

## **Legal protection at risk – the cumulative impact of anti-terror legislation**

Briefing paper analysing the impact of proposed Dutch anti-terror  
legislation on standards of human rights protection.

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## SUMMARY

The five bills on combating terrorism proposed at the beginning of 2005 will have negative consequences for the level of human rights protection in the Netherlands. The cumulative impact of these five legislative measures will result in significant limitations on the rights and freedoms of Dutch citizens. It is difficult to get a complete picture of this cumulative impact since the proposals have been and are being brought before Parliament one at a time. Furthermore, the (proposed)<sup>1</sup> legislation relates to several different areas of law. Up till now the cumulative effect of the various legislative measures has not received adequate attention within the political debate. In addition, the decision-making process on the (proposed) legislative measures should take into account the potential effects which the implementation of these measures will have on the rights and freedoms of citizens.

### *Compatibility with human rights guarantees*

The Humanist Committee on Human Rights (HOM) has examined the (proposed) legislation for compatibility with a human rights framework. This paper assesses to what extent the powers restricting human rights included in the (proposed) anti-terror legislation meet the guarantees required by the human rights framework for these measures to be lawful. It examines the compatibility of the (proposed) legislation with the following guarantees: conformity with the rule of law; foreseeability for citizens; purpose limitation; necessity; proportionality; and adequate judicial control. It can be concluded that the proposed legislation is not in line with these guarantees as regards the points listed below, among others (see also Table 2 on page 6):

- Through the use of vague criteria, the scope of the (proposed) legislation becomes too broad in relation to the situations in which the far-reaching powers can be exercised.
- The limited-access position of the defence to relevant information imperils the guarantee of a fair trial, because insufficient counterbalances are included in the legislation.
- Judges have limited access to evidence, which hampers their ability to reach a balanced judgement.
- The violation of human rights is not proportional to the aim of the (proposed) legislation. The necessity of the (proposed) legislation has not been proven.

### *The cumulative impact*

The cumulative impact of the limiting effect that the proposed legislation generates regarding the protection of human rights can be seen in the following table:

Table 1	right to respect for private life	right to a fair trial	freedom of movement	freedom of expression	freedom of religion	prohibition of discrimination	safeguards against deprivation of liberty	right to property	prohibition of torture
(Proposed) legislation									
Authority to demand information	1								
The use of anonymous witnesses		2							1
Expanded powers of investigation and prosecution for terrorist offences	3					1	2		
Administrative measures in relation to national security	2	1	3		3			1	
Penalisation of incitement to commit serious criminal offences and removal from office				4					

Red indicates a direct impact by the proposed legislation on the human right. Orange shows a limiting consequence that is to be expected. The figures indicate the number of different ways that the (proposed) legislation affects the human right.

<sup>1</sup> The use of proposed between brackets refers to the fact that the Authority to demand information Act has become official law. The other cited legislation are still in the proposal phase.

The table indicates that the (proposed) legislation affects **nine** different human rights and freedoms. Seen from a human rights perspective, the rights and freedoms are limited not only by the different (proposed) legislative measures, but also by multiple provisions within particular measures, each of which have their own limiting effect. The right to respect for private life provides a good illustration of this cumulative effect. This right is affected by the Act on the Authority to Demand Information, the Bill on Expanded Powers of Investigation and Prosecution for Terrorist Offences (in three ways) and the Bill on Administrative Measures in Relation to National Security (in two ways). Thus, the right to respect for privacy is limited in a total of six separate ways.

It is also to be expected that the proposed legislation will have a deterring impact on the legitimate and legal behaviour of civilians due to fear of coming under government suspicion. This may result in the restriction of citizens' exercise of freedom of religion and freedom of expression. Neither does the (proposed) legislation contain enough safeguards, such as purpose limitation and duration limitation, to prevent the risk of a snowball effect and a sliding-scale effect.

#### *Material application*

The implementation of the (proposed) legislation has potential negative impacts on legal protection. Disturbing risks to be expected in the implementation of the proposed legislation are:

- Arbitrariness due to legislation that is too vaguely defined.
- Latitude for a discriminatory approach.
- Disproportionate infringement of the rights and freedoms of innocent citizens.
- Damage to confidence in the administration of justice. Judges will have to decide between the general interest and the importance of respecting fundamental rights in their judgments, with limited access to evidence and without objective verifying criteria .

#### **Recommendations**

To prevent undesirable effects on the protection of human rights over both the long and short term, HOM puts forth the following recommendations to be considered during the decision-making process concerning anti-terror legislation:

- a) **Consideration of the cumulative effect:** in seeking a balance between combating terrorism and protecting the fundamental rights of citizens, the cumulative effect of the measures should be taken into account.
- b) **Prohibition of torture must be respected at all times:** information originating from sources in which torture may have been used cannot be used as evidence in criminal proceedings, nor can far-reaching powers be exercised on the basis of such information.
- c) **Guarantee of the principle of non-discrimination:** The principle of non-discrimination should be guaranteed in the legislation as well as in its implementation.
- d) **Specifically defined legislation:** legislation should be formulated in a way that is sufficiently clear and precise so as to guarantee the principle of foreseeability.
- e) **Purpose limitation:** the limiting powers proposed by the legislation should be purpose-specific and should be used for the defined purpose of combating terrorism.
- f) **Monitoring the conditions of necessity and proportionality:** these conditions should be made explicit in the Explanatory Note. The questions which should be asked are: could the same result be obtained with a better use of the existing mechanisms or through better cooperation between the various organizations? Are less-drastic measures possible?
- g) **Monitoring an equal and adequate information position of the defence.** Sufficient counterbalances must be present to compensate the limitations generated by the (proposed) legislation.
- h) **Adequate judicial control:** the role of the judge may not be marginalized, in particular in view of the pivotal role which judges have to fulfil due to lack of limitations and objective criteria within the (proposed) legislation itself.

- i) **Time-restricted measures:** a fixed time sunset-clause and evaluation provisions in legislation contribute to the prevention of the sliding-scale effect.
- j) **Clear directives for implementation:** in order to prevent arbitrariness and discrimination, clear directives for implementation must be formulated. A procedure for parliament to monitor delegated legislation would be suitable here which guarantees that these government measures will not enter into force before parliament has been informed about their nature and exact text, thus giving parliament the opportunity to discuss these measures with the responsible minister or to suggest changes in the text.
- k) **Monitoring of effects:** before, during and after new legislation is enacted, the effects on the protection of human rights must be measured and evaluated.

**Table 2: Human rights guarantees and the (proposed) Dutch anti-terror legislation**

Guarantees	Act on the authority to demand information	Act on the use of anonymous witnesses	Act on expanded powers of investigation and prosecution for terrorist offences	Act on administrative measures in relation to national security	Act on penalisation of incitement to commit serious criminal offences and removal from office
<b>Conformity with the rule of law</b>	This degree of demand information may be within the scope of the restriction clause provided there are sufficient guarantees present.	The hearing of anonymous witnesses in some circumstances is in conformity with the right to a fair trial. The admittance of evidence probably obtained by the use of torture is in violation of the prohibition of torture.	The measures concerning the safeguards against deprivation of liberty and the right to respect for private life may fall within the margin of appreciation. Latitude for indirect discrimination is in violation of the positive obligation regarding the non-discrimination principle.	The right to respect for private life, freedom of movement and the right to property may be restricted provided the guarantees have been met. The proposal is in violation of the <i>equality of arms</i> principle.	The far-reaching restriction threatens to damage the substance of freedom of expression.
<b>Foreseeability for citizens</b>	The term 'indications' creates too broad a scope.	The proposed legislation has been adequately and precisely formulated.	The term 'indications' creates too broad a scope.	The term 'based upon facts and conditions can be connected to terrorist activities or the support of it' creates too broad a scope.	Foreseeability not guaranteed by broadly interpretable concepts such as 'minimize' and 'could disrupt'.
<b>Purpose limitation</b>	Not bound to either national security or counter- terrorism.	Bound to national security.	Restricted to the investigation and prosecution of terrorist offences.	Restricted to 'terrorist activities'.	Restricted to 'very serious crimes'.
<b>Necessity</b>	No concrete examples that current powers fall short.	Necessity to allow anonymous witnesses to control contents of the report and to use intelligence information in the criminal proceedings is not demonstrated.	Not shown that the current existing mechanisms are insufficient.	Necessity of far-reaching measures is not demonstrated.	The existing criminal code already provides for sufficient possibilities.
<b>Proportionality</b>	Disproportionate infringement on the right to respect for private life in proportion to insufficiently demonstrated necessity and effectiveness.	Weakening of the rights of the defence together with restricted judicial control is disproportionate to social interest.	The use of vaguely defined criteria creates a disproportionate infringement on the right to privacy. The possibility to withhold the suspect unrestricted access to the case file for a period longer than two years under remand is disproportionate.	Marginal necessity not in proportion to far-reaching restrictions. Other measures are difficult to verify without disproportionate interference to the rights of innocent civilians.	Far-reaching restriction disproportionate to social interest.
<b>Adequate judicial control</b>	No adequate and structural control on the information-gathering process.	No possibility to appeal a decision to hear anonymous witness. Limited examination of intelligence information that is useful in the criminal proceedings.	Restricted examination of intelligence information.	The presiding judge is not allowed to examine the intelligence information on the basis of <i>equality of arms</i> principle. There is no investigating magistrate in the criminal code that can assume this task.	Insufficient points of contact for the judge to make a balanced judgement.