

# Investigation protocol report of alleged misconduct

## I. Purpose of the investigation protocol

The handling of reports of alleged misconduct (hereinafter: report of misconduct) of the General Intelligence and Security Service (AIVD), the Military Intelligence and Security Service (MIVD) and the Coordinator of the Intelligence and Security Services has been placed with the Complaints Handling Department (hereinafter: Department) of the Review Committee on the Intelligence and Security Services (CTIVD). The Department uses this investigation protocol to provide insight into the way in which it implements its role when handling these reports of misconduct. Set down in this protocol are the Department's statutory duty, its composition, its investigatory powers and the framework for assessing a report of misconduct. The following protocol acts as a guide for the Complaints Handling Department to handle reports of misconduct.

The protocol is a public document. It can be inspected through the website of CTIVD ([www.ctivd.nl](http://www.ctivd.nl)) and is further actively brought to the attention of everyone involved in a report of misconduct handled by this Department.

## II. Duty

Based on Section 97 of the Intelligence and Security Services Act 2017 (ISS Act 2017), the Department is charged with the investigation and assessment of reports of misconduct of the AIVD, the MIVD or the Coordinator of the Intelligence and Security Services.

## III. Composition

The Department consists of at least three members, including the Chair. The Chair of the Complaints Handling Department is also a member of the CTIVD. The other members of the Department are not members of the CTIVD. The ISS Act 2017 regulates the appointment of members of the Department. The members of the Department, including the Chair, have a university degree in law. Members are appointed for a period of six years and can be re-elected once.

The Department is supported by the CTIVD's secretariat. The secretariat is led by the secretary of the CTIVD. The secretariat consists of a number of review officers, an IT unit and secretarial support.

Reports of misconduct are handled in practice by so-called investigation groups. An investigation group consists of one member of the Department (the rapporteur) and at least one review officer. The investigation group conducts the investigation into the report of misconduct and draws up a report with its findings and an advisory opinion regarding its conclusions. The report of findings is adopted by the Chair and two members of the Department, including the rapporteur, with the conclusion on whether it is plausible that misconduct occurred.

## IV. Investigatory powers

The Department has direct and independent access to all data processed in the context of the ISS Act 2017 and the Security Screening Act. The Minister concerned, the heads of the services and others involved in the implementation of this legislation will provide full cooperation to the Department. The Department has direct access to all information systems of both the AIVD and the MIVD and it has the expertise necessary to use those systems. The Department establishes of its own accord which information and which cooperation it deems necessary.

In handling reports of misconduct, the Department may interview anyone involved in the implementation of the ISS Act 2017 and the Security Screening Act. In the first place this will concern AIVD and MIVD staff, but it could also concern other individuals. If the Department deems it necessary, it can hold hearings with these individuals under oath. Staff and former staff of the AIVD and the MIVD cannot invoke their duty of confidentiality if they are called to a hearing by the Complaints Handling Department. The Department can call experts to hearings. Experts are obliged to perform their duty with impartiality and to the best of their ability. When drawing up its report, the Department will protect its sources; it will ensure that the contents of its reports cannot be traced back to individuals interviewed by the Department.

The Department is authorized to enter any premises. However, the Department must have a resident's consent to enter their home.

## VI. Assessment framework

The Department investigates whether misconduct is plausible. The ISS Act 2017 stipulates what constitutes misconduct. Misconduct exists if the interests of society are at stake and one or more of the following aspects apply:

- the law has been broken
- there is a danger or risk to public health
- there is a danger or risk to the safety of individuals
- there is a risk or danger to the proper operation of the public service as a result of an improper act or omission.

What is meant exactly by the interests of society will have to be considered on a case-by-case basis. Contributing factors could be that the situation concerns several individuals, occurs regularly and/or can have severe consequences. It therefore concerns an interest that goes beyond the individual interest.

## VII. Handling a report of alleged misconduct

### *Filing a report*

Every person who is or has been involved in the implementation of the ISS Act 2017 or the Security Screening Act may report alleged misconduct to a service (AIVD or MIVD) or the Coordinator. Alleged misconduct must first be reported to a superior, confidential counsellor or other person appointed in the internal regulations of the service concerned. The services have internal regulations describing the procedure that applies to the handling of misconduct. If the report has not been properly handled by the service concerned, or not within a reasonable term, the alleged misconduct can be reported to the Department. If a party reporting misconduct cannot reasonably be expected to first report the alleged misconduct to the service concerned, the reporting party can turn to the Department directly. This might be the case, for example, if the reporting party has reasonable suspicions that the highest responsible person within the service was involved in the misconduct.<sup>1</sup>

The law stipulates which requirements a report must meet.<sup>2</sup> The report must at least contain the following information: (i) the name and email or post address of the reporting party, (ii) the organization

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<sup>1</sup> Compare the brochure *Integrity in practice. The regulations for reporting* by the Whistleblowers Authority, p. 13. Accessible on the website <https://huisvoorklokkenluiders.nl/wp-content/uploads/2017/02/HvK-broch-10-Meldregeling-1.pdf>.

<sup>2</sup> Section 126 of the ISS Act 2017.

where the person involved works or worked, (iii) the organization to which the report relates, (iv) a description of the misconduct reported, and (v) the reason for reporting it to the Department. The reporting party must furthermore indicate which involvement they have had in the implementation of the ISS Act 2017 or the Security Screening Act. In addition, the reporting party must provide the Department with the details necessary to handle the report and which can be obtained within reason. We ask every reporting party to provide a phone number on which they can be reached.

#### *Assistance and representation*

During the procedure, the reporting party can be assisted or be represented by an authorized representative. The Department may request the authorized representative to produce a written authorization.

#### *Anonymity*

The Department always treats the personal data of a reporting party as confidential. The Department will only disclose the identity of the reporting party to the Minister concerned if the reporting party consents.

If the reporting party requests the Department not to disclose their identity, the Department will endeavour to protect the anonymity of the reporting party. However, situations may arise in which the Department is obliged to disclose the reporting party's identity outside the Department. That could be, for example, if the court orders the Department to disclose the identity, if it concerns a serious offence subject to the notification requirement or if a CTIVD staff member is heard under oath in a court case or parliamentary enquiry.

#### *Interviewing the reporting party in a hearing*

If an investigation into the report is initiated, the reporting party will be invited by the investigation group to further explain their report. By interviewing the reporting party in a hearing, the wording and content of the report can be clarified if necessary. The reporting party may waive the right to a hearing.

A concise report will be drawn up of the hearing with the reporting party. A sound recording will be made of the interview with the reporting party to aid the drafting of this report. The recording will be destroyed once the report has been settled.

The reporting party is given the opportunity to inspect the interview report. The reporting party can thus include a remark in the report if they feel that the facts of the interview have not been properly represented. The investigation group will incorporate these remarks either in the interview report itself or in the footnotes to the report.

#### *Position of the Minister concerned*

The Minister concerned and the individual to whose conduct the report relates are also given the opportunity by the Complaints Handling Department to explain their position.

#### *Modes of investigation*

In addition to hearing the reporting party, an investigation by the Department may consist of the following investigatory actions:

#### *Investigation into systems and archives*

On the basis of the report, the explanation given in this matter by the reporting party and the position of the Minister concerned, the investigation group conducts an investigation into the systems and archives of the service concerned. It includes all information necessary to assess the report of misconduct. For this purpose, the Department has direct access to the services' digital information systems. Furthermore, it can request from the services all information it deems necessary to conduct its investigation and to further assess it on completeness.

#### *Calling service staff and other individuals involved to hearings*

The investigation group can come to the decision that to assess the report requires one or more of the service's staff to be interviewed in a hearing. The investigation group can also come to the conclusion that it is appropriate to interview individuals other than service staff, including former staff of the service.

A concise interview report will be drawn up of the hearing with the individuals involved. A sound recording will be made of the interview with the individuals involved to aid the drafting of this interview report. The recording will be destroyed once the report of misconduct has been settled. The individuals who have been heard are given the opportunity to inspect the interview report. A note may be made in the report if the interviewee feels that the facts of the interview have not been properly represented. The investigation group will incorporate these remarks either into the interview report itself or as footnotes to the report.

#### *Hearing both sides of the argument and reporting*

Based on the report of misconduct, the position of the Minister concerned, the interviews held and the file research, the investigation group sets down its findings in a report of findings. This report is submitted to the reporting party and the Minister concerned. They are both given the opportunity to respond to the report of findings. Because the findings of the Department could contain sensitive information, the reporting party is given the opportunity to inspect the report of findings at the Complaints Handling Department. The investigation group will subsequently draw up a report, consisting of the report of findings and the conclusion on whether misconduct is plausible. The report is adopted by the Chair and two members of the Complaints Handling Department, including the rapporteur. The Complaints Handling Department can make recommendations to the Minister concerned regarding the investigation it conducted.

#### *Dispatch and publication of the report*

The Department sends the adopted report to the Minister concerned. The adopted report will also be sent to the reporting party, albeit after state secret information has been removed. Within a fortnight of receiving the report, the Minister concerned will inform the reporting party and the Department how the Minister intends to implement the Department's decision and within what time frame. The report will be published - in anonymous form and with any state secret information removed - on the website of the CTIVD. The outcomes of the investigation are also reported in the CTIVD annual report.

#### *Time frame*

The investigation group determines, on the basis of the report and its own preliminary investigation, within which time frame they expect to complete the investigation into the report of misconduct. Depending on the content of the report of misconduct and the expected complexity of the investigation, the investigation group will determine whether the investigation into the report will take three or six months. The reporting party and the Minister concerned are informed of the time frame in which the Department expects to settle the report of misconduct.

## **VIII. Statutory limits to handling a report of alleged misconduct**

When a report comes in, the Chair and two members will assess whether it concerns a report of misconduct. If it does, they will take the report into consideration. If it does not, they will inform the reporting party by letter. The letter will further substantiate the Department's decision. The ISS Act 2017 stipulates in which cases the Department is not obliged to initiate an investigation into a report. If the Complaints Handling Department decides not to initiate an investigation, it will decide against hearing the reporting party.

## IX. Legal position

The Complaints Handling Department does not have the power to investigate how the reporting party is treated by the employer following a report of misconduct. Nor does the Whistleblowers Authority investigate the treatment of individuals who reported alleged misconduct on the basis of the ISS Act 2017.

## X. Advisory opinion

Section 3k of the Whistleblowers Authority Act stipulates that an employee can ask the Advice Department of the Whistleblowers Authority for information, advice and assistance regarding alleged misconduct. AIVD and MIVD staff are not excluded from this. However, they are bound by their statutory duty of confidentiality. For more information about the advisory role of the Whistleblowers Authority, see <https://huisvoorklokkenluiders.nl/advies-bij-werkgerelateerde-misstand/>.