. According to the SG AZ an invitation was extended to the SER for a meeting on 1 August 2019 but due to the ‘disturbing nature’ of the letter d.d. 1 August 2019 from the SER that was sent to the Min AZ and several others this meeting was cancelled by the SG AZ.

**Lbham pertaining to financial provisions of (substitute) board members and the ‘Secretaris’**

In accordance with article 22 Lvo SER the following Lbham was established: ‘*Landsbesluit, houdende algemene maatregelen, van 1 februari 2012 tot vaststelling van de geldelijke voorzieningen van de leden, hun plaatsvervangers en van de secretaris van de SER*’ (Lbham pertaining to financial provisions of the (substitute) board members and the ‘Secretaris’).

This Lbham currently contains 1 article with 4 paragraphs; paragraphs 1 to 3 outlines the financial provisions for (substitute) board members of the SER. Paragraph 4 establishes that the financial provision of the ‘Secretaris’ of the SER is equal to the remuneration in scale 14 and highest grade/level in accordance with the government salary scale (*‘Bezoldigingsregeling ambtenaren’*).

Since its inception this Lbham was amended once before on 1 May 2017, this amendment decreased the financial provision of the (substitute) board members in line with the ending of the building-up phase of the SER, however it regulated that substitute board members would only be compensated if they actually replace a board member that wasn’t present. The Board of the SER wished to see a compensation for substitute board members in line with their attendance requirement to every meeting.<sup>18</sup>

Therefore, according to the SER, as a result of this being conveyed in a meeting of 14 February 2019, the Min AZ proposed that the SER submit a reasonable proposal regarding the compensation for substitute board members. Subsequently, the SER submitted a proposal

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<sup>18</sup> According to the SER substitute board members are required to prepare for and attend board meetings even if their co-board member is present and as such compensation is warranted.



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by letter dated 12 March 2019 to the Min AZ, entailing the amendment of the remuneration of the substitute board members. The Min AZ did not respond to the proposal of the SER.

Notwithstanding the above, an email thread starts on 4 April 2019 from a legal advisor at JZ&W to the SER with the title '*Renumeratie Plv-leden SER*', assigning the legislative product a number (JZWetg-19-00461) and the legislative lawyer who would be handling the case. The email further states that there would first be a meeting with the Min AZ after which JZ&W would contact the SG SER on the further handling of the case. On 7 and 14 June 2019 the SG SER seeks an update from the legislative lawyer of JZ&W and receives no response until 17 June 2019 (by phone) when he is referred to the SG AZ; the SG SER follows up with the SG AZ. On 18 June 2019 SG AZ responds indicating the meeting with the Min AZ had not yet taken place and that a follow up would be provided. On 12 July 2019 the SG SER requested an update for the 4<sup>th</sup> time on this matter, this time mentioning that a non-response would be taken up with the Board of the SER. On 30 July 2019 the SG SER (again) requests an update on behalf of the Board of the SER. To date of this FR the SER did not receive a response to the pertinent proposal from the Min AZ.

The Ombudsman notes that no corroborative document (including the draft amendment) was provided to substantiate a request for the amendment of the remuneration for substitute board members to JZ&W. In a response to the follow up questions from the Ombudsman d.d. 11 February 2020, the SER referred to the email of 3 April 2019 as evidence of this request. However, this email only contains the draft legislation containing the amendment of the salary scale of the function of the 'Secretaris', not the draft amendment for the remuneration of (substitute) board members.

### **Request equal remuneration 'Secretaris' of the SER**

By letter of 22 March 2019 to the Min AZ, the SER submitted a request for equal remuneration of the function of the SG SER (scale 14) to that of the remuneration of the 'Secretaris' of the General Audit Chamber and the Council of Advice (scale 17).



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The letter specifically requested permission from the Min AZ to increase the current scale and stated the intention to finalize all relevant legislation and send to the relevant departments after approval in order for the salary scale adjustment to go into effect for the year 2020.

Initially, the SER held the position that this topic was of a personal nature and thus sharing information between departments was implicated as improper, the SER shared this sentiment in its letter of 16 August 2019 to Min AZ and acting head P&O. However, after further questioning by the Ombudsman, the SG SER acknowledged that the request was not of a personal nature and the departments are allowed to share information.

Additionally, the letter like the other requests seen from the SER, was signed by the Chairman and the SG SER.

By email of 3 April 2019 entitled '*wetgevingstoets verzoek*', through their legal advisor, the SER sent a request for review of 2 draft laws accompanied with their explanatory notes<sup>19</sup> to JZ&W. These amendments sought only to change the scale of the function of 'Secretaris' from 14 to 17. According to an email<sup>20</sup> response from the SER this request was not sent to the Department of P&O.

By letter dated 27 May 2019 from the Min AZ to the SER the decision was conveyed that the request for equal remuneration was denied. In a reaction letter dated 29 May 2019, the SER confirmed receipt of the decision of Min AZ, motivated their disagreement and contended that 'they' would initiate court proceedings on this matter against the government. The denial of this request by the Min AZ was not communicated to JZ&W by the SER.

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<sup>19</sup> 1. 190403 Lbham geldelijke voorzieningen aanpassing scatering secretaris met nota van toelichting. 2. 190329 Nota van toelichting aanpassing formatieplan SER 2019. 3. 190404 Landsbesluit aanpassing formatieplan SER scatering secretaris. 4. 190328 Concept functieboek SER aangepaste scatering secretaris functie.

<sup>20</sup> d.d. 13 March 2020.



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The remuneration of the SG SER is found in two different national decrees, namely:

- 1) *LANDSBESLUIT, HOUDENDE ALGEMENE MAATREGELEN, van 4 mei 2012 tot regeling van de inrichting en de organisatie van het secretariaat van de Sociaal-Economische Raad* (Lbham Function book SER). This Lbham credits its establishment on article 11a of the Lvo SER, which states that the structure and organization of the SER is regulated by Lbham. The Lbham Function book SER contains 2 articles. Article 1 establishes that the composition and organization of the SER is outlined in a formation plan (also known as function book) in the attachment to the Lbham. The attached formation plan describes the different functions of the SER and also indicates the scale of that particular function. According to the formation plan the function of the ‘Secretaris’ is remunerated on scale 14.
- 2) *LANDSBESLUIT, HOUDENDE ALGEMENE MAATREGELEN, van 1 februari 2012 tot vaststelling van de geldelijke voorzieningen van de leden, hun plaatsvervangers en van de secretaris van de Sociaal-Economische Raad* (Lbham pertaining to financial provisions of (substitute) board members and the ‘Secretaris’). Article 1, paragraph 4, of this Lbham states that the financial provision of the ‘Secretaris’ of the SER is equal to the remuneration in scale 14 and highest grade/level in accordance with the ‘*Bezoldigingsregeling ambtenaren*’.

**Breakdown letter d.d. 14 August 2019 from SG AZ to the SER entitled ‘toetsing JZ&W’**

In the letter from SG AZ to the Chairman of the SER the SG AZ alleges that:

- with the results of the 4<sup>th</sup> review he wishes to make use of the opportunity to bring clarity to the comment of the SG SER concerning a possible delay in delivering the 4<sup>th</sup> review;
- he also wants to shine a light on the request for review/advice of the *Landbesluit, houdende algemene maatregelen, tot vaststelling van de geldelijke voorzieningen van de leden, hun plaatsvervangers en van de secretaris van de Sociaal-Economische Raad* in verband met de wijziging van de salaris van de SER.



- that the SER requested advice on this draft law from both JZ&W and P&O without informing either about it nor sharing the denial of the Min AZ to the request or their decision to challenge the decision in court.
- despite all of the above the SG SER kept requesting updates on this law, lastly on 13 August 2019.
- JZ&W conducted thorough research and provided him with an internal memo d.d. 13 August 2019 with the following facts:
  - Explanation on timeline of review as received from JZ&W.<sup>21</sup>
  - The results of the 4<sup>th</sup> review is received by SG AZ on 22 June 2019 to pass on to the SER. Due to different circumstances, including the need for a meeting with the SER, the email could not be immediately passed on.
  - Invitation for a meeting was extended to the SER on 1 August 2019, SG SER noting that a letter would still be sent to the Min AZ. SG AZ cancelled the meeting after taking notice of the disturbing nature of the letter.
  - Proceeds to explain why the draft Lvo SER took so long: quality of the draft law of the SER, limited capacity, legislative procedure not being followed.

### **Memo JZ&W 13 August 2019**

In the memo from JZ&W to SG AZ the legislative lawyer explains among others that:

- The first legislative request for Lvo SER was received by JZ&W on 18 December 2018 and returned via the SG AZ to the SER on 15 January 2019.
- The second request was submitted on 23 January 2019,<sup>22</sup> it was returned via the SG AZ to the SER on 29 January 2019.
- The third request was submitted on 26 February 2019,<sup>23</sup> it was returned via the SG on 29 March 2019.

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<sup>21</sup> For details see memo JZ&W 13 August 2019 in this report.

<sup>22</sup> Memo does not state to whom the request was submitted.

<sup>23</sup> Memo does not state to whom the request was submitted.





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- An update for the 4<sup>th</sup> review was requested by the SER on 5 May 2019 without having submitted a request for a 4<sup>th</sup> the review. JZ&W received the 4<sup>th</sup> request from the SER on 21 May 2019. JZ&W sent the 4<sup>th</sup> review to SG AZ on 22 May 2019 to be passed on to the SER.
- That the SER submitted a request to the Min AZ for equal remuneration for the SG SER and while this request was in process, the legal advisor of the SER submitted 3 legislative products to JZ&W: 1) Landsbesluit, houdende algemene maatregelen, tot wijziging van het Landsbesluit, houdende algemene maatregelen, van de 17 augustus 2015 tot regeling van de inrichting en de organisatie van het secretariaat van de SER in verband met het aanpassing van het formatieplan 2) Landsbesluit, houdende algemene maatregelen, tot wijziging van het Landsbesluit, houdende algemene maatregelen, van de 14 december 2017 tot vaststelling van de geldelijke voorzieningen van van de leden, plaatsvervangende leden en van de secretaris van de SER in verband met de wijziging salaris behorende bij de functie van secretaris van de SER op basis van het gelijkheidsbeginsel en 3) Functieboek SER.

### **Breakdown SER complaint letters 16 and 22 August 2019**

In the letter from the SER to Min AZ (copied to several institutions) the SER alleges that:

- the addition ***‘in verband met de wijziging van de salaris van de secretaris van de SER’*** given by the SG AZ to the draft law *‘Landsbesluit, houdende algemene maatregelen, tot vaststelling van de geldelijke voorzieningen van de leden, hun plaatsvervaarders en van de secretaris van de Sociaal-Economische Raad’* is incorrect;
- the reaction of the SER to the Min AZ d.d. 27 May 2019 with reference number SER 19/DCB/010 only concerns the Lbham function book which regulates the remuneration of the secretariaat of the SER including the ‘Secretaris’ and not the *‘Landsbesluit, houdende algemene maatregelen, tot vaststelling van de geldelijke voorzieningen van de leden, hun plaatsvervaarders en van de secretaris van de Sociaal-Economische Raad’*.
- the salary of the ‘Secretaris’ of the SER can never be changed by amending the *‘Landsbesluit, houdende algemene maatregelen, tot wijziging van het Landsbesluit, houdende*





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*algemene maatregelen, van de 14 december 2017 tot vaststelling van de geldelijke voorzieningen van van de leden, plaatsvervangende leden en van de secretaris van de SER’.*  
This law only pertains to the board and not the personnel. The Lbham Function book need to be changed first.

- P&O needed to refrain from sharing information containing personal information pertaining to the salary of the ‘Secretaris’;

- SG AZ made a fundamental mistake by stating the “secretaris genoodzaakt is gerechtelijke stappen ...is afgewezen”.

The statements of the SG AZ are incorrect and gives the impression that the SG SER is trying to change the lham in a peculiar way for his own gain. By making these incorrect statements the SG AZ is trying to cast doubt on the integrity of the SG SER and by extension the SER.

### **Structurally undermining SER independence**

In its letter dated 1 August 2019 and during the hearing of 17 December 2019, the SER made the allegation that the SG AZ is structurally undermining the independence of the SER. The SER was requested to substantiate this allegation and they provided the Ombudsman with 4 examples by letter dated 31 December 2019.

#### 1. Letter dated 12 February 2013 from SER to the Min AZ (history of discord)

The SER asserts that the letter shows the history of discord between the SG SER and the SG AZ. The letter was regarding how instructions and/or directives from the Min AZ are to be communicated to the SER. ██████████ was occupying a different position (senior policy advisor in the cabinet of the Min AZ) at the time. The SER’s preference was that instructions from the Min AZ’s office be sent directly to the Chairman (of the SER) and not via the SG SER. Seemingly at the time, the SG AZ was not part of the communication protocol as is currently the case. It is not clear when and what the reason was for the change.

Although the SER indicated that it is an unwritten rule that all correspondence from government is officially addressed to the SER chairman, it is not unusual that certain communication, in institutions such as SER take place via the SG SER as well, who is



responsible for the daily management of the institution. Moreover, it can be argued that, in some circumstances, this is the preferred and most effective method of communication. The email of 18 January 2013, referenced in the abovementioned letter, was in response to an email from the SG SER dated 14 January 2013 to the cabinet of the Min AZ regarding the publication of an advice from SER.

2. Dismissal of the SER's (former) senior policy advisor

The SER dismisses the senior policy advisor on 12 June 2014 and subsequently informs the Min AZ in writing on 23 June 2014. The SER presents as evidence, for the alleged undermining, a newspaper clipping from the Today Newspaper of 8 August 2014 and highlights a quote from said newspaper: "On 2 June, [REDACTED] meets with the PM's senior advisor, [REDACTED], who assures him that there is no national decree in existence or underway to suspend him." Apparently, prior to being dismissed, the senior policy advisor was suspended on 29 April 2014. However, the draft national decree to formalize the suspension was never finalized. The same newspaper article provides the reason why the national decree for the suspension was not signed: "The PM put it aside because it was not accompanied by a formal resolution from the SER board".

3. SER Memorandum dated 17 November 2015 (budget placement)

The SER objects in the letter that the institution is being placed in the 2016 budget under chapter 3, the Ministry of General Affairs. Until 2015 the SER was placed under the budget of Parliament and the High Councils of State (chapter 2).

The specific reason for the change is not clear, however, the SER indicated during the hearing on 17 December 2019, that the change was initiated by the Secretary General of the General Audit Chamber, who pointed out to the Ministry of Finance that the SER was not a High Council of State and therefore should not be located under chapter 2 of the budget. During the hearing the SG AZ mentioned that the reason for the change was not clear to him, and that it was a decision of the Ministry of Finance.



Although the SER claims that this was finally corrected in 2019, the SG AZ claims that the SER is still under the budget of the Ministry of General Affairs. The Ombudsman notes however that in the budget 2019 and 2020, the SER is located under chapter 2 (*Parlement, Hoge Colleges en Bijzondere Entiteiten*).

4. Letter dated 9 January 2014 from SER to the Min AZ (ongoing challenges)

The SER claims that the SG AZ is fully aware of the challenges of the institution as these date back to December of 2012, when he (SG AZ) was also involved in the discussions between the SER and Min AZ, as senior policy advisor.

The letter in question - that refers to a meeting of 5 December 2012 between the Min AZ, her senior policy advisor and the SER – confirms the agreements made, in particular, changes to the national ordinance SER.

The proposed changes aimed at improving the interaction between the government and the SER. Additionally, a change to the Constitution of Sint Maarten is proposed by the SER.

The SER argues for an explicit mentioning of the institution in article 79 of the constitution. Mentioning the SER explicitly would further anchor its *raison d'être* on a constitutional level, as presently, without the change, the establishment and existence of same is, in principle, optional, according to the SER.

In the letter, the SER is soliciting to be recognized, in its capacity as an independent advisory council, on a similar footing as the High Councils of State. The request of the SER to be explicitly mentioned in the constitution was misunderstood by the Min AZ at the time, who understood the request to mean providing the SER with more independence and giving the SER a position equal to the High Councils. The SER explained that this was not the case.

The list of action points from the meeting of 5 December 2012, that is attached as an enclosure to the letter of the SER, clearly outlines the challenges that the SER is confronted with: (non) /delayed publication of its advices, a SLA that still was not signed, signing



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authority of the SER Chairman, lack of a mandate to sign lease agreement and study agreements with SER employees.

All these were issues that the High Councils were not confronted with. It is specifically mentioned by the SER Chairman, regarding the lack of a mandate to sign the lease and study agreements, that a similar procedure was already in place for the High Councils. The fact that the SER's SLA was still not signed is also notable, considering that the SLA with the High Councils was signed 21 months earlier. The Ombudsman notes that the sentiment of the SER was that they were being treated as a stepchild. They were concerned being rendered ineffective and irrelevant like other government advisory councils<sup>24</sup>.

The SER's position presently is that [REDACTED] was aware of these issues, and yet to date, more than 8 years later, many of these challenges still exist, despite the fact that [REDACTED], now in the function of SG AZ, is in a key position to facilitate the correction of the identified challenges.

### **Legal Basis:**

Pursuant to article 19 sub 1 of the National Ordinance Ombudsman, the Ombudsman is authorized to request from government bodies, civil servants, the complainant, civil servants as experts or witnesses, all information and or documents pertaining to the investigation. The persons mentioned in the aforementioned article are obliged to respond to the request within the time indicated by the Ombudsman, except in cases where the persons can appeal to legal grounds ("verschoningsrecht" - see article 19 sub 4).

- *Staatsregeling van Sint Maarten (AB 2010, GT no. 1).*
- *Landsverordening Sociaal-Economische Raad (AB 2010, GT no. 19).*
- *Landsbesluit, houdende algemene maatregelen, van 1 februari 2012 tot vaststelling van de geldelijke voorzieningen van de leden, hun plaatsverangers en van de secretaris van de Sociaal-Economische Raad (AB 2012, no. 8).*

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<sup>24</sup> See article in the 'Caribisch Netwerk' of 17 February 2014: 'Corporate Governance Council stapt op'.



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- *Landsbesluit, houdende algemene maatregelen, van 4 mei 2012 tot regeling van de inrichting en de organisatie van het secretariaat van de Sociaal-Economische Raad (AB 2012, no. 17).*
- *Service Level Agreement SER.*

**Standard(s) of Proper Conduct:**

The Ombudsman investigates whether the behavior of public bodies towards citizens is correct. The applicable standards of proper conduct in this case are:

***Promptness***

A public body is expected to be dynamic and as such be decisive and swift in its decision making. Hence, providing a response or decision within the legal timeframe or at least within a reasonable time is required. When a public body expects citizens to adhere to deadlines, based on the principle of equality the public body should strive to adhere to deadlines provided by law. Not adhering to a legal time frame will undermine the authority of the public body as well as tarnish its credibility with the citizen.

There are acceptable exceptions to the mentioned deadlines. A public body can miss a deadline in cases where more information is required to come to a decision. In such cases a public body is required to duly inform the citizen of the delay. Meeting a deadline however by no means guarantees that promptness has been observed. Promptness requires a decision to be taken in less than the legal timeframe in matters of urgency.

***Adequate organization of services***

Proper service refers to the principle of meticulousness in the administration. Proper service also includes organizing the administration in a manner that is lawful, effective, transparent, accessible, equipped to provide prompt service and information. Continuity should be guaranteed; proper registration and archiving are essential in achieving and guarantee continuity in the administration.

***Active and adequate information provision***

Providing adequate information can clear up the air between public bodies and the citizens. In general, an individual is more willing to accept a situation when there is an explanation, or



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the outcome of a request is motivated. To ensure a high level of credibility in public bodies, transparency is essential. Being open and clear in providing adequate information regarding plans and actions of the government, that affect the interest of the citizen is a requirement for enhancing the credibility of public bodies.

That administrative bodies are required to actively and upon request provide adequate information to the public, entails on the one hand the duty to provide citizens with information upon request.

As well as the duty to inform the citizen on its own initiative about proceedings that have a direct effect on them. Proper information provision creates legal certainty for all.

### ***Correct treatment***

Correct treatment can be classified in two main categories, namely dignity and impartiality. A public body is required to show respect and treat its citizens with dignity.

Moreover, a public body should be careful not to increase the dependency of a citizen on the government by giving the citizen a feeling of powerlessness. Professionalism entails that civil servants are expected to adhere to higher standards regarding their behavior towards citizens. The basic assumption is that the interests of the citizen are prioritized by the civil servant even though the citizen may be unreasonable or even impolite. Thus a public body in general is always helpful and polite towards the citizen. Being polite and helpful embodies everything from giving directions, to making sure the citizen is able to make use of every option available to them in a procedure.

A public body is required to be impartial. This entails that a public body is to handle unbiased and without judgment. To support impartiality the principle of motivation is essential. In its motivation a public body can objectively explain the reason behind a decision. The interest of the citizen should be taken serious.

### ***Fair play***

The principle of Fair Play entails that a public body is expected to allow the citizen the opportunity to express and defend their views and opinions, while also being able to object



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the position and or point of view of a public body. Thus the behavior of the public body has to attest to openness, honesty and loyalty. A public body should be transparent and cannot prepare covert actions against a citizen. On the contrary a public body is required to actively assist the citizen in utilizing its procedural options. There are various ways to provide the citizen the opportunity to utilize the different procedural options.

***Active and adequate information gathering***

The standard of active and adequate information gathering requires that government bodies acquire the necessary relevant information in preparation of their decisions, or actions.

The standard of active and adequate information gathering entails that in handling complaints, government is required to conduct an investigation into fact-finding.

This implies that government actively gathers the correct relevant facts and circumstances and, if necessary, continue investigation to adequately and accurately establish the facts.

Philipsburg, 22 December 2020

Ms. Gwendolien Mossel, LL.M.  
Ombudsman