

Netherlands -- Age of Consent

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NETHERLANDS

International sex tourism involving abuse of minor children is prosecutable under the law. Since 1996 three Dutchmen have been tried and convicted for abuse of minors in the Philippines and Thailand respectively. The maximum penalty for child pornography was raised from 3 months' to 4 years' imprisonment, 6 years in the event of financial gain, and the maximum fine was more than tripled. New legislation allows for provisional arrest, house searches, and criminal financial investigations. Moreover, the authorities no longer must prove that a person possesses child pornography for the purpose of distribution or public display. The possession of pictures of sexual behavior with minors itself will be sufficient cause for prosecution. The age of consent is 16.

Prosecution of adults for sex with minors between the ages of 12 and 16 only occurs upon the filing of a complaint by an interested party.

Source:

U.S. Department of State

The Netherlands Country Report on Human Rights Practices for 1997

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source:Dutch Association for the Integration of Homosexuality COC

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INTRODUCTION

For many years COC, the Dutch Association for the Integration of Homosexuality has worked on the improvement of the Dutch sex laws. The most important change was brought about in 1971, when clause 248bis was abolished. Until that time homosexual contacts between people over 21 and under 21 years of age had been prohibited. For heterosexual contacts the age-limit was traditionally at 16. In 1991 the sex laws were amended considerably again, and in this change COC played an active part as well. In 1987, for example, advocates and opponents of liberalisation of the sex laws had been united under the same petition. This petition was submitted to the Secretary of Justice and was given due attention in the discussions in Parliament. By the end of 1991 Dutch sex legislation was modernised. Some outdated notions are no longer mentioned and the new act is in better accordance with the current ideas on sexual relations. Without discriminating on the grounds of gender, sexual preference or lifestyle, the new act attempts to protect individuals against forms of sexual violence. Rape within marriage has now become punishable and the distinction on the basis of the victim's gender has been abolished. Under the old act only rape of women (and only outside matrimony) was considered punishable. Even so, the new act does not imply that everything to which partners consent is permissible. In some instances the new act takes protection against sexual violence very seriously, particularly in situations where differences in power or authority

between partners are at stake. For instance, the law provides additional protection for young people. It would not be adequate to say that sexual contacts with a young person always involve abuse of power. Yet it should be acknowledged that the general relation between adults and young people is such that children may easily be abused. For this reason the act includes special provisions for sexual contacts with young people. In this brochure COC provides information on the most important changes in the law and their effects on children and adults.

AGE-LIMITS

In various clauses new upper-age limits have been introduced. Since the introduction of the sex act in the 19th century, two age-limits have been in effect: 12 and 16. In the old sex act the twelve-year age-limit was reserved for exceptional cases. Dutch law accepts matrimony from the age of twelve after permission by the Crown.(i.e. by ministerial decision) This age-limit made it possible, for example, for a man of 24 to have a sexual relationship with a girl of 14, provided they were married. This was an exceptional instance, since any other sexual contact with a person under the age of 16 was prohibited. The discussion in Parliament over this point took an entire afternoon. Since marriages at such early ages nowadays hardly occur, one could wonder why any fuss should be made over this. The reason was that this point created inequality between the sexes. Should any sexual contacts between boys of 12 to 16 and men, or between girls of 12 to 16 and

women be prevented, where heterosexual relations may be legal through marriage? Moreover it was realised that the upper-age limit of 16 was no longer tenable in this day and age. It took the Members of Parliament a long time to work out a satisfactory arrangement. In the new act both age-limits have been preserved, but they have been given a new meaning. Ordinary sexual contacts (without abuse or force) are absolutely prohibited before the age of 12, and totally permissible from the age of 16. In the 'shady' area between 12 and 16 sexual contacts are punishable only when a complaint is lodged. Prosecution can only take place after charges have been made.

BETWEEN THE AGES OF 12 AND 16

At first sight the above stipulation does not seem to have any great consequences. As long as no charges are made, the Prosecution is not aware of the existence of a punishable sexual relation. But there are other points that need to be taken into account, since the new act differs in two respects from the old one: * not everyone is allowed to make a charge; * the criminal investigation department's powers have been restrained. Between the ages of 12 and 16 only the child itself, his or her parents and the Council for the Protection of Children may bring in charges. This means that initiatives of the criminal investigation department are no longer in order. Should a neighbour, a physician or a teacher make an accusation, the Prosecution is no longer competent to investigate. Third parties need to contact the

parents, or if this is not viable (such as in the case of incestuous relationships) the Council for the Protection of Children. If a charge does not stem directly from the young person or the parents concerned, this council acts as a buffer. The council assumes authority in case the situation within the family has got out of hand or when children and parents see no way of coping with the situation. Usually the council will first try and find a solution with the help of social workers and therapists. Should the council fail to see any feasible solutions, it may decide to contact the Justice Department. It is clear that under the new arrangement protection against sexual violence is reasonably warranted. The new act provides young people with more opportunities to end such situations: by contacting the police directly or via their parents, or by contacting social workers. Sexual abuse and intimidation frequently go hand in hand. Young people are often afraid to end undesirable sexual relations for this reason. If force is used, or if secrecy is insisted upon, threats uttered etc., the Council can assume responsibility for the charges. The fact that a young person is allowed to bring in charges against someone, is as unique as it is important. In all other instances of legal protection it is the parents who do this on behalf of their child. The new act sets great store on the young person's personal view and volition. Take for instance a sexual friendship between an adult and a young person, to which the parents have consented. Even in this case the adult needs to be careful: (s)he should make certain that the type of sexual contact does not have any

negative or obnoxious effects on the development of the young person.

This responsibility is taken seriously under the new act through a 'decided risk': the adult will not be prosecuted as long as the relationship is mutually agreeable, but should the young person in due course begin to feel uncomfortable about the type of contact, the adult may still be prosecuted. There is no clarity with respect to the situation where a young person and the parents are at odds about a sexual contact with someone outside the parental situation. Should the parents inform the police, even if the child wishes to continue sexual relations, then the charges are nevertheless valid. The Justice Department may decide to prosecute, but it is not certain if it will indeed do so. In order to prove that a sexual relation exists, the Justice Department will need the young person's co-operation. This type of situation will only occur in disrupted family-circumstances.

Intervention through social workers and therapists seems more appropriate here than legal action. Conclusion: the new sex act leaves more room for the young person, the parents and the adult friends to come to a satisfactory arrangement of a sexual contact. Nobody is allowed to interfere as long as the situation is mutually agreeable, but should problems arise, then the sexual relation is certainly punishable.

Note: Sexual violence against a young person is always punishable. Also sexual contacts in dependency-relations are punishable (such as between teachers and their pupils).

YOUNGER THAN TWELVE

Sexual contacts with children under the age of twelve are not permissible. The Justice Department must investigate all complaints and charges, even if lodged by outsiders. The moment evidence is available with respect to the type of contact, the Justice Department is free to prosecute. Even if the Act is unequivocally clear, daily life always provides special and exceptional examples. What should be done if the child has almost reached the age of twelve in cases where child and parents are not prepared to co-operate in a criminal investigation? Or where to draw the line in free sexual education? Or what to do if the type of sexual friendship also has educational elements in it so that it may be considered a teacher-pupil relation? Even if the law is outspoken and strict, actual circumstances may influence the decision as to whether or not to prosecute. After all, in all cases the child's interests should be of paramount importance and not the inflexible maintenance of criminal law. There is no saying how the Justice Department will exert its authority. This may vary over the course of time, and in the various regions. Increased awareness of sexual violence is nowadays taken into account in assessing sexual contacts. Improved co- operation between social workers and therapists on the one hand, and the Justice Department on the other, may lead to various approaches: sometimes the choice will be for prosecution, sometimes for adequate help of the victim. Victim here

may also be read as 'the offender'. The law need not necessarily be enforced, but may sometimes be seen as a preventive device.

Conclusion: Any sexual contact with children under 12 is always punishable. In exceptional cases the Justice Department will not prosecute, viz. if the child's interests go against prosecution. It is too early for the time being to know what policy the Justice Department will follow.

PERSONAL RESPONSIBILITY AND DEVELOPMENT

The way age-limits have been reorganised in the new sex act reflects a changing tendency in society, and is the result of a general change in attitude in the population. All sexual contacts before the age of twelve are punishable, not because such contacts would be considered morally objectionable (as was the case in the formulation of the previous version of the sex act), but because legislation is more concerned about protection against sexual harassment than about positive sexual experiences. 'The good suffer along with the bad'.

Children nowadays assume greater responsibility for their own development. Good sex education and increased insight into human relationships will help them assess a particular situation and recognise sexual violence. For this reason the new act takes the child's own will into account from the age of twelve.

source: www.xs4all.nl/~heinv/dqrd/zedenwet.html

Report of the Kingdom of the Netherlands

PART II - DEFINITION OF THE CHILD

Definition

14. The definition of a child in the Dutch Civil Code is in keeping with that of article 2 of the Convention. "Minors are persons who have not reached the age of eighteen years and are not and have never been married and have not been declared adult by the application of article 253 ha" (Civil Code, article 1:233). Since 1 November 1993 article 253 ha of Book 1 of the Civil Code has allowed minor women aged 16 or 17 to have parental-authority of their child if they wish to care for and raise it themselves. This is arranged through a declaration of adulthood issued by the juvenile court judge if he considers this to be in the interests of both mother and child.

Age of civil majority

15. The age of civil majority is fixed at 18 years (Act of 1 July 1987, which came into force on 1 January 1988).

16. If he acts with the consent of his legal representative, a minor is competent to perform legal acts (Civil Code, article 1:234, as amended on 2 November 1995). This rule means that minors are competent to perform legal acts themselves provided they have the consent of their parent(s) or guardian. However, consent may be given by legal representatives (the parent/parents or guardian) only if they themselves have the power to perform the legal act on behalf of the minor.

17. A legal representative may give consent only for a given legal act or for a given object. It follows that a minor cannot be given full legal capacity by a general consent. The requirement that consent for a given object must be in writing has been abolished (as of 2 November 1995). Since the wording of article 1:234 was amended on 2 November 1995, consent is presumed to have been given to a minor to perform a legal act if the act in question is one which is, according to common usage, performed by minors of his or her age. Once it has been established that the legal act comes within this category, the act is deemed to be performed with the consent of the legal representative and is equivalent to a legal act performed by an adult. This most important provision ensures that minors are able to act as an

independent person in legal transactions in many fields in accordance with existing practice. The aim is to take account of the greater responsibilities accepted by young people and to acknowledge this in the acts of daily life.

18. The competence of minors to perform legal acts applies unless the law provides otherwise. For example, a minor who has been given limited independent contractual capacity by the court may exercise the powers of an adult, i.e. without the necessity of obtaining the consent of the legal representative. Some other examples of competence for which the consent of the legal representative is not required at all are where a 16 or 17-year-old applies for the appointment of a special representative in the event of a conflict of interest of a material and/or non-material nature between the child and its parent(s) or guardian (article 1:250 Civil Code) or concludes an agreement for medical treatment for himself/herself (article 7:447 Civil Code, took effect on 1 April 1995). Where children aged 12-16 are to undergo medical treatment, it is necessary to have both their consent and the consent of their parents or guardian. However, the consent of the parents or the guardian is not required if the treatment is clearly necessary in order to avert serious danger to a minor aged 12-16 or if the minor well considered continues to wish to receive the treatment despite the refusal of the parents to give consent (article 7:450 Civil Code).

Minimum legal age for the exercise of certain rights and obligations

(1). Consent to marriage

19. The age at which a person can lawfully enter into a marriage is uniformly fixed at 18 for both men and women. This age requirement, which is the same as the age of legal capacity, does not apply if a man and a woman are both aged 16 or over and the woman lodges a doctor's statement that she is pregnant or if a child has already been born to the parties concerned. In this situation priority is given to the manifest wish of the prospective spouses to raise their child together. It is also possible to obtain a marriage licence at a younger age on "serious grounds". In such cases the main consideration is whether the prospective spouses are actually capable of taking responsibility for raising the child.

(2). Voluntary enlistment in the armed forces

20. See under article 38

(3). Call-up

21. In 1995 any obligation to do military service was suspended.

As regards wartime, see under article 38

(4). Part-time work

22. This is dealt with in more detail under article 32.

(5). Full-time work

23. Under the Civil Code a person aged 16 or over has been able to enter into an employment contract without the consent of his or her parents since 1 April 1997. However, a child is obliged by law to attend school until the age of 17. This is dealt with in more detail under article 28, paragraph 1 (b).

(6). Freedom to testify before the courts

24. Under article 203, paragraph 3, of the Code of Civil Procedure, a witness who has not yet reached the age of 16 and a witness who is unable adequately to comprehend the meaning of the oath is not required to take an oath. He or she is then warned to tell the whole truth and nothing but the truth. If evidence is accepted in part on the strength of the statement by the witness, the judgment must make particular mention of the reason for this.

(7). Criminal liability

25. Young people who have not yet reached the age of 12 years when they commit an offence (i.e. a criminal offence) may not be prosecuted. This means that in appropriate circumstances a child may be arrested and asked by an investigating officer to give his or her name. The child may also be questioned and searched and his or her possessions may be confiscated. More far-reaching measures such as police custody and remand in custody are not possible. In such cases the public prosecutor does not have a right of prosecution. If charges should be brought, the court is required to hold that the case is inadmissible.

(8). Other legislation

26. The minimum legal ages which apply to the following subjects may be found at the places in the text where these subjects are discussed:

- Compulsory education, see at discussion of article 28.
- Hazardous employment, see at discussion of article 32
- Deprivation of liberty, see at discussion of article 37 paragraph (a).