ANNEXE I

Policy Document on Fundamental Rights in a Pluralistic Society

1. Introduction

1.1. Background

Dutch society is characterised by pluralism. There is a wide range of (religious) ideologies, beliefs, lifestyles and value patterns. This is a major asset. It is freedom and the openness of society that make this pluralism possible. The Dutch Constitution and human rights conventions have anchored these freedoms and are therefore a source of shared basic assumptions. This does not detract from the fact that there are also tensions between these basic assumptions. These may be hard to deal with and constitute very sensitive issues in society. This has proved to be the case above all in the last three years, primarily as a result of '11 September', the events in Afghanistan and Iraq, the factual data on the integration of minorities and the increasing level, partly because of this, of public debate on integration. Statements by imams about homosexuality and the position of women, comments by politicians on the nature of Islam and the meaning of fundamental rights such as the prohibition of discrimination. People have taken up positions and hardened their points of view. This has lead to either significant social resistance or support. These and other positions have contributed to a forbidding climate. A report issued in March 2004 by the General Information and Security Service (AIVD) about, among other things, the treatment experienced by a growing number of Muslims at the hands of opinion-makers[6] has also contributed to public discussion about the responsibility of opinion-makers and columnists and the freedom of speech. At the same time, Islamic religious education at state schools, (denominational) education of an Islamic nature, the Arab European League NL and wearing the chador or niqab in public spaces are now being viewed with Argus eyes. Partly as a result of developments in the countries around us, wearing a headscarf has also once again become the subject of discussion. The refusal by a number of denominational schools to admit pupils from other religious denominations should, some people believe, constitute grounds for the abolition or amendment of article 23 of the Constitution, that guarantees the freedom of education.

[6] Parliamentary documents II 2003/04, 27 925, no. 120.

These events and developments directly affect the meaning of the Constitution, in particular the prohibition of discrimination, religious freedom and the principle of the separation of church and state arising therefrom, the freedom of speech, the freedom of association and the freedom of education, as well as the relationships between them. What can you say about minority groups or homosexuality without being discriminatory? To what extent can a school or association propagate its own identity without discriminating against others or being banned? Just how different can you be in the Netherlands? How tolerant are we? These are questions that go straight to the heart of the Netherlands as a democratic state under the rule of law, the individual as democratic citizen and the question of social cohesion within the Netherlands. In looking for answers to such fundamental questions, generally accepted and shared basic assumptions have an important role to play. The Constitution is particularly important in this respect, and therefore also forms part of the debate. Some people have high hopes of the Constitution, argue for the introduction of the separation of church and state and a new 'neighbours law' as fundamental rights or even argue for the abolition or amendment of certain articles of the Constitution. Other people do not regard the Constitution as a 'holy text' or say that there is 'nothing wrong' with discussing article 1 of the Constitution. The lack of a hierarchy of fundamental rights may sometimes have little support or run up against doubts.

1.2. The aim of the policy document

Debate about social issues is of vital importance in a democratic state under the rule of law. Even if this is about matters that relate to the exercising of constitutional freedoms. Indeed, debate forms the core of the functioning of our democracy and is essential for maintaining a pluralistic society. For citizens and the government this means, among other things, that it is very important to give those with (different) beliefs and ideas, above all, the same space as like-minded people. Debate sometimes shows that there is serious dissatisfaction and uncertainty. Dissatisfaction about the way in which different groups in our society make use of their fundamental rights and about the judicial assessment of that use. Uncertainty about the boundaries of the freedoms guaranteed by fundamental rights and the way in which various fundamental rights relate to one another. If there continues to be dissatisfaction about constitutional provisions as such, then there is a need to consider whether choices made in the past when the fundamental rights were shaped fit in with our current pluralistic society. This question affects the Constitution as the backbone of the democratic state under the rule of law, with the government bearing a particular responsibility for the quality thereof. This policy document has also been prompted by the motion put forward by Dittrich & co., in which they asked the government to issue a policy document on the area of tension between

the prohibition of discrimination, the freedom of speech and religious freedom (Parliamentary documents II, 2001/02, 28 000 VI, no. 34; appendix 4). In addition, this policy document is aimed at implementing the commitment made by the Cabinet to issue a position paper on wearing clothing and jewellery that may express religious or ideological beliefs.[7]
Against this background, the aim of the policy document is to give impetus to the answering of the following question, which also serves to formulate the problem:

> Is there, in our pluralistic society, enough balance in the reciprocal relationship between fundamental rights, in particular in the case of (discriminatory) statements which are (partly) based on religious or ideological beliefs?

1.3. Contents

In what follows, we will first of all look at the pluralism of society as the social background to the turmoil which has existed in society in recent years (section 2). Section 3 will then consider the values of the democratic state under the rule of law, tolerance and the separation of church and state, which offer guidelines for the assessment of a number of social issues such as those that will be dealt with in section 4. Based on these issues, the question will be raised as to whether, and if so which, fundamental rights-related dilemmas are at issue. In conclusion, a number of key points will be identified and where possible the initial impetus will be given for the emphasis or (further) development of policy instruments (section 5).

The appendices are (1) a concise explanation of how fundamental rights work, (2) general background information on the prohibition of discrimination, the freedom of religion and beliefs, and the freedom of speech, (3) the legal framework for the relationship between the prohibition of discrimination, the freedom of religion and beliefs, and the freedom of speech, and (4) the motion put forward by Dittrich & co.

2. Pluralism as a characteristic of our society

2.1. Introduction

The past two and a half years have been eventful ones. Turbulent developments and events have arisen on a national and international level that have had repercussions for the

[7] Parliamentary documents II 2003/04, Annex - Official Report no. 1073, pp. 2267-2268 and Official Report no.

relationships between various population groups in our society. Relationships have been put under pressure and latent tensions have surfaced. The multicultural society stands squarely at the centre of discussion; support for it no longer goes without saying.[8] Much of the social turmoil that has arisen as a result of a number of events relating to the exercising of fundamental rights must also be seen against the background of this period during which a great deal of attention has been paid to the position of minorities and the Muslim community in particular.[9] This does not detract from the fact that the social and political changes in the Netherlands are taking place at a rapid pace for reasons other than '11 September' and demographic developments. Individualisation, secularisation and the postmodernisation of society, among other things, have contributed to the pluralism of society.

2.2. Pluralism

The pluralism of Dutch society is nothing new. Often very divergent and different lifestyles, religious movements, opinions, values and standards have co-existed for hundreds of years. The current pluralism is however, unlike earlier times, less embedded in a dominant culture. The latter has been broken open by various developments from the 1960s onwards, such as, in the first instance, the process of individualisation that has since manifested itself on a larger scale and more intensively than before. This has, among other things, created a better balance of power between individuals and their immediate social environment, which has reduced the guiding capacity of that environment. Secularisation, the removal of traditional religious and socio-political barriers and changed education, with an increase in the contribution made by children themselves, demonstrate this trend. The Advisory Council on Government Policy (WRR) and Van den Brink point out that the individualisation process results in people becoming more morally independent, making choices independently and therefore not allowing themselves to be influenced by their immediate social environment to the same extent.[10] Freedom and self-development appear to constitute an important standard when forging relationships. There is still a degree of dependence, but this has been

---

59, pp. 3880-3896.

[8] Cf. Rapportage Integratiebeleid Etnische Minderheden [Report on Integration Policy in respect of Ethnic Minorities] 2002, Parliamentary Documents II 2002/03, 28 612, no. 2, Rapportage Integratiebeleid Etnische Minderheden 2003, Parliamentary Documents II 2003/04, 29 203, no. 2 and the final report 'Bruggen bouwen' [Building Bridges] of the Interim Commission for the Investigation of Integration Policy (Blok Commission), Parliamentary documents II 2003/04, 28 689.

[9] This policy document refers to 'Islam'. This does not detract from the fact that there are many movements within Islam which sometimes deviate widely from one another. An overview of this can, for example, be found in: J. Waardenburg (ed.), *Islam, Norm, ideaal en werkelijkheid [Islam, Standard, ideal and reality]*, Fibula, 1999.

[10] WRR report, De toekomst van de nationale rechtsstaat [The future of the national state under the rule of law], The Hague: Sdu uitgevers 2003. G. van den Brink, Mondiger of moeilijker. Een studie naar de politieke habitus van hedendaagse burgers [Independent or just difficult. A study into the political habits of modern-day citizens.] (WRR preliminary studies and backgrounds series, no. V 115), The Hague: Sdu uitgevers 2002.

shifted onto anonymous relationships. According to Van den Brink, there is an increasing sense of self-worth as far as the economic, social, cultural and instinctive aspects of daily life are concerned. This is expressed in, among other things, the self-confident and assertive lifestyle of many of the citizens of today.[11] What influences prevail when choices are made depends ever more significantly on personal preferences and circumstances.

Related to the process of individualisation is the postmodernisation of the cultural and social climate. In this climate, cultural traditions are playing less and less of an all-embracing and binding role. They are rejected as 'grand narratives'. What has replaced this is experimenting with lifestyles, searching for satisfactory experiences and 'putting together' one's own ideology. People talk about being liberated from the galling bands of church and state, or saying goodbye to 'illusions'. There is a 'narrow' underlying set of ethics or morals; a number of rules that make cooperation between strangers possible. The emphasis here is on the concept of freedom, in particular negative freedom: freedom from government interference, religious interference etc. Ultimately it is all about human autonomy. In the 1980s, a counterpart to postmodernism developed, namely communitarism. Morality, traditions and practices are once again being re-valued. A return to the 'myth of the grand narratives' is regarded as well and truly past, however.

Finally, increased migration has also contributed to an increasingly pluralistic society. Immigration is also nothing new for the Netherlands. But immigration took on a different character after the Second World War, however. Larger and more varied migration streams reached our country. The composition of the Dutch population has been significantly changed by this. Partly because it is now much easier to travel long distances, immigrants come from the most diverse countries and differ widely in terms of their culture, religion and level of education, both among themselves and vis-à-vis the established population of the Netherlands.
More than eighteen percent of the Dutch population now comes from a non-Dutch background, half of these come from non-Western countries. In 2003, the four largest ethnic minority groups together contained more than one million people. These four groups consist of people of Turkish, Surinamese, Moroccan and Antillean/Aruban origin. As a result of immigration, almost all world religions and beliefs are currently represented in all their broad diversity in our country.[12] The underlying factors which lead to immigration - globalisation,

---

[11] Cf. Parliamentary Documents II 2003/04, 29 362, no. 1, p. 4 (Modernisering van de overheid [Modernising the government]).
[12] Cf. Parliamentary documents II 1997/98, 25 919, nos. 1-2, 'Integratiebeleid betreffende etnische minderheden in relatie tot hun geestelijke bedienaren' [Integration policy relating to ethnic minorities in relation to their spiritual

major differences in prosperity and safety - will continue to exist in future.

2.3. Pluralism and communality

Different social developments have contributed to the (increased) pluralism of society. The social debate about the pluralistic society concentrates primarily on the pluralism that has arisen because of the presence of immigrants or minority groups, their degree of self-organisation and the sometimes different values and standards these groups have.[13] Tensions as a result of the exercising of fundamental rights and uncertainty about the relationships between these have also become better known and have become the subject of debate partly because of this pluralism. This requires renewed attention to a number of common basic assumptions which direct the approach to these questions. These are discussed in the following section.

3. Democratic state under the rule of law, tolerance and the separation of church and state

3.1. Pluralism of values, democratic state under the rule of law and human dignity

Pluralism of values is an essential characteristic of our democratic state under the rule of law. It arises of necessity from the space for freedom which the democratic state under the rule of law and, in particular, the classic fundamental rights strive to create and have indeed established. It is in the interest of both individual citizens and society as a whole that citizens have the freedom to develop and propagate their own values. This is an important achievement of the modern, free and pluralistic society. It is therefore extremely important that the tensions that sometimes arise from this pluralism be seen against the background of the said fundamental rights, democracy and rule of law. These serve as the basis for guidelines on how to deal with these tensions. This basis is undisputed and should be actively disseminated. For these reasons, the government position paper on the WRR report 'Waarden, normen en de last van het gedrag' [Values, standards and the burden of behaviour] refers to the importance of the Boulevard of the Present Past to be created and the proposal to establish a House of Democracy and Freedoms.[14] These can be used to

---

ministers].

[13] Cf. Lucassen and De Ruijter (eds.), *Sociale cohesie in Nederland. Nederland multicultureel en pluriform?, [Social Cohesion in the Netherlands. A multicultural and pluralistic Netherlands?]* Amsterdam: Askant 2002, pp. 144-146 and B. Parekh, *Rethinking Multiculturalism, Cultural Diversity and Political Theory,* New York: Palgrave 2000, pp. 3-6.

[14] Cf. the government position paper 'Publieke moraal' [Public Morals] in respect of the WRR report 'Waarden,

draw attention to the cultural-historical backgrounds to current questions or the historical dimension of our parliamentary democracy and the accompanying civil liberties. In order to retain the said values, a strongly developed and modern citizenship is required, to be achieved via education and integration courses, among other things.

Fundamental rights, democracy and the rule of law represent, as historical achievements, an intangible value of great significance. This is accordingly also emphasised in many conventions, other documents and court rulings that jointly also form the basis for the national and international legal system.
As early as the Universal Declaration of Human Rights of 1948 it was regarded as being of the greatest importance 'if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.' The preamble of the European Convention for the protection of Human Rights and Fundamental Freedoms of 1951 adds, among other things, that 'the maintenance of justice and peace is based on an effective political democracy and on the common understanding and observance of human rights.' The preamble of the Charter of Fundamental Rights in the (draft) Constitutional Convention of the European Union further states that " (..) The EU is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law." And according to article 2 of this Constitutional Convention, the Union is founded on the values of 'respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, equality, solidarity and non-discrimination.' Finally, the fundamental importance of the values of democracy, the rule of law and pluralism are strongly expressed in the permanent case law of the European Court of Human Rights (ECHR) in Strasbourg; 'Democracy (..) appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it' and that 'there can be no democracy without pluralism.'[15]

The importance of the rule of law increases even further in a society in which beliefs and lifestyles differ widely and in which the composition of the population is becoming increasingly heterogeneous. The values of the rule of law and the standards and rules of conduct arising therefrom constitute the minimum link binding different groups to one another.[16] These values include freedom, equality and solidarity and the protective values

---

normen en de last van het gedrag' [Values, standards and the burden of behaviour], Parliamentary documents II 2003/04, 29 454, no. 2.

[15] See *inter alia* the judgement of the ECHR of 13 February 2003, Refah Partisi e.a. vs Turkey, par. 86-89.

[16] Cf. the government position paper 'Rechtsstaat en rechtsorde' [The rule of law and the legal system] in respect of the WRR report 'De toekomst van de nationale rechtsstaat' [The future of the national state under the rule of

that are contained in the fundamental rights and human rights, such as in particular human dignity, personal autonomy and the right of each individual to make his or her own choices. These underlying ideas are also robustly expressed and embedded in the documents and statements referred to above.[17] Article 1 of the said draft EU Charter even starts by stating: 'Human dignity is inviolable. It must be respected and protected.' At the same time, the rule of law acts as a binding agent, because it provides reference points for containing the numerous unavoidable conflicts about values and standards, as well as conflicts between interpretations and realisations of these, within reasonable limits. This is done via case law and the democratic process, among other things. Dialogue plays a crucial role in this regard, as the ECHR has also emphasised: "One of the principal characteristics of democracy (is) the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome".[18] Dialogue brings people and institutions together and also contributes to the prevention of alienation and the detrimental consequences of this. It does indeed require an open and positive attitude on the part of the participants and presupposes, among other things, that people bring their identity into the discussion for which the public space ideally forms a safe place.

3.2. Tolerance

To the aforementioned need for dialogue can be added the need for tolerance in dealing with differences in religion, beliefs and the related values and standards. The Netherlands has an age-old tradition of this. Tolerance and forbearance are essential elements for the way in which the freedom leading to pluralism is handled. Reciprocity plays an important role in this respect. Wanting to make your own choices and make use of your freedoms but forcing others to follow your favourite patterns or simply disregarding someone else's freedoms violates this principle of reciprocity. Recognising the other as a person who is able to make his or her own choices means being willing to create space for others to live the lives chosen by them. Others, with all their differences, must be respected as equals. This means relinquishing unnecessary coercion, pressure or interference, both on the part of the government and citizens themselves. As far as dealings between citizens are concerned, this means tolerance in the broad sense: the willingness to accept the choices and behaviour of

---

law], Parliamentary documents II 2003/04, 29 279, no. 1, as well as the government position paper 'Publieke moraal' [Public morals] in respect of the WRR report 'Waarden, normen en de last van het gedrag' [Values, standards and the burden of behaviour], Parliamentary documents II 2003/04, 29 454, no. 2.

[17] In the judgement of the European Court of Human Rights of 29 April 2002, Pretty vs United Kingdom, the Court for the first time explicitly recognised personal autonomy as a principle based on the rights laid down in the European Convention for the protection of Human Rights and Fundamental Freedoms (par. 61).

[18] ECHR 30 January 1998, United Communist Party of Turkey e.a. vs Turkey, par. 57 and ECHR 13 February 2003, Refah Partisi, par. 97.

others that take place within the limits of Dutch law, above all also where these appear incomprehensible. In this sense, citizens themselves also contribute to the creation of freedom and modern citizenship; in addition to civil liberties there is also a responsibility to be tolerant, to exercise restraint and to be willing to recognise the effects of one's own behaviour and where necessary attach consequences to this.

3.3. Separation of church and state

Various issues in respect of conflicting fundamental rights also relate to the exercising of religious freedom in the (semi-)public domain and the principle of the separation of church and state. Reference can be made to the presence or absence of prayer areas or wearing religious clothing in state schools or in hospitals. The principle is used as an argument both for and against such behaviour or practices. For this reason, it is important to spend some time considering the meaning of the principle that is, as a historical achievement, of immense significance.

The principle originated in the Batavian revolution of 1795. In 1796, the constitutional body of the Batavian Republic decreed the separation of church and state and full freedom of religion for all. This put an end to the privileged status enjoyed by the Dutch Reformed Church since the Union of Utrecht (1579) and government interference in religious matters also declined. This disentangling of church and state was continued via the Batavian Constitution and later constitutions and legislation. Accordingly, the government gradually abandoned its interference in the internal organisation of the Reformed Church,[19] the state's right to nominate or appoint a minister when a vacancy arose was rescinded by means of an act of 1861 and an act passed in 1983 put an end to the traditional government obligations with regard to salaries, pensions and suchlike for church ministers.

The principle of the separation of church and state constitutes a fundamental basis for the establishment of our democratic state under the rule of law. It can to a significant extent be derived from article 6 of the Constitution that guarantees the freedom to confess one's faith and one's beliefs, also in conjunction with article 1 of the Constitution. The meaning of this principle for today's society is that both the state and churches and other spiritual organisations function as independent bodies. For the spiritual organisations, this means, among other things, that they choose their officials independently and that they (and their members separately or jointly) can freely determine or confess their faith or beliefs. They

[19] The freedom of church organisations was generally recognised in the Religious Associations Act (1853).

determine their spiritual and institutional order according to their own views. The state respects this independence. It may not bring any pressure to bear on the administrative organisation. The state must refrain from any interference in the confession of faith or beliefs, without prejudice to its authority and obligation to act against those who violate the law. The spiritual organisations must be treated equally by the state. The government may not, therefore, side with a particular religious or ideological belief. It is, in the words of the ECHR, a 'neutral organizer.' On the other hand, the independence of the state vis-à-vis these organisations is expressed in the fact that the organisations and their officers do not as such have any public-law powers.[20]

As long as the aforementioned conditions are fulfilled, the principle does not necessarily prevent the government from concerning itself, under certain circumstances, with religious matters or from referring to religious sources or allowing itself to be inspired by these. In this sense, it does not have to be entirely neutral. International standards such as those of the European Convention for the protection of Human Rights and Fundamental Freedoms and the ICCPR offer scope for this. They do not prescribe precisely how the separation of church and state should be shaped. They presuppose the existence of national structures in respect of religion and law and proceed on the assumption that there will be a wide variety of relationships between church and state,[21] as is for example the case within Europe. The United Kingdom, Greece, Finland and Denmark, for example, recognise a state religion. In Germany, Austria and Luxembourg, certain religions are officially recognised and in France and Spain there is a more rigorous separation of church and state.

In addition to national law, international law also lays down a number of minimum guarantees in respect of the aforementioned systems, such as the prohibition of discrimination between various religions and ideologies. Differences in the treatment of individuals in any area of public and private law cannot therefore be justified on the basis of the European Convention for the protection of Human Rights and Fundamental Freedoms.[22] Furthermore, excessive government interference in church matters or pressure in favour of a specific religion all too quickly lead to the violation of the right to religious freedom. When recognising a specific

---

[20] Cf. the Final Report of the Commission for advice on the criteria for the provision of support to church organisations and other spiritual organisations, 1988, as well as the Nota Integratiebeleid betreffende etnische minderheden in relatie tot hun geestelijke bedienaren [Policy document on integration policy relating to ethnic minorities in relation to their spiritual ministers], Parliamentary documents II 1997/98, 25 919, nos. 1-2, p. 9.

[21] Cf. ECHR 27 June 2000, Cha'are Shalom ve Tsedek vs France, in which the Court states: 'eu égard a la marge d'appréciation qu'il faut laisser a chaque état, notamment pour ce qui est de l'établissement des délicats rapports entre les Eglises et l 'Etat'. See also the UN Human Rights Committee, General Comments, No. 22, par. 9 and 10.

[22] ECHR 13 February 2003, Refah Partisi e.a. vs Turkey.

group, the government may not therefore allow itself to be lead by the dismissive opinion of certain church authorities.[23] Nor may the government strongly favour one spiritual leader when a split has occurred within a church.[24] Nor may the government make it impossible for a religious minister to work because he has no official appointment.[25] Sabotaging certain groups that deviate from the official church by refusing a permit to use an area for services also violates the European Convention.[26] Furthermore, the requirement that new members of parliament must first swear an oath on the New Testament is not acceptable.[27] Conversely, 'religion' must not aim to take over the state's power. According to the European Court of Human Rights, parties that are aiming for a form of government with theocratic characteristics must under certain circumstances - for example, where they constitute a real threat to democracy - be banned.[28] There are therefore material democratic limits to the formation of political opinion.

Facilitating the manifestation of religion

It has already been stated that the principle of the separation of church and state does not mean that the government cannot or may not get involved in religious matters at all. This does not, however, mean that religious groups always have a claim to financing by the government. Based on the principle of equality, such a claim can however be brought into being. The funding of general social activities of religious and ideological organisations in the areas of education (see article 23, paragraph 7 of the Constitution), social work, aid and suchlike is acceptable,[29] as is indirect support in the form of the general granting of subsidies for monuments, including church buildings.
The active involvement of the government may sometimes be necessary to create opportunities and facilities by means of which the freedom of religion can actually be experienced or professed. Such a (positive) duty (of care) in respect of facilitating the manifestation of a religion - such as offering spiritual care, a prayer area and a special diet - arises where there are special legal relationships, as in the case of prisoners.[30] In

---

[23] ECHR 13 December 2001, Metropolitan Church of Bessarabia e.a. vs Moldavia.
[24] ECHR 26 October 2000, Hasan and Chaush vs Bulgaria.
[25] ECHR 14 December 1999, Serif vs Greece.
[26] ECHR 26 September 1996, Manoussakis e.a. vs Greece.
[27] ECHR 18 February 1999, Buscarini e.a. vs San Marino.
[28] ECHR 13 February 2003, Refah Partisi e.a. vs Turkey.
[29] Also according to the Hirsch-Ballin Commission in its final report Overheid, godsdienst en levensovertuiging [Government, religion and beliefs], The Hague 1988, and the government position paper approving this: Parliamentary documents II 1989/90, 20 868, no. 2, p. 3.
[30] Cf., *inter alia,* articles 41 and 44, paragraph 3, of the Prisons Act, Recommendation R(87)3 of the Committee of Ministers of the Council of Europe regarding prison rules (rules 46 and 47) (www.coe.int), Parliamentary documents II 1989/90, 20 868, no. 2, pp. 4/5 and M. D. Evans, *Religious liberty and international law in Europe,*

addition, states must provide for legislation which bans discrimination on the grounds of (among other things) religion and beliefs. They must also ensure reciprocal tolerance, in a broad sense, between religious groups.[31] Furthermore, it may be desirable for states to provide for special regulations to accommodate foreign religious traditions. For example, the Burial and Cremation Act includes a provision which makes it possible to follow the Islamic practice of burying the deceased within 24 hours.

3.4. Interim conclusion

Fundamental rights - and the principle of the separation of church and state contained therein - democracy and the rule of law form the ultimate basis on which it is possible to organise a peaceful society. This is based on strong common values, such as human dignity, freedom and equality. The government and citizens bear the particular responsibility to actively propagate this basis and these values. The capacity for dialogue and tolerance is indispensable in this regard. Within a society that is based on the said basic assumptions, they play a crucial role in dealing with disputes and conflict situations.

4. The reciprocal relationship between fundamental rights

4.1. Introduction

Laws can be seen as the codification of values and standards of the dominant culture in a group. This applies in particular to the Constitution. Since the breaking open of the dominant culture from the 1960s onwards, the fragmentation or pluralism of values and standards has increased. They have also been given a less unequivocal embedding from this time onwards. Tensions caused by the exercising of certain fundamental rights sometimes increase as a result of this and have, as indicated earlier, become better known and the subject of debate because of this. The reciprocal relationship between fundamental rights and the tensions which sometimes go along with this have primarily come up for discussion in respect of a number of social issues. These throw a light, from various points of view, on the diverse dimensions of the debate about fundamental rights in a pluralistic society. Reference can be made to religion-inspired comments about homosexuality and the position of women, comments on religion, wearing items of clothing or jewellery that may express religious or ideological views, the possibility of homosexuals being admitted as teachers in a denominational school or appointed to a religious office, avenging family honour, female

---

Cambridge University Press, Cambridge, 1997, p. 216.

genital mutilation and public prayer areas. Fundamental rights are at issue in various ways in these questions. It may be about the scope, horizontal and vertical effects, interpretation, limits, convergence and/or conflict of fundamental rights (appendix 1). These situations must be properly distinguished from one another in view of the aim of this policy document, within the framework of which the reciprocal relationship between fundamental rights is particularly relevant.

4.2. Horizontal effects of fundamental rights and convergence

The reciprocal relationship between fundamental rights is regarded as problematic where fundamental rights clash with one another. The pre-eminent example of this phenomenon is the conflict between the prohibition of discrimination and the civil liberties of others, such as in comments on homosexuality and in some questions relating to the niqab or headscarf. This is partly because of the nature of the fundamental rights concerned. The prohibition of discrimination limits the guaranteed freedoms, or, to turn this on its head, the freedoms also determine the scope of the prohibition of discrimination. Seen this way, tension between the two is for the most part unavoidable.

A conflict between fundamental rights means that the citizens' interests protected by the fundamental rights are in opposition to one another. 'Conflicting fundamental rights' is therefore a specific manifestation of the horizontal effects of fundamental rights, that is, of the effect of the fundamental rights of citizens in their relations with one another, and not with the government. This effect of fundamental rights was explicitly accepted in the general constitutional revision of 1983. The courts regularly deal with this issue of conflicting rights. This issue can also come up for discussion when legislation is passed, as in the case of the criminal law provisions on discrimination and the Equal Treatment Act (Awgb). All this requires often very difficult and sensitive consideration back and forth between the courts and the legislator. This is a well-known and 'old' phenomenon, inherent in the (horizontal and conflicting) effects of fundamental rights in an open and democratic society.

In connection with possibility of conflict between fundamental rights it is important to establish that the Constitution does not have any purported order of precedence for the fundamental rights. The objective criteria necessary for this are lacking. And if, furthermore, an order of precedence could be drawn up, this would still do insufficient justice to the particular nature of individual cases. A minimal violation of a fundamental right higher up in

[31] Cf. ECHR 13 December 2001, Metropolitan Church of Bessarabia e.a. vs Moldova, par. 123.

the hierarchy could, after all, be more acceptable than the maximum violation of a fundamental right with a lower ranking. The hierarchy of the fundamental rights as such would therefore in other words not be the same as the hierarchy of the 'intensity of realisation' which would remain after the violation. It must be concluded that setting up a hierarchy of fundamental rights is undesirable because this does not offer a satisfactory solution to conflict situations and is, furthermore, unfeasible. In addition, the courts have in general proved to be able to deal adequately with the issue of (indirectly) conflicting fundamental rights and case law even offers good insight into specific situations in which the one fundamental right interest weighs more heavily than the other. This supplies useful guidelines, as will also be seen under 'a.' below (see also appendix 3). In cases where fundamental rights have been abused (appendix 1, under 3.3), the problem obviously does not arise.

In a pluralistic society, communication in respect of how interests are weighed up in concrete cases of conflicting fundamental rights is increasingly important. It is precisely in such a society that there is a possibility that the outcome of such an (indirect) weighing up of the interests protected by fundamental rights will be regarded as less obvious. In addition, critical comments about such outcomes come to the fore earlier and more overtly, as can also be concluded from the reactions from society, academia and politicians about the social issues referred to above. What must be prevented is that a lack of understanding of how the factors that play a role in the prosecution policy or the taking of a decision by the court or the Equal Treatment Commission are weighed up, results in questions being raised about the credibility of the (criminal) procedure.
Against this background, the clear explanation and description, by briefing judges, prosecutors and the media, of the considerations brought to bear are of great importance. When these considerations are explained, particular attention must be paid to the equivalence of the status of fundamental rights. In addition, it is important that the reciprocal relationship, laid down in the Equal Treatment Act, between the principle of equality and other fundamental rights be evaluated on a regular basis. Such an evaluation will once again take place with the evaluation of the Equal Treatment Act to be initiated this year and in respect of which the House will receive a separate report.

Fundamental rights may not only conflict with one another, but may also *converge* or *compete*. Someone may invoke two or more fundamental rights in a specific situation. This can for example be seen in the public statements made by Imam El Moumni and the former member of the Lower House Mr Van Dijke about homosexuality, as discussed under a. below. Both the freedom of speech and the freedom of religion are simultaneously at issue

here. Other possible cases of convergence are possible, such as religious freedom and the freedom of association. In such cases, the question arises as to which fundamental right is the decisive one. One view of this is that the right offering the most extensive protection in the actual situation is the one that takes precedence. This is known as the 'maximisation requirement'. The question is whether freedom of religion offers this maximum protection in the case of public statements. But if this were to be the case, then the question could be raised as to whether this is justified. In an ideologically neutral state, can the maximisation requirement be used to treat proclamations of faith as different to ordinary expressions of opinion? One reason for preferential treatment would then have to be located in the special character of the religious motive. This is not particularly undisputed. In practice this has proved to sort itself out reasonably well, since the Supreme Court has, in its assessment of proclamations of faith, included not only the religious basis but also the contribution made by these to the social debate and has therefore moored its opinion to two anchors, as will be explained in greater detail below.

a. Non-discrimination, freedom of religion and freedom of speech

- Practical example: Islam-based comments on homosexuality

In a television broadcast of the programme Nova on 3 May 2001, Imam El Moumni called homosexuality 'harmful to Dutch society' and a 'contagious disease'. Many reacted by condemning his comments – some of them with very heated arguments - in the media. 49 reports of an offence were submitted to the Public Prosecutions Department in respect of the Imam's comments. The Public Prosecutions Department then opened a case against the Imam on the grounds of the violation of article 137c and 137d of the Criminal Code, namely defamation on the grounds of homosexual orientation and inciting hatred of or discrimination against a group of people because of their homosexual orientation. On 8 April 2002, the court acquitted the Imam. The court of appeal confirmed the first court's judgement.

There were differing reactions from society, academia and politicians not only to the comments by Imam El Moumni, but also to his prosecution and acquittal. Although the response to his comments was predominantly critical, his prosecution and acquittal brought both support and condemnation. There were comparable reactions to the comments made by the former Member of the Lower House Mr Van Dijke and the court rulings on these.

- Practical example: Christianity-based comments on homosexuality

The weekly magazine De Nieuwe Revu of 25 June - 3 July 1996 published an interview with the Member of the Lower House, Mr Van Dijke. He was asked whether it was a good thing that the Evangelical Broadcasting Association deliberately excluded homosexuals, as Andries Knevel had said. In his reply, Van Dijke said the following: 'I think that you need to distinguish between homosexual practice, which I reject, and homosexuals as such. I don't reject fraudsters out of hand because they commit fraud. What I mean is this 'you can possibly accept someone who has made a mistake once. As long as the person does not intend to repeat these lapses.' It was then put to Van Dijke that he had in fact put committing fraud and practising homosexuality on a par. Van Dijke then said: 'We Christians have developed a really nasty characteristic: we wrongly introduce the concept of degrees into God's commandments. As if you have bad and less bad! But why would stealing, for example pinching government payments, be less terrible than violating the seventh commandment? Yes, why should a practising homosexual be better than a thief?'
The court convicted Van Dijke of the violation of article 137c ff. of the Criminal Code. The court of appeal acquitted him, however, a ruling that was upheld by the Supreme Court on 9 January 2001.

Finally, the response to the comments made by imams in mosques, broadcast in June 2002 on Nova, about the position of women, among other things, was extremely critical. The comments lead to a government position paper in which concerns were expressed about the social effect of the statements broadcast.[32] The Public Prosecutions Department concluded on 10 December 2002 that there were no grounds for the criminal prosecution of these imams.

The cases referred to show the very strained relationship that can exist between the freedom of speech and religious freedom on the one hand, and the prohibition of discrimination, on the other. Although the discrimination provisions in criminal law as such adequately guarantee the reciprocal relationship between these fundamental rights (see appendix 3), this does not mean that the provisions of criminal law cannot be amended, nor that a conviction in an actual criminal case is by definition also in agreement with the relevant fundamental and human rights provisions. The national courts will have to test the *application* of the statutory provisions for compatibility with the provisions of the convention, on the basis of article 94 of the Constitution.

[32] Parliamentary documents II 2001/02, 28 006, no. 11 and Parliamentary documents II 2001/02, Official Report

The question of whether someone has, in a specific case, become guilty of discrimination under criminal law and/or whether the limits of the right to freedom of speech and religion have been exceeded in this respect, must be raised against the background of the framework created by the jurisprudence of the European Court of Human Rights. What is crucial in this regard is above all whether the conviction can be regarded as «necessary in a democratic society». What is important for the determination of this is whether there is an "urgent social need" and whether the restriction is proportional. In this regard the national courts in general have a certain discretionary leeway, a «margin of appreciation». This applies all the more if moral and religious standards are at issue, since there is no uniform European concept of these; morals and religion differ from age to age and from place to place, according to the European Court (see appendix 3, under 1.2.1).

Should a comment be made with the intention of making a contribution to public debate, the limits of permissible criticism are rather broad and there is relatively little scope for a criminal conviction.[33] A prerequisite for such a debate is that it is in any way suitable for 'bringing development or progress with regard to matters affecting humankind into the spotlight.'[34] The scope for restricting the freedom of speech is very limited if the comment is intended as a contribution to public debate on a specific topic, and even more limited if this involves comments about a politician, political speeches or debates relating to issues of public importance. Even more restricted is the scope for a conviction in the case of criticism of governments. As far as the application of criminal law provisions relating to discrimination on the grounds of race (article 137c Criminal Code ff.) is concerned, states appear to have a little more scope for assessment than in the case of 'ordinary' defamation provisions, given the obligations that arise from the UN anti-racism convention. This lays down certain priority rules in respect of fundamental rights for the various cases.

Also in the light of the framework created by the European Court of Human Rights, it is understandable that when answering the question of whether someone who has made certain statements is in fact guilty of discrimination, the nature and tenor of the comments, their mutual relationship and the context in which the comment were made, among other things, are regarded as very important.[35] The national courts will therefore take the freedom of speech and the freedom of religion, if this is at issue, into account when assessing

---

no. 90, pp. 5363-5375.

[33] Cf. A.L.J. Janssens, Strafbare belediging [Punishable defamation], 1998, in particular chapter 13 and European Convention for the protection of Human Rights and Fundamental Freedoms, Case Law & Commentary, article 10/3.10-31.

[34] ECHR 4 December 2003, Müslüm Gündüz vs Turkey, par. 37.

[35] Cf. Supreme Court 16 April 1996, NJ 1996, 527 and Supreme Court 9 October 2001, NJ 2002, 76.

whether a criminal offence has been committed in the specific case. The courts use a number of criteria for this. These boil down to the fact that a comment which is, in itself, offensive or hurtful, may lack the character of a defamatory statement if it is based in the religion or beliefs of the accused and contributes to social debate. In this regard there must be no obvious abuse of rights and freedoms granted under the Convention or the Constitution (appendix 3, under 1.2.2) and the comment should be understood not on its own, but in its context, against the background as a whole. The more offensive and hurtful the nature and tenor of the whole is, and the greater the degree to which the comment takes up a more prominent place in that whole, the more likely this is to be regarded as a discriminatory comment.[36]

The vulnerability of groups worthy of protection

Some reasons for making a distinction are more sensitive than others and not all justify the use of the criminal system. The statutory system of the criminal law's provisions on discrimination reflects this view: "(...) far from all groups in society (require) protection under criminal law. In any case, the need for protection decreases the less vulnerable the group is or where it has its own means of defence. The degree to which possible attacks on the group may disrupt society and the degree to which society will itself take corrective measures must also be taken into account."[37]

Against this background it is important to note that the rulings of the Supreme Court quoted above relate to discrimination on the grounds of homosexual orientation. The fact that the prohibition of this form of discrimination is not anchored in conventions, is possibly relevant to the weight attached in these cases, in which the Supreme Court upheld acquittals on the grounds of discrimination, to the freedom of speech and the freedom of religion.

The necessity of violating the right of freedom of speech in order to protect the rights of others is, according to the Supreme Court, regarded as 'all the more' applicable where prosecution is offered in execution of the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination, given that there are strong feelings about living up to this convention (appendix 3, under 2.2). Vigorous criticism of religions or religious beliefs has rarely led to a prosecution and/or conviction.

- Practical example: comments, not based on religion, about religion

[36] Cf. Wedzinga in: Cleiren/Nijboer (2002), T&C, 4th printing, p. 589 and A.L.J. Janssens, Strafbare belediging [Punishable defamation], 1998, pp. 397- 398.

[37] See Parliamentary documents II 1969/70, 9724, no. 6, p. 3 and cf. Parliamentary documents II 2001/02, 27 792, no. 6, pp. 5-6.

In an interview with the newspaper de Trouw in 2002, Ms Hirsi Ali described Islam as 'backward according to some criteria'. She also called the Prophet Mohammed 'perverse', in view of his marriage to the minor Aïsja, and a 'tyrant'. Thirteen reports of an offence and 600 complaints were submitted to the Public Prosecutions Department. On 23 April 2003 the Public Prosecutions Department decided not to prosecute.

It has therefore proved to be the case that the legal system is slow to use religion as a reason for limiting freedom of speech. Nor is this surprising since it is just as slow to restrict opinions that are based on the freedom of religion and that contribute to the social debate.

Interim conclusion

The case law of the Supreme Court appears to leave the necessary leeway for the view that both opinions that are based on religious or ideological beliefs and other kinds of opinions can be regarded as contributing to social debate. The Supreme Court therefore appears not to make a decisive choice where both religious freedom and the freedom of speech are involved if there is a religiously motivated contribution to social debate. The Supreme Court moors its opinion to both anchors. According to the European Court of Human Rights, it is precisely because of the social debate that the said comments should not be restricted too quickly. The Court appears to be even more cautious in these cases than in respect of the restriction of religiously motivated comments.[38] If they make a contribution to social debate, comments can only fall under criminal legislation if they are unnecessarily offensive. This appears to restrict the meaning of article 137c of the Criminal Code in respect of the defamation of homosexuals and persons on the grounds of their religion or beliefs. This fits in with the view of the legislator and legal scholars that expectations in terms of the criminal law in respect of this article should not be unrealistic.[39] It should rather be expected that such comments will be rebutted and that a debate will be initiated. In the case of the examples cited above, this did in fact take place, to an intensive degree. The responsibility for achieving fully-fledged tolerance also requires this. Furthermore, it is only in this way that rancorous opinions can be recognised and refuted at an early stage. Only then can prejudices be removed and the escalation of latent conflicts avoided. Where hatred is incited (137d Criminal Code), a line is however crossed in terms of which the freedom of speech and religion will be restricted at an earlier stage. None of this detracts from an active approach to tackling racism as laid down in the National Action Plan against Racism.[40] Whether and to what extent the anti-discrimination provisions in criminal law (article 137c

[38] Cf. ECHR 10 July 2003, Murphy vs Ireland.
[39] Parliamentary documents II 1969/70, 9724, no 6 (MvA), p. 4. See also appendix 3, under 3.
[40] Parliamentary documents II 2003/04, 29 200 VI.

Criminal Code and ff.) also offer adequate solace and require possible tightening to combat, by means of criminal law, radical fundamentalism and activities directed against the state, is still under consideration.[41]

b. Clothing that may express religious or ideological views

Various items of clothing and jewellery may express religious or ideological views. Well-known examples are the Islamic chador, niqab and headscarf, the Jewish yarmulke, the Sikh turban and chains with a Christian cross or a Fatima hand. Of all these items of clothing and jewellery, it is the Islamic headscarf that has taken up an important place in the debate about the pluralistic society, integration and the conflict between fundamental rights. One explanation for this is that Islam is relatively new and is growing in the Netherlands. And the most easily recognisable and most common external symbol is the headscarf, a symbol that has furthermore proved to be highly media sensitive.

Women wear the headscarf for a variety of religious, social or political reasons. On the one hand, there are (mainly young) Muslim women for whom wearing the headscarf is an expression of pride, identity and emancipation. For some of them, wearing a headscarf is the gateway to education and participating in the labour market. On the other hand, there are women for whom the headscarf is an expression and an element of very traditional male-female relationships and whose decision to wear the headscarf has often been made under pressure from a patriarchal structure.[42] These unequal power relations between the sexes may lead to a right deteriorating in practice into an obligation. It is above all against this background that many regard the headscarf as restrictive and discriminatory for women and at odds with women's emancipation which has undergone significant development in the Netherlands in recent decades. Alertness is called for in such cases of social coercion or religious obligations imposed by others. The freedom to make their own, independent choices fought for by women in the Netherlands applies to them as well, after all. For this very reason, a general prohibition on the wearing of such items of clothing would go against this fought-for freedom. It would lead to a legal inequality on the basis of religion and sex that would affect many other areas, such as participation in the labour market and education. Women who wear a headscarf also have the right to unimpeded participation in society, however. Insofar as these items of clothing can moreover be interpreted as a symbol of certain male-female relationships, a general ban would furthermore result in the (continued)

---

[41] Cf. the promise made by the Minister of Justice to the Lower House, Official Report II 2003/04, no. 72, pp. 4726-4728 and Official Report II 2003/04, no. 66, p. 4337.
[42] Cf. ECHR 15 February 2001, Dahlab vs Switzerland, independence decision no. 42393/98, pp. 12 -13.

existence of these relationships being rendered invisible. This would benefit neither those concerned, nor the policy of integration.

A woman wearing a headscarf who invokes freedom of religion may in principle derive protection therefrom, even if the question can be raised as to whether the religious requirement to wear a headscarf only reflects one specific interpretation of Islam. Because of the separation of church and state, the government must after all take a very detached stance in any substantive dispute about the religious basis or lack thereof for wearing items of clothing that may constitute an expression of a certain religion or belief (see appendix 2, under 2.2). This does not detract from the fact that restrictions may be set on the exercising of the right to freedom of religion, even in this case. Various circumstances and situations are important in this regard. These will be discussed below (see also appendix 1, under 3).

B.1. Public servant status and clothing regulations

Fundamental rights apply to everyone, including public servants. This was expressly discussed and recognised[43] during the revision of the Constitution in 1983 and has subsequently been repeatedly confirmed in case law. Public servants enjoy this protection under human rights conventions as well, which has also been repeatedly emphasised by the European Court of Human Rights.[44] The right to religious and ideological beliefs falls under this protection, even if this goes together with certain external symbols (see appendix 2, under 2). The particular legal relationship between public servants and the state does not affect this, nor does the separation of church and state. What is important is that public servants carry out their duties properly and conscientiously, in terms of which they must respect the Constitution and all the other laws of our country. The proper performance of the duties of a public servant is the point of departure for the relationship between the public servant and the state, which is expressed even more pointedly in a proposal to amend the law that is currently before the Lower House.[45] Furthermore, the said right of religious freedom, also in relation to the prohibition of discrimination, is indeed, as regards the employment situation, guaranteed and elaborated in EC Directive 2000/78 (OJ L 303) and in the Equal Treatment Act. On the basis of this, making a direct distinction on the grounds of religion or belief when appointing a public servant or terminating his or her employment is prohibited, and an indirect distinction is only permissible if there is objective justification for this. This is only the case where there is a legitimate aim for the achievement of which the

[43] See *inter alia* Parliamentary documents II 1975/76, 13 872, no. 3, p. 11.
[44] Among many others: ECHR 26 September 1995, Vogt vs Germany and ECHR 1 July 1997, Kalac vs Turkey.
[45] Parliamentary documents II 2003/04, 29 436, nos. 1-4, in particular the proposed article 125c.

said (restrictive) means are appropriate and necessary, prerequisites that include requirements in respect of proportionality and subsidiarity. Insofar as these means restrict freedom of religion, the requirements laid down by article 6 of the Constitution and article 9 of the European Convention for the protection of Human Rights and Fundamental Freedoms in this regard (see appendix 1, under 3.1) must also be met. On the basis of article 6 of the Constitution, a specific legal basis is, for example, required for the restriction of the free confession of faith or beliefs, such as by wearing certain items of clothing.

Although wearing items of clothing and/or jewellery which may express a religious belief does not in principle stand in the way of being a good public servant, there are circumstances under which this may in fact be the case.

- In the first instance, there are situations in which items of clothing or jewellery hamper the proper functioning of the public servant or render this impossible. This can easily be the case where the public servant is wearing a veil covering the face or body, since this can seriously hamper communication and identification. In the case of a headscarf or other kinds of clothing, this is however not entirely self-evident.
- Secondly, there are public servants in jobs where the impersonal or uniformed exercising of authority is particularly important. The best examples of this are in the case of judicial power and jobs via which the government manifests itself in society with the help of the strong arm of the law, such as the Public Prosecutions Department and the police. As far as judicial power is concerned, the impartiality that is anchored in article 6 of the European Convention for the protection of Human Rights and Fundamental Freedoms also applies, that guarantees the right to a fair trial and that is interpreted in such a way that even the semblance of partiality must be avoided.

There may therefore be reasons connected to the nature of the job relating to safety, functionality or the impersonal exercising of authority that may lead to the urgent need to lay down clothing regulations.

B.2. Educational institutions and clothing regulations

As regards whether or not to draw up clothing regulations as well as how these are to be interpreted, the relevant distinction must be made between institutions for state education and those for denominational education.

- *State education*

The legislator has laid down the key characteristics of state education in article 23, paragraphs 3 and 4 of the Constitution; it is given by the government and with respect for the religion or beliefs of all. The fundamental characteristic of state education is accordingly its neutral character. The legislator has described this character in greater detail in article 46 of the Primary Education Act, article 49 of the Expertise Centres Act and article 42 of the Secondary Education Act.[46] The main points are:

- contributing to the development of pupils with attention being paid to the religious, ideological and social values current in Dutch society and recognising the importance of the diversity of these values;
- accessibility for all children without any distinction being made on the basis of religion or beliefs;
- providing education with respect for the religion and beliefs of all.

Guaranteeing and maintaining the neutral character of state education is a matter for the authority responsible for the school, that is, the municipal board or the management board, also set up by the municipal council, of the respective state school. Against this background, a state education institution may set specific requirements for teaching staff, such as having an open attitude towards the different ideological and social values. In the opinion of the Equal Treatment Commission, a state school that does not permit a student teacher to wear a headscarf in school makes a prohibited direct distinction on the grounds of religion, if this is done solely on the basis of the presupposition that wearing a headscarf in class shows a specific religious view, regarded as undesirable by the school management. It is then the management's responsibility to ask the student teacher about her attitude towards ideological and social values (Equal Treatment Commission ruling 1999/18). Requirements may however be set for teachers which result in an indirect distinction. There must then be objective justification for this. In this regard, the following requirements must be met:

- there is a legitimate purpose (which is both important and non-discriminatory in nature) and
- the means for achieving this aim are appropriate and necessary.

[46] The Adult and Vocational Education Act and the Higher Education and Research Act do not describe this character.

Clothing regulations for teaching staff must meet these criteria. The same applies to clothing regulations for pupils. A legitimate purpose could, for example, be: promoting mutual communication, being able to determine the identity of those participating in the education, guaranteeing safety during swimming and physical education lessons and carrying out some of the statutory tasks incumbent upon the educational institution.

- *Practical example: wearing a face veil at the Regional Training Centre*
"The Amsterdam Regional Training Centre has banned the wearing of face veils", the NRC Handelsblad reported on 24 January 2003. After making an earlier announcement, the Amsterdam Regional Training Centre (ROC) was true to its word. Three pupils were refused entry to the school because they were wearing a so-called niqab or chador, a veil covering their faces leaving only their eyes uncovered. The ban was justified on functional grounds: the veil covering the pupil's face makes open communication between the pupil and the teacher impossible. One of the girls in question submitted a complaint to the Equal Treatment Commission. On 20 March 2003, the Equal Treatment Commission ruled that the ban on wearing the veil was permissible. (Equal Treatment Commission ruling 2003/40).

In the case of the ban imposed by the ROC institution against permitting a pupil to enter the school when such pupil only wished to appear in a niqab, the Equal Treatment Commission deemed the aforesaid conditions to have been fulfilled.[47] No court has as yet pronounced on this issue. The Minister of Education, Culture and Science has indeed drawn up 'Guidelines for clothing regulations in schools', the tenor of which is in line with the ruling of the Equal Treatment Commission and a recommendation drawn up by the Equal Treatment Commission (Equal Treatment Commission recommendation 2003/01).

- *Denominational education*

The freedom to provide education, guaranteed in article 23, paragraph 2 of the Constitution, is vested in the party offering the education. In the case of a denominational education institution this is in general the legal person that maintains the relevant institution (the competent authority). This freedom, which is laid down in greater detail in the fifth and sixth paragraphs of article 23 of the Constitution, means, among other things, that the competent

[47] Although this school was in fact denominational in nature, it did not invoke the statutory exception to the equal treatment standard for denominational education institutions. For this reason, the Equal Treatment Commission investigated whether the indirect distinction on the grounds of religion made on functional grounds was objectively justified. Such an assessment is also applicable to state schools.

authority has the freedom, on the basis of the freedom of conviction and freedom of organisation of teaching, to set requirements, within certain limits, in respect of the selection of (trainee) teachers and in respect of the admission of and participation by pupils. The principle of equality and the prohibition of discrimination are at issue in such a case as well. With a view to finding a balance between the freedom of conviction as guaranteed in article 23 of the Constitution on the one hand and the principle of equal treatment and the prohibition of discrimination on the other, specific regulations have been laid down in the Equal Treatment Act. A denominational education institution may set requirements for the admission of pupils to education and in respect of the pupils' participation in such education, if these are, given the aim of the institution, necessary for the fulfilment of the principles on which the institution has been founded, in terms of which these requirements must not lead to any distinction being made on the grounds of the *mere fact* of, among other things, race or hetero- or homosexual orientation (article 7, second paragraph, of the Equal Treatment Act). It is a requirement in this regard that the policy of the competent authority relating to admission and participation is a consistent policy based on religious or ideological grounds and that this is followed in a consistent manner. The requirements to be laid down may in principle also relate to whether or not a headscarf can be worn during lessons, as was the case in the example below.[48]

- Practical example: wearing a headscarf at a Catholic school

"Pupil takes off headscarf after ban imposed" ran the NRC Handelsblad headline on 26 August 2003. In 2003, the board of the 130 year old Catholic Gregorius School in Utrecht refused to continue to allow a Muslim girl who regarded herself as obliged to wear a headscarf, to attend the school. In doing so, the board relied on its freedom of religion. The pupil also invoked this freedom, partly in relation to her right not to be discriminated against on the grounds of her Islamic faith. She submitted a complaint to the Equal Treatment Commission. The latter ruled that the complaint was not substantiated (Equal Treatment Commission ruling 2003/112).

Furthermore, the denominational basis of a school does not affect the fact that it can also set functional requirements which are independent of the basis concerned (cf. the Equal Treatment Commission ruling 2003/40 cited above).

- *Interim conclusion*

[48] Cf. answers to questions of the Member of the Lower House Ms Azough of 14 January 2003, Parliamentary documents II 2002/03, Official Report annex no. 738, pp. 1551-1552.

Restrictions may be set in respect of wearing items of clothing or jewellery that may express certain religious or ideological views. These restrictions are permitted in both state and denominational schools on condition that these can be objectively justified. In addition, a denominational education institution may set requirements in respect of clothing if these are necessary for the fulfilment of the principles on which it is founded; such requirements must then be based on a consistent policy that is based on religious or ideological views and that is followed in a consistent manner. On the basis of the Equal Treatment Act, a state education institution may not prohibit such clothing purely based on its neutral identity. Such an institution may however expect its staff to have an open attitude to social and ideological values. The possibility of drawing up clothing regulations in a state or denominational school applies all the more to the teaching staff, who, after all, contribute to the identity of the school in a more defined manner; they represent this identity, as it were.

C. Homosexual teacher at a denominational school

The freedom of conviction of article 23 of the Constitution guarantees above all freedom of choice in respect of educational tools and the appointment of teaching staff. The reciprocal relationship between the freedom of conviction on the one hand and the principle of equality and prohibition of discrimination on the other (article 1 of the Constitution) is elaborated, as regards the performance of a job within denominational education, in article 5 paragraph 2, under c, of the Equal Treatment Act. On the basis of this, a denominational education institution may set requirements for the performance of a job which, given the aim of the institution, are required for the fulfilment of the principles on which it has been founded. The requirements must not lead to any distinction being made on the basis of the *mere fact* of, among other things, race or homo- or heterosexual orientation. The job-related requirement must furthermore be based on a fixed policy based on the aim of the institution that is consistently geared towards maintaining the identity of the institution (Equal Treatment Commission ruling 2001/116).

- Practical example: 'mere fact of homosexual orientation'
A school board of a primary school founded on Reformational principles rejected a homosexual applicant who lived with his partner as a candidate for a vacant teaching post. When making this decision, the board relied on the freedom of institutions founded on a religious basis to set further requirements which are necessary for the performance of a job, given the aim of the institution, as laid down in the Equal Treatment Act. The board asked the Equal Treatment Commission to investigate whether it had acted in violation of equal treatment legislation in this case. The Commission ruled that the law had

in fact been violated (1999/38).

During the parliamentary discussion of the Equal Treatment Act, the question of whether a Christian school is allowed, based on the freedom of education, to exclude a co-habiting homosexual teacher because his lifestyle is not compatible with the principles on which the school was founded, was explicitly discussed. Does this involve a 'mere fact', where making a distinction on the basis of this fact would in principle be prohibited? This may indeed be assumed on the basis of the text of article 5 of the Equal Treatment Act and the explanatory documents relating to it: 'The mere fact of, for example, someone's sexual orientation and whether or not homosexual or heterosexual cohabitation is involved, does not constitute grounds for justifying the making of a distinction (...) The mere fact of hetero- or homosexual orientation or civil status, including the mere fact that someone lives with another person of the same or the other sex without being married to them, (...) does not justify the exclusion of the person concerned.'[49] The Equal Treatment Commission therefore also came to its ruling in the aforesaid example that the board had violated the law. Only where there are additional circumstances, for example behaviour that shows that the person concerned actually rejects the principles on which the school has been founded, does the Equal Treatment Act offer the possibility of weighing up the interests involved.

d. Avenging the family honour and female genital mutilation

- Practical example: avenging the family honour

The Turkish community would have to take action itself to combat the avenging of family honour, according to Turkish and Dutch women's organisations and Mayor Vreeman of Zaanstad, commenting on the case of a 32 year old woman who was shot dead by her husband in front of a women's refuge in Koog aan de Zaan on 12 March 2004 (NRC Handelsblad of 16 March 2004). Over a period of ten months, two other women from a women's refuge had previously been shot dead, possibly to save the family honour. In 2003, the Supreme Court upheld the sentencing of the father and mother of a 16 year old Afghan girl murdered in 2001 to ten and six years respectively for the murder of their daughter.[50] The grounds for the appeal in cassation included the argument that there was, among other things, insufficient evidence against the woman and that she was not able "in her subordinate position as a woman in a non-Western culture" to distance

[49] Parliamentary documents I 1992/93, 22 014, no. 212c, p. 11. Cf. in this regard the Equal Treatment Commission ruling 1999/38, 29 April 1999, AB 2000, 71 with notes on practical training.
[50] Supreme Court, 14 October 2003, Elro-number AJ1457.

herself from the decision made by her husband and his oldest brother to kill her daughter. These grounds, a cultural defence, failed, as they also did in an earlier case involving the avenging of family honour in the Netherlands. In this case, a 17 year old boy of Kurdish Turkish origin, acting on the instructions of his father, was responsible for a massacre in a school in Veghel on 7 December 1999.

Avenging the family honour and female genital mutilation are forms of violence based on cultural grounds which constitute an impermissible injury to the right to life or the bodily integrity of minor children. The right to experience one's own culture clearly has limits in this regard, as does the right of freedom of religion, insofar as this can for that matter be regarded as at issue here. At the international level there is broad consensus about the negative impact and reprehensibility of these phenomena and therefore about the need to reject and tackle them.[51] In the Netherlands, both types of behaviour are punishable under criminal law. The cultural background is not regarded as a (statutory) mitigating circumstance in this regard. Increasing the maximum penalty for these offences, or recognising both motives as aggravating circumstances, does not appear to be appropriate. Courts can after all already take all the various circumstances under which the offence, murder or abuse respectively was committed into account when making their judgements.[52] The requirement of double punishability will indeed be nullified in respect of female circumcision abroad, for example.[53] With these penalisations, the correct balance between the fundamental rights involved is guaranteed. In addition, the Cabinet deems a more specific approach to be required.[54] In this regard, it will consult with the Lower House as to the way in which culturally determined violence against women and girls, including genital mutilation, can be prevented and combated in the most effective manner.

4.3. Fundamental rights at issue, but no conflict or convergence

It is obvious that not all conflicts or tensions in a pluralistic society can be translated in terms of fundamental rights. Nor can social issues that relate to the exercising of fundamental rights always be translated into conflicts between fundamental rights. For example, the

[51] See the resolution of the General Meeting of the United Nations regarding 'traditional and customary practices affecting the health of women and girls' passed on 19 December 2001 in New York and Resolution 57/179 of the General Meeting.

[52] Re the (im)possibility of giving the avenging of family honour a place in criminal law, see *inter alia* C.W. Maris van Sandelingenambacht, "Ik heb mijn namus gezuiverd'; over eerwraak en cultureel verweer' ['I have purified my *namus*'; on avenging the family honour and the cultural defence'] , Culturele diversiteit [Cultural Diversity], *Justitiële Verkenningen* [Judicial Explorations] 2002, no. 5, p. 61 and ff..

[53] Letter from the Minister of Justice to the Lower House, Parliamentary documents II 2003/04, 29 451, no. 1.

[54] Cf. Parliamentary documents II 2003/04, 29 200 VI, no. 21, p. 108.

foundation of the Arab European League in the Netherlands in principle relates to 'only' one fundamental right, namely the freedom of association. Avenging the family honour primarily relates to the right to live and the right of physical integrity. The prohibition on wearing a headscarf or chador at school does not always have to relate to a conflict between fundamental rights, either. This is the case if the school does not rely on the freedom of education, but, for example, on functional criteria. In short, in these and other cases it is sometimes only about the interpretation of one fundamental right or the (permissibility) of the possibility of curtailing a fundamental right. For that matter, these questions are not always easy, either. Certainly not where they relate to associations, religions or views that are far removed from us or about which little is known.[55]

Facilitating the manifestation of religion: prayer areas in public institutions

Praying is exercising the freedom of religion. This freedom does not entail the general obligation for the government or public institution to provide for prayer areas.[56] If a prayer area is already being considered, then the public nature of the (educational) institution means that such an area must be open to all for a moment of silence, to meditate or pray, irrespective of religious orientation or beliefs. Making a prayer area available to a specific group may otherwise easily create the impression that such a group is dominant within the public institution concerned. This blurs the public character of the institution concerned and hampers general accessibility. Permitting prayer areas for specific groups does not fit in with the nature of public (educational) institutions.[57] it is the task and responsibility of the competent authority to - rigorously - guarantee and maintain this broad accessibility. As far as education is concerned, the Minister of Education, Culture and Science will consult with the Association of Netherlands Municipalities and representatives of state schools about this. As regards persons who have a special legal relationship with the government, such as prisoners, freedom of religion may indeed bring with it a duty (of care) to provide for a prayer area or an area where silence is observed (see paragraph 3.3 above).

5. Summary and conclusions

Dutch society is open and pluralistic. The freedom guaranteed by fundamental rights and human rights makes this possible. Tensions as a result of the way in which fundamental

---

[55] For example the doctrine adhered to by the Santo Daime church as discussed in the judgement of the court in Amsterdam, 21 May 2001, ELRO-no. 25479.

[56] Cf. Equal Treatment Commission ruling 2000/51 and Parliamentary documents II 2003/04, Official Report annex no. 735, pp. 1557-1558.

[57] Cf. Parliamentary documents II 2003/04, Official Report annex no. 735, pp. 1557-1558.

rights are exercised and uncertainty about the relationships between these have become better known and the subject of debate partly because of increased pluralism and a number of social issues. This demands renewed attention to a number of common assumptions that guide the way the issue of freedom is approached.

It is more important than ever to have a legal basis which is impartial vis-à-vis conflicting opinions about values and which is conducive to dialogue and debate about these opinions. This basis will have repercussions for, among other things, the values of the democratic state under the rule of law and the related fundamental rights, human rights and regulations arising therefrom or connected thereto and the principle of separation of church and state. They offer the basis for pluralism and at the same time form the fundamental frameworks within which this takes shape. The reciprocal relationship between fundamental rights is thereby guaranteed and offers scope for solutions to problems which arise from increasing pluralism. Many useful guidelines and criteria have been developed in case law for giving substance to this scope. If this case law becomes too far removed from social practice, however, the views of the legislator may be enlisted, if need be. For the time being, this is not necessary. The relationship between these practices is likewise the subject of continued attention.

The Constitution accordingly guarantees that people can live together peacefully in an increasingly pluralistic society as well. It is therefore not necessary to amend the Constitution. Nor is there a need to establish a hierarchy of fundamental rights. Practising tolerance, reciprocal forbearance and permanent dialogue are however essential prerequisites if living together in society is to have a deeper meaning. Dealing with different behaviours and practices in such a society will therefore sometimes require considerable resilience on the part of those involved. It is precisely at this point that active participation in the social debate becomes extremely important, however. None of this detracts from the fact that the government and social actors have a particular responsibility to propagate freedoms.

- *Communication about decisions to prosecute, jurisprudence and rulings of the Equal Treatment Commission*

It has proved to be the case that some decisions to prosecute, court judgements or rulings of the Equal Treatment Commission in which the relationships between fundamental rights are at issue, are not understood. A clear explanation and description by the media, among others, of the considerations brought to bear in the rulings and decisions are therefore required. The Cabinet therefore believes that it is important for particular attention to be paid to communication about decisions and judgements. In this way creating the impression that,

for example, existing jurisprudence means that it is lawful to say anything provided that the principle of religious freedom is invoked, can be avoided. Reference can also be made to the difference between the degrees of protection against discriminatory remarks offered to various groups requiring protection under criminal law and the Constitution; not every prohibition of discrimination should also be punishable under criminal law. It may furthermore be expected that certain statements will be disputed and that a debate will be initiated, instead of the matter being immediately turned over to the Public Prosecutions Department. In an open society, it may be assumed that all parties will bring a sense of responsibility and resilience to the debate.

- *Evaluation of the Equal Treatment Act*

The Equal Treatment Act contains a provision providing for it to be regularly evaluated. This includes a review of the relationship, laid down in the Equal Treatment Act, between the principle of equality and other fundamental rights. Such an evaluation will once again take place with the evaluation of the Equal Treatment Act to be initiated this year and in respect of which the House will receive a separate report.

- *Clothing regulations*

Wearing items of clothing and/or jewellery which may express religious or ideological views does not in principle stand in the way of being a good public servant.
It is only in connection with the nature of the job of the public servant that there may be reasons in relation to safety, functionality or impartiality which may lead to the urgent need to lay down clothing regulations. Clothing regulations may in principle be drawn up for teaching staff in state schools, as long as there is objective justification for this. This is the case if there is a legitimate purpose (which is both important and non-discriminatory in nature) and the means for achieving this aim are appropriate and necessary.

- *Disseminating common values of the democratic state under the rule of law*

The government is responsible for promoting the common values of the democratic state under the rule of law and bringing these to people's attention. This policy document makes a contribution to this. Within this framework, consideration is also being given to the suggestion that a House of Democracy and Freedoms be created, in which attention can be paid to the

historical dimension of our parliamentary democracy and the accompanying civil liberties.[58] The Cabinet further refers to the initiative of the Ministry of Education, Culture and Science to set up a Boulevard of the Present Past in The Hague. This is a cultural-historical collaborative project where a broad section of the public (including school pupils, students and newcomers to the Netherlands) will be introduced to the historical backgrounds to current affairs. The aim of this is, among other things, to increase citizens' social participation and get them involved in social debates such as those about values and standards, integration and pluralism. Finally, an important role has also been demarcated for society in this respect. In this regard, reference can be made to the activities of the Forum for Democratic Development (FDO) subsidised by the Ministry of the Interior and Kingdom Relations, which came out of the activities undertaken in 1998 as part of the 150th anniversary of the Constitution, as well as the activities of (non-governmental) (human rights) organisations.

- *Attention must be paid to modern and shared citizenship*

To preserve the common values of the democratic state under the rule of law a strongly developed, modern citizenship is needed as one of the prerequisites for holding the extremely pluralistic society together. Only with specific skills and ideas can the abstract values of the democratic state under the rule of law be put into practice on a daily basis. Extensive consideration has therefore been given to this in the government position paper 'Publieke Moraal' [Public Morals].[59] The core ideas include human dignity, individual autonomy, tolerance and forbearance.

Attention must be paid to citizenship in primary and secondary education

The active participation of young people even at school level is good practice for active and democratic citizenship in society as a whole. A great deal of importance must be attached to the preservation and practice of social and moral values and the use of rules within the school itself. In its response to the advisory documents 'Onderwijs en burgerschap' [Education and citizenship], 'Samen leren leven' [Learning to live together] and 'Vaste grond onder de voeten' [Solid ground underfoot] published by the Education Council, the Cabinet has therefore also taken up the recommendation for a provision relating to citizenship to be included as one of the aims in the various sector acts for primary and secondary education.[60]

---

[58] Cf. Parliamentary documents II 2003/04, 29 454, no. 2, p. 11.
[59] Parliamentary documents II 2003/04, 29 454, no. 2.
[60] Cf. also the letter 'Kerndoelen basisonderwijs' [Core aims of primary education], Parliamentary documents II

Such a provision gives schools a clear instruction to pay attention to citizenship and to the values and standards on which this is based, as part of the education they provide. The way in which schools contribute to shaping citizenship is not prescribed by the government. This is the responsibility of the school itself, which must be accounted for to society at large and the Education Inspectorate. In secondary education, attention is paid to shaping citizenship, knowledge of various ideologies and reflecting on values and standards, throughout a pupil's school career. The current core aims of the first stage of secondary education offer points of reference for this, as will the future 'people and society' area of learning. In the second stage of lower secondary professional education, higher general secondary education and pre-university education the subject social studies offers a good forum for discussing and strengthening ideas about shaping citizenship. This will therefore also remain a compulsory subject for all pupils.[61]

Shared citizenship as an aim of the integration policy

The New Style Integration Policy is characterised by attention to what diverse groups in our pluralistic society have, or should have, in common. The Cabinet therefore emphasises the importance of paying attention to shared citizenship and related values and standards in the integration programmes. If newcomers are asked to behave in accordance with the basic values that form the basis of the Dutch democratic state under the rule of law, it must be made clear and transparent to them what these values are and how these are shaped in practice. To this end, newcomers must be informed of the historical roots of the Dutch democratic state under the rule of law and the meaning of fundamental rights. In addition, the Cabinet wants to stimulate intercultural debate about values and standards as part of the integration policy. It has already been indicated that support will be given to initiatives from within society which are geared towards this. In more concrete terms, when subsidies are awarded within the framework of the integration policy, preference will be given to initiatives which encourage dialogue between immigrants and those born in the Netherlands. The Cabinet regards this as an important instrument for promoting shared citizenship.[62] In conclusion, the Cabinet believes that shared citizenship means that citizens choose Dutch society and also participate actively in this.

2003/04, 29 488, no. 1.

[61] Cf. Parliamentary documents II 2003/04, 29 454, no. 2, p. 18.

[62] Cf. Parliamentary documents II 2003/04, 29 454, no. 2, p. 19.

In summary

- The Constitution does not need to be amended.
- There is no need to establish a hierarchy of fundamental rights.
- The reciprocal relationship between fundamental rights offers scope for tackling problems that arise from the increasing pluralism of society, such as discrimination, avenging family honour and female genital mutilation.
- Case law offers guidelines and criteria for the (indirect) weighing up of interests relating to fundamental rights, such as the prohibition of discrimination, religious freedom and the freedom of speech.
- Legislation and jurisprudence show that religious freedom and freedom of speech do not constitute a licence to discriminate on the grounds of, for example, homosexual orientation.
- The principle of the separation of church and state does not mean that no religious or ideological views of any kind may be expressed in the public domain.
- Laying down regulations governing clothing which may express religious views is not desirable, unless this is urgently required for reasons of functionality, safety or the exercising of authority in an impersonal manner.
- Clothing regulations may be laid down for teaching staff in a state school if this can be justified in objective terms.
- The relationship between legal practice and social practice is the subject of ongoing attention. Should the two diverge from one another too greatly, the views of the legislator may be enlisted, if need be. For the time being, this is not necessary.
- Confidence in judicial pronouncements must be improved by means of better communication about these. Interpretation by briefing judges and prosecutors requires structural attention.
- In an open and pluralistic society it may be assumed that all parties bring a sense of responsibility and resilience to debates.
- It is necessary to support and actively disseminate the values of the democratic state under the rule of law, including by requiring attention to be paid to modern and shared citizenship both in education and via integration courses. The initiative to set up a Boulevard of the Present Past and the suggestion that a House of Democracy and Freedoms be created require attention as part of this.

ANNEXE II

President of the House of Representatives
of the States General
Postbus 20018
2500 EA DEN HAAG

Our ref:	Your contact	Tel:	
IBE/E-2637467			
Re:		Enc(s)	Your letter of:
Termination of life (neonates)			

In the position paper on the report entitled 'Medical decisions at the end of life' (Parliamentary Papers, House of Representatives 2003/2004, 29 200 XVI, no. 268) we undertook to inform the House on the subject of unrequested termination of life in the case of neonates. Please see our findings below.

1. Background

Termination of life on request is regulated in the Act on the Termination of Life on Request and Assisted Suicide. Termination of life without a request is an offence under article 293 of the Criminal Code. In certain circumstances, the doctor may invoke the defence of necessity. The patient's suffering must in such circumstances be severe, compelling the doctor to choose between his/her duty to save lives on the one hand and to do everything in his/her power to prevent unbearable suffering on the other. That is never a simple choice, particularly in situations involving unrequested termination of life. If the doctor exercises due care, termination may be justified. What exercising due care entails is dealt with in the Prins ruling (Amsterdam Appeal Court, 7 November 1995, *Nederlandse Jurisprudentie* (NJ) 1996, 113) and the Kadijk ruling (Leeuwarden Appeal Court, 4 April 1996, *Tijdschrift voor Gezondheidszorg* 1996, no. 1).

Terminating the life of a patient in great suffering without a request to that end results in an unnatural death. It must therefore be reported to the Public Prosecution Service, which investigates the way in which termination took place and decides whether or not to prosecute the doctor in question.

Doctors find this procedure very stressful, since despite their conviction that they acted with due care, they are under suspicion of murder. For this reason, the then Ministers of Justice and of Health, Welfare & Sport set up a consultative group charged with formulating proposals (based on the due care criteria governing medical procedures relating to newborn infants with serious disorders) for a procedure for reporting and reviewing cases in which such procedures had led to intentional termination of life. In 1997 the consultative group published a report entitled 'Toetsing als spiegel van de medische praktijk' (Review as a reflection of medical practice). Its conclusions are in line with the due care criteria set out in the rulings referred to above.

On 29 January 2003 we received a letter from the Royal Dutch Medical Association (KNMG) drawing attention, on behalf of a number of other organisations, to reporting and review procedures in the case of unrequested termination of life.[63] After a new government had been formed, the State Secretary for Health, Welfare and Sport invited representatives of these organisations and other experts to a meeting on 10 February 2004. At this meeting the participants strongly advocated the development of clear reporting procedures for unrequested terminations.

In the summer of 2004, we drew up a position paper on the basis of the findings of the 'Medical decisions at the end of life' report (Parliamentary Papers, House of Representatives 2003/2004, 29 200 XVI, no. 268). In that paper we promised to send a letter to Parliament by the end of 2004 with our views on a response to the need felt by the medical profession for more clarity regarding unrequested termination of life. Further consultations were held to this end, for example in spring 2005 with representatives of the Ministries of Health, Welfare & Sport and Justice, and with the national office of the Public Prosecution Service. Issues discussed included the due care criteria a doctor would need to meet to avoid prosecution for terminating the life of a seriously ill newborn child.

The Dutch Paediatrics Association was also active in this field. In June 2005, it accepted the protocol on actively terminating the life of neonates with a serious disorder (drawn up by Groningen University Medical Centre (UMCG) and thus known as the Groningen protocol) as the national guideline. The Public Prosecution Service was involved as a source of

---

[63] The Royal Dutch Medical Association was writing on behalf of the Dutch Paediatrics Association (NVK), the Dutch Psychiatric Association (NVVP), the Dutch Mental Health Association (GGZ-Nederland), the Mental Health Care Confidential Advisors Foundation (Stichting PVP) and the Dutch Voluntary Euthanasia Society (NVVE – now known as Right to Die-NL).

information in drawing up the protocol: the Public Prosecutor's Office in Groningen gave the UMCG the 'Medical decisions at the end of life' report, indicating that it seemed to be compatible with existing case law in this field. It emphasised that neither the report nor the protocol should give rise to expectations on how the Public Prosecution Service would deal with any specific case. According to the Public Prosecution Service, the protocol provides sufficient practical information to enable it to assess whether a doctor has exercised due care in terminating the life of a newborn infant.

In addition to seeking greater clarity regarding termination of the life of seriously ill neonates, the medical profession has a similar wish when it comes to cases of late-term termination of pregnancy where the doctor is liable to prosecution. These cases involve terminating pregnancy after 24 weeks in special cases.

In 1999 the government stated in a letter to the President of the House of Representatives that it wished to support careful decision-making in certain cases of late termination where the doctor was liable to prosecution by making it obligatory to report such cases to a central committee of experts for review (Parliamentary Papers, House of Representatives, 1998/99, 26 717, no. 1, pp. 7 and 8).

On the basis of the above developments, we would like to meet the need felt by the medical profession for greater clarity concerning termination of the life of newborn infants whose suffering is severe, and terminations of late-term pregnancy where the doctor is liable to prosecution. In doing so, we bear in mind that it is also important for parents and unborn children for there to be clarity on how doctors deal with the problems outlined above.

2. Scope of the proposal

Before describing the procedure to be followed in terminating the life of seriously ill neonates and in termination of late-term pregnancy, it is important to clearly define the cases in which these are possible options. It is also important to bear in mind that not all cases relating to end-of-life decisions involve an unnatural death. Obviously, if the death is a natural one there is no criminal offence at issue, nor does any special procedure have to be followed.

a. Termination of life of neonates

Children may be born with very poor prospects of survival, or of reasonable health in later life. In such cases, the decision on whether medical treatment has any point is taken on the

basis of current medical opinion. It may be clear that the child will die either within a few days or a few months after birth. In such cases, medical treatment is pointless. It is then part of normal medical procedure not to start treatment or to end it. The child in question then dies a natural death.

Another possibility is that, with treatment, the child may have a limited chance of survival, but that its health prospects in later life may be extremely poor. Whether treatment has any point is a question that must then be resolved on the basis of current medical opinion. The attending physician draws up an overall prognosis of the child's current and future health situation, taking into account the relationship between factors such as the expected degree of suffering, life expectancy, the degree of distress involved in treatment, the expected ability to communicate and to be self-reliant, and dependence on the medical/care sector. If the situation is serious, it is normal medical procedure not to start treatment or to end it. Palliative care may be given up to the time of death and may have the effect of shortening life. In such cases there is no question of termination of life: these are natural deaths, and do not have to be reported.

Termination of life is only at issue when the life of a newborn infant is intentionally shortened because of the extreme nature of its suffering. In some cases the child would have died anyway. In other cases, the child might be able to survive but there is no possibility of any improvement in its health, resulting in constant, unbearable suffering with no prospect of improvement. There is also no prospect of an independent life. In these cases palliative care will also be given. However, termination of life leads to an unnatural death which must be reported to the forensic pathologist.

Since most of the cases reported involve serious forms of spina bifida, the impression has unfortunately been created that certain disorders nearly always lead to termination. This is not true. Only the actual degree of suffering can serve as a basis for the decision to terminate life. Patients' organisations have expressed concerns about the misconceptions that have arisen around these disorders. Spina bifida, for example, is in most cases treatable, and patients can lead perfectly acceptable lives. We would concur with this view. Life is worth protecting, and this applies to all of us, disabled or not.

b. Termination of late-term pregnancy

Like termination of the lives of neonates, termination of late-term pregnancy involves the death of a child – in this case unborn – either at or shortly after termination. In this

connection it is important to recall the distinction between category 1 and 2 cases (see the letter from the government to the President of the House of Representatives of 6 September 1999, Parliamentary Papers, House of Representatives 1998/99, 26 717, no. 1 concerning termination of late-term pregnancies). Below we discuss this distinction in greater detail.

Partly on the basis of the premises and conclusions of the report entitled 'Termination of late-term pregnancies: due care and review' published by the consultative group set up to consider this issue, the following definition was drawn up. Termination of late-term pregnancy is a procedure that aims to terminate a pregnancy after 24 weeks because a serious foetal disorder has been diagnosed and which results in the death of the foetus. The report states that it may be acceptable according to prevailing medical standards to terminate the life of an unborn child. It distinguishes between two categories of serious foetal disorders where late-term termination may be considered acceptable.

Terminating a pregnancy falls under article 296 of the Criminal Code in conjunction with the Termination of Pregnancy Act. On the basis of medical opinion, the point at which a foetus becomes viable outside the mother's body has been set at 24 weeks' gestation. In other words, under article 296, paragraph 5, termination of pregnancy up to 24 weeks is not a criminal offence provided the requirements laid down in the Act are complied with. After 24 weeks, however, article 82a of the Criminal Code applies. This article makes it an offence to kill a foetus that might reasonably be expected to have survived outside the mother's body.

Category 1 cases are those in which the unborn child cannot reasonably be expected to survive outside the mother's body. The disorder is untreatable. The baby is almost certain to die during delivery or immediately after birth. Because of a serious congenital disorder, the foetus is not viable and will never be so. As a result, the reasoning behind article 82a becomes inapplicable, since the aim of the article is to protect the life of the viable unborn child through the criminal law, and termination in these situations falls outside its scope. Although terminating the life of a foetus that is not viable independent of the mother does not fall under the scope of Article 82a, it nevertheless remains within the scope of article 296, paragraph 5 of the Criminal Code which, as indicated above, states that termination is not an offence if the requirements of the Termination of Pregnancy Act have been met. In such cases the public prosecutor is not required to decide whether or not to prosecute. However, the termination must be reported, under the Burial and Cremation Act, to the municipal forensic pathologist, who in turn informs the public prosecutor. The reason is that an unnatural death has taken place, since late-term termination is an active intervention whose aim is the death of the foetus. The Dutch Association of Obstetricians and Gynaecologists

established guidelines at a meeting of its members in November 2003 describing the decision-making procedure preceding late-term termination for category 1 cases. The guidelines also provide for a form of peer review and an appeals committee decides whether the doctor acted with due care. The guidelines take into account the statutory provisions.

The second category covers foetuses that have anomalies leading to serious and incurable functional disorders but which might reasonably be expected to have a chance of survival, although mostly a very limited one. Without medical intervention, the disorder will result in death. Medical intervention will however lead to lifelong suffering and may even be deemed to be harmful. Termination of pregnancy in the case of disorders falling into this category nevertheless falls within the scope of article 82a of the Criminal Code and is therefore in principle an offence. Invoking necessity as a ground for immunity from prosecution may in some cases be successful. But necessity can only be successfully invoked if it has been established that according to prevailing medical opinion, the disorder affecting the foetus is of such a nature that medical intervention after birth would be pointless from a medical point of view.

3. Review procedure

We would propose the following procedure on the basis of the documents, case law and principles referred to above.

Terminating the life of neonates who are in great suffering and termination of late-term pregnancies falling in category 2 remain offences. Our choice would be to set up a committee to provide the Public Prosecution Service with expert advice in specific cases. The attending physician who terminates the life of the neonate or the late-term pregnancy does not draw up a death certificate, but reports the death under section 7, subsection 3 of the Burial and Cremation Act to the municipal forensic pathologist by filling in the form prescribed in article 2 of the Royal Decree of 6 March 2002 (Bulletin of Acts and Decrees 2002, 140). The municipal forensic pathologist carries out a post mortem and informs the public prosecutor by filling in the form prescribed by Royal Decree of 17 December 1993 (Bulletin of Acts and Decrees 1993, 688) for neonates or that prescribed in article 3 of the Royal Decree of 6 March 2002 for late-term terminations. The forensic pathologist has to enter on the form his conclusions as to the pathology of the disorder and whether another doctor was consulted. Currently, the forensic pathologist sends these documents to the public prosecutor. Under the proposed arrangement, the forensic pathologist would send them to a central five-member committee of experts consisting of a chairperson, three

physicians (sharing a single vote) and an ethicist. The three physicians would be specialised in paediatrics, for example a neonatologist and a child neurologist, with a gynaecologist in the case of late-term terminations. On the basis of the criteria set out below, the committee will decide whether the doctor acted with due care in terminating the life of the neonate or the late-term pregnancy. The committee's decision will then be forwarded to the Board of Procurators General. The Board then assesses whether the doctor has complied with the criteria and may take account of the committee's decision in deciding whether or not to prosecute. The committee's decision does not therefore replace the public prosecutor's decision, but serves as a form of expert advice. If the Board decides to prosecute, the relevant public prosecutor will be charged with instituting proceedings. But not every failure to comply with the due care criteria will lead to prosecution.

The proposed procedure will be laid down in an instruction from the Board.

The procedure will benefit both the Public Prosecution Service and doctors. The standards laid down and the decision of the committee offer doctors the certainty that the case will be assessed not only from a legal perspective but also from a medical and ethical point of view. In addition, doctors will have guidelines to follow in situations involving unrequested termination of life and of late-term pregnancies, putting an end to their uncertainties on these issues.

4. Due care criteria

Terminating the life of neonates who are in great suffering and termination of late-term pregnancies falling in category 2 call for the highest possible standards of care. The criteria against which such actions will be assessed have been taken from case law and the reports referred to above. The Public Prosecution Service will take these criteria into account when deciding whether or not to prosecute. The committee of experts will take them into account when deciding whether doctors have acted with due care.

In terminating the life of a neonate, the physician has acted with due care if:

a. according to prevailing medical opinion, the child's suffering was unbearable and without prospect of improvement, which means that the decision to withhold treatment was justified. There was therefore no doubt about the diagnosis and prognosis, in the light of prevailing medical opinion;
b. the child's parents gave their consent;

c. the physician fully informed the child's parents of the diagnosis and prognosis. This means that together with the parents the physician came to the firm conclusion that there was no reasonable alternative in the light of the child's situation;
d. the physician consulted at least one other, independent physician who saw the child and gave a written opinion on compliance with these due care criteria. Alternatively, the physician could have asked for the views of the medical team attending the child;
e. the termination was performed with due medical care and attention.

In terminating a late-term pregnancy, the physician acted with due care if:

a. the foetus had a disorder falling into category 2, which means that it was of such a nature that after the child had been born medical treatment would have been withheld on the grounds that it would be pointless from a medical point of view according to medical opinion. In other words, there was no doubt about the diagnosis or the prognosis according to prevailing medical opinion. What is more, in that same medical opinion, continuing the pregnancy would have made no meaningful contribution to a more accurate diagnosis;
b. the child was currently suffering or could be expected to suffer, with no prospect of improvement;
c. the mother had expressly asked for the pregnancy to be terminated because of physical or mental suffering caused by the situation;
d. the physician fully informed the child's parents of the diagnosis and prognosis. This means that together with the parents the physician came to the firm conclusion that there was no reasonable alternative in the light of the child's situation;
e. the physician consulted at least one other, independent physician who gave a written opinion on compliance with these due care criteria. Alternatively, the physician could have asked for the views of the medical team;
f. the pregnancy was terminated with due medical care and attention.

It is important with a view to assessing the due care criteria for the attending physician's report to give the municipal forensic pathologist an accurate picture of whether they have been complied with. The report form will therefore be supplemented with questions relating to the criteria.

5. The committee's composition and method of operation

As indicated above, the committee will consist of five members: a chairperson, three physicians from different paediatric disciplines, and an ethicist. The chairperson will be a lawyer. All members will be appointed for a period of six years by the State Secretary for Health, Welfare and Sport and the Minister of Justice. They may be reappointed for a further six years. The committee will be assisted by a secretary, who will have an advisory vote at meetings. The committee members may be discharged at their own request or for unsatisfactory performance. They will receive an attendance fee and travel expenses in accordance with existing rules for public servants.

In order to assess a case, the committee will be empowered to ask the physician who performed the termination to explain his actions in writing or orally. It may also request further information from one or more members of the medical team concerned. In addition, the committee may consult third parties depending on the specific expertise required.

The committee's decision will be based on the due care criteria set out above. It can only be finalised once all committee members have voted. The Public Prosecution Service is then informed of the decision, which it may take into account as a form of expert advice in deciding whether to prosecute. If the decision is that the doctor did not comply with the due care criteria, the Health Care Inspectorate will be informed. The attending physician receives a copy of the decision. A version of the decision (with all names removed) will be published in a databank open to the public.

The committee members have a duty of confidentiality and may decline to give evidence. The committee issues an annual report to the State Secretary for Health, Welfare and Sport and the Minister of Justice. It is set up by ministerial order and has its own rules of procedure.

6. Conclusion

We believe that this proposal meets the demand from the medical profession and others for more clarity concerning the application of the criminal law to termination of

the life of neonates and of late-term pregnancies. The due care criteria and the reporting form provide a uniform structure to guide attending physicians through the various procedural steps and in answering all the questions relating to compliance with the criteria. They can thus assist physicians in dealing with these very difficult situations. This does not mean, however, that physicians can ask the committee of experts for advance approval of a termination of either kind. The committee reviews actions that have already been taken.

We recognise too that in recent years much work has been done in the various medical organisations and consultative groups referred to above with the aim of achieving a sound medical and legal approach to these issues. Their work has been most valuable to us in arriving at the proposed arrangement.

Clémence Ross-van Dorp
State Secretary for Health, Welfare and Sport

Piet Hein Donner
Minister of Justice

ANNEXE III

Annexe III a

Research in the Netherlands – minors and decisionally incompetent adults

Title: Classification of research involving minors and decisionally incompetent adults

2001

Total number of assessments: 1668, of which

212 concerned research involving minors and decisionally incompetent adults, of which

87 were therapeutic studies and

125 were non-therapeutic studies, of which

98 were non-therapeutic observational studies and

29 were non-therapeutic intervention studies

2002

Total number of assessments: 1654, of which

216 concerned research involving minors and decisionally incompetent adults, of which

80 were therapeutic studies and

136 were non-therapeutic studies, of which

118 were non-therapeutic observational studies and

18 were non-therapeutic intervention studies

2003

Total number of assessments: 1856, of which

256 concerned research involving minors and decisionally incompetent adults, of which

108 were therapeutic studies and

148 were non-therapeutic studies, of which

109 were non-therapeutic observational studies and

41 were non-therapeutic intervention studies

2004

Total number of assessments: 1809, of which

271 concerned research involving minors and decisionally incompetent adults, of which

100 were therapeutic studies and

171 were non-therapeutic studies, of which

147 were non-therapeutic observational studies and

25 were non-therapeutic intervention studies

2005

Total number of assessments: 1748, of which

280 concerned research involving minors and decisionally incompetent adults, of which

115 were therapeutic studies and

165 were non-therapeutic studies, of which

147 were non-therapeutic observational studies and

18 were non-therapeutic intervention studies

These figures are reproduced in the chart below.

Minors and decisionally incompetent adults

Non-therapeutic intervention studies	2001 n	2001 %	2002 n	2002 %	2003 n	2003 %	2004 n	2004 %	2005 n	2005 %
Minors	19	66%	15	83%	23	56%	17	68%	12	67%
Decisionally incompetent adults	8	28%	2	11%	11	27%	7	28%	6	33%
Minors and decisionally incompetent adults	2	7%	1	6%	7	17%	1	4%	0	0%
Total	29	100%	18	100%	41	100%	25	100%	18	100%

Non-therapeutic observational studies	2001 n	2001 %	2002 n	2002 %	2003 n	2003 %	2004 n	2004 %	2005 n	2005 %
Minors	66	67%	71	60%	73	67%	98	67%	117	80%
Decisionally incompetent adults	14	14%	19	16%	11	10%	19	13%	22	15%
Minors and decisionally incompetent adults	18	18%	28	24%	25	23%	30	20%	8	5%
Total	98	100%	118	100%	109	100%	147	100%	147	100%

Annexe III b

From: THE CCMO 2001 Annual Report (pp. 26-27)

In 2001, the Central Committee on Research Involving Human Subjects (the CCMO) decided that it would assess observational research of a non-therapeutic and invasive nature involving minors and decisionally incapacitated adults itself, as of 1 January 2002. The CCMO also made another change to its assessment policy in the course of 2001: it would also assess all non-therapeutic intervention studies involving minors and/or decisionally incapacitated subjects. However, the distinction between therapeutic and non-therapeutic is often a difficult one to make.[64] When the Medical Research (Human Subjects) Act, or WMO, came into effect at the end of 1999, this classification problem applied primarily to placebo-controlled and vaccine research. At the time, the CCMO decided that such studies were non-therapeutic and would therefore assess them itself. After 18 months, the CCMO found no overriding reason to continue doing so and decided that, from 1 August 2001, most placebo-controlled and vaccine studies will be classified as therapeutic, so that they can be assessed by medical ethics review committees (METCs) instead.

As a result of these two assessment policy changes, the CCMO will only assess the following types of research involving minors or decisionally incapacitated adults as of 1 January 2002.

1) Non-therapeutic intervention research.
   a) Research involving a modification (intervention) in order to discover or verify a mechanism of action, such as in:
      - early phases of vaccine research (phase I, sometimes phase II);
      - early phases of pharmaceutical research (phase I, sometimes phase II);
      - the administering of stable isotopes;
      - workload or capacity tests to determine normal values;
      - research in which the intervention is a change in prevailing patterns or circumstances, such as a study into the relationship between more exercise and cardiac capacity.
   b) Vaccine research (not phases I or II) in which the effectiveness of a vaccine is studied in subjects who themselves would not directly benefit from any protective effect.
2) Non-therapeutic, invasive observational research.
   a) Observational research involving one or more invasive procedures. An invasive procedure is any medical procedure in which instruments, radiation or magnetic resonance enter the body (through skin or mucous membranes). For example:

---

[64] The term therapeutic study, or trial, does not occur in the Medical Research (Human Subjects) Act, which instead refers to

- research in which a lumbar puncture is used to obtain normal values for certain types of cells or bodily substances;
- research in which children are mildly sedated in order to obtain normal MRI images.

b) Invasive psychological observational research, in which the subject's environment is manipulated to evoke negative emotions in test subjects, such as:
   - stress-coping studies, in which a child has to solve a puzzle which is actually unsolvable.

From: the CCMO 2002 Annual Report (pp. 22-23)

In 2002, as in the previous year, the CCMO analysed the degree of invasiveness of non-therapeutic research involving minors and/or decisionally incapacitated adults. The CCMO defines invasive observational research as follows.

- Observational research involving one or more invasive procedures. An invasive procedure is any medical procedure in which instruments, radiation or magnetic resonance enter the body (through skin or mucous membranes). For example:
  - research in which a lumbar puncture is used to obtain normal values for certain types of cells;
  - research in which children are mildly sedated in order to obtain normal MRI images.
- Invasive, psychological observational research, in which the subject's environment is manipulated to evoke negative emotions in test subjects, such as:
  - stress-coping studies, in which a child has to solve a puzzle which is actually unsolvable.

Although since 1 January 2002 protocols for invasive observational research have to be sent to the CCMO for assessment, a number of them were also assessed by METCs. This occurred when the protocol was submitted before 1 January 2002, but assessed after that date.

Of the 136 protocols for non-therapeutic research involving minors and/or decisionally incompetent adults, 106 were assessed by accredited METCs and 30 by the CCMO. Fifty-nine of the 136 studies did not involve any invasive procedures. In the other studies, the

---

'trials which may be of direct benefit to the subjects' (section 4, subsection 1).

most common type of invasive procedure was the collection of one or more blood samples. One protocol required a small piece of muscle tissue to be collected (biopsy) for research during necessary surgery. Two other studies required children to be administered non-radioactive, stable isotopes. Other invasive procedures named were x-rays (three studies), rectal temperature measurement (one study) and oesophageal pressure measurement in young children (one study). All invasive studies satisfied the requirement that 'the risk associated with participation is negligible and the burden minimal'.

Evaluation of risks, burdens and justification for using decisionally incompetent subjects

In 2001, the UN Human Rights Committee expressed its concern about medical scientific research in the Netherlands involving minors and decisionally incapacitated subjects. The Committee urged that non-therapeutic research on these categories of people be prohibited; it feared that in weighing the direct benefits and risks, unacceptably high risks would be tolerated if important interests were at stake. In her reaction to parliament, the Minister of Health, Welfare and Sport stated that under section 4 of the WMO, non-therapeutic research involving minors and decisionally incapacitated subjects is only allowed if it could not be conducted without the participation of persons in this category, and the research poses negligible risk and a minimal burden.

The Minister asked the CCMO to focus attention on monitoring compliance with these criteria in practice.

Annexe III c

From: THE CCMO 2001 Annual Report (pp. 22-24)

Risks and burden

The CCMO records show that 125 protocols for non-therapeutic research involving minors and decisionally incapacitated adults were reviewed in 2001. Of these, 96 concerned observational research and were assessed by accredited METCs. The CCMO assessed 29 intervention studies. The CCMO analysed all 125 protocols with regard to the question whether the study could only be carried out with the participation of persons in the research population, and the risks and burden involved.

The 96 protocols assessed by METCs could be categorised as follows:

- 65 studies involved minors;
- 13 studies involved decisionally incapacitated adults; in 7 of these, subjects were temporarily incapacitated;
- 18 studies involved minors as well as decisionally capacitated and/or incapacitated adults.

All studies but one were approved.

Fifty-seven out 96 studies did not involve invasive procedures. Most of the other 39 studies only required minor invasive procedures, such as blood collection (31 studies). Samples were usually collected using IV lines already in place, so that the skin did not have to be punctured again. In some cases, sampling for the study was combined with blood collection for routine testing. In one study involving children with acute leukaemia who had to undergo a bone marrow puncture for diagnostic purposes, a small amount of extra bone marrow was extracted at the same time for research. In another study, research was carried out during coronary angiography for diagnostic purposes. In two studies, non-radioactive, stable isotopes were administered to children. In yet another study, a small tissue specimen was collected for further study during medically necessary surgery. In these 34 cases, the study protocols fulfilled the criteria of negligible risk and minimal burden. It was also clear that the studies could not be conducted without the participation of persons in the targeted research population.

One study protocol that failed to get METC approval required healthy 2-3 year olds to perform a capacity test as part of pulmonary function testing. An objection to the METC decision was lodged with the CCMO, which however confirmed the METC's negative

assessment. With regard to the four remaining invasive studies, the CCMO will ask the METCs in what way these researchers failed to satisfy the criteria of negligible risk and minimal burden. These studies involved, respectively, a lumbar puncture, a stressful psychological test, a fairly large quantity of blood collection over a short period, and extensive examination of brain trauma patients.

In the case of eighteen studies involving both minors and adults (competent and incompetent) it is unclear whether it might not have been possible to conduct them without the participation of persons in this category. The necessary data could possibly have been obtained from competent adults. The CCMO will discuss this question with the METCs.

The CCMO itself assessed 29 non-therapeutic intervention protocols concerning minors and decisionally incompetent adults, including placebo-controlled and vaccine studies, which were classified as non-therapeutic until August 2001. The 29 protocols assessed could be categorised as follows:

- 19 studies involved minors;
- 8 studies involved decisionally incapacitated adults; in 6 of these, subjects were temporarily incapacitated;
- 2 studies involved minors as well as decisionally capacitated and/or incapacitated adults.

The CCMO gave three negative assessments. Two protocols were considered to pose unacceptable degrees of risk and burden to subjects. A number of other studies were not approved until the burden to subjects had been reduced considerably. In all approved studies, the risks were negligible and the burden minimal. In 25 studies, the invasive treatment typically consisted of one or a few blood collections using IV lines already in the body or combined with routine blood testing. One protocol prescribed an inhalation provocation test for children with asthma, to be carried out three times.

Fourteen studies were placebo-controlled. They were assessed by the CCMO as if they had been therapeutic studies. The burden was usually limited to one or a few hospital visits and/or one or more blood collections. Some studies required additional tests to be performed, such as an x-ray, a pulmonary function test or neuropsychological tests.

Annexe III d

Non-therapeutic research involving minors and decisionally incapacitated **adults: 'no, unless'**

Is research on subjects who are under the age of 18 or unable to reasonably judge what is in their interests allowed? According to Dutch law:

> *'It is prohibited to conduct trials involving as subjects persons of less than eighteen years of age or persons who cannot be deemed capable of giving informed consent. This prohibition shall not apply to trials which may be of direct benefit to the subjects, nor shall it apply to trials which could not be conducted without the participation of persons of the same category as the subject, provided that the risk associated with participation is negligible and the burden minimal.'*
> (Section 4, subsection 1 of the Medical Research (Human Subjects) Act)

In principle, therefore, researchers may not use as their subjects minors, elderly people with dementia or other persons who are otherwise decisionally incapacitated . There are two exceptions. The first concerns therapeutic research, in which the study may be of direct benefit to the subjects. Such studies should comply with the requirements for research involving 'normal', decisionally capacitated adults. No additional requirements apply. The second exception is non-therapeutic research which would promote the health of the population represented and could not be conducted without the participation of persons of that population or category. The study subjects themselves (e.g. minors, elderly people with dementia) might not benefit directly from the study results, but the study would not be possible without them. Despite the non-therapeutic nature of the study, the use of decisionally incompetent subjects in these cases will be allowed, provided two conditions are met: the risk of participation for the subject must be negligible and the burden (pain, discomfort) minimal.

In this paper, the CCMO explains in detail the conditions that apply when a study can only be conducted with decisionally incompetent subjects belonging to the research population (justification, negligible risk, minimal burden). When is a subject considered to be a member of a group in whose interest research is proposed? And how should the negligible risks and minimal burden associated with participation be dealt with, both within and outside the context of the study protocol?

Research population requirement

The research population requirement for studies involving minors and/or decisionally incapacitated adults means that the study could not be carried out without the participation of persons who are part of the population targeted by the research (e.g. children, persons with dementia, persons with an intellectual and developmental disability). There are different reasons why research might need to be carried out in a particular population.

- The nature of the study: the impairment might only occur in a particular population, such as children, or a crucial diagnostic test might only be able to be done on subjects of that population. Or the objective of the study might be specific to a population, e.g. persons with mental disabilities. (Both children and adults in this category are considered decisionally incapacitated . In the case of children with intellectual and developmental disabilities, the necessity of participation need not be established twice.)

- Practical reasons: Adults might make up part of a certain patient population, but not enough for a study sample. In that case, including children would solve the sample-size problem. Theoretically, such research does not comply with the research population requirement, but practically speaking it does. The question is, how much trouble should a researcher go to in order to find the required number of subjects for a study sample and when should a study be considered infeasible?

  Practical feasibility might also be a reason to include minors in a segregation analysis of the inheritability of genetic markers. Some diseases are so rare that a study into it might only be feasible if enough family members (including children) participate.

Non-therapeutic research involving minors and decisionally incapacitated adults may only be carried out if it is clear that it could not be carried out without the participation of subjects who are part of the research population. Researchers should ask themselves whether they might be able to obtain the necessary data from a study sample of competent adults only, and whether there has been enough preliminary study involving competent adults to justify a study involving minors or decisionally incompetent adults. These considerations should be included in the study protocol.

Researchers must argue convincingly why they believe their study could not be carried out without the participation of persons in this category. The most common reason would be the nature of the study and this should be apparent in both the research objective and the proposed method of analysis. If the study sample consists of competent adults as well as minors and decisionally incapacitated adults, the latter group should be large enough to enable researchers to answer the research question for this sub-sample. This last point does not apply if minors and decisionally incapacitated adults are included only for practical reasons. But even in that case, researchers must clearly motivate the inclusion of decisionally incompetent subjects in their study protocol.

Risk and burden

Non-therapeutic research which depends on the inclusion of minors or decisionally incapacitated adults in the study must comply with two other criteria in order to receive a positive medical ethical assessment. The risks to the study sample must be negligible and the burden minimal. These additional criteria do not apply when research subjects stand to benefit directly from the study.

But what are 'negligible risks' and 'minimal burden'? These concepts also occur in the scientific literature and in various international guidelines and agreements on medical research[1]. In English texts, the term most commonly used is 'minimal risk'. Sometimes, 'risk of physical or psychological injury' is distinguished from 'inconvenience, discomfort, embarrassment'. Risk is a combination of the likelihood of an undesirable event occurring and the magnitude of such an event, should it occur. There are various degrees of risk, from a very small probability of severe impairment, to a very high chance of suffering a very minor undesirable effect.

In most cases, 'minimal risk' is described as the risk of everyday life. A child's daily life, however, is filled with new experiences and thus by extension is always characterised by a heightened risk, however small. In the literature, this is referred to as 'minor increment over minimal risk'. When parents are asked consent for their child to participate in a trial, they must consider whether the new experiences presented by the study fall within their child's range of 'minimal risk'.

[1] The ICH guidelines for Good Clinical Practice, Declaration of Helsinki, European Convention on Human Rights and Biomedicine, Directive 20001/20/EC on clinical trials

The risk of everyday life is different for everyone, depending on age, state of health and so on. Thus a child with diabetes, who must follow a strict diet and have multiple daily insulin injections, has a different risk of everyday life than a healthy child participating in a study. The question is where to draw the line. Routine medical procedures are a risk of everyday life, provided the person carrying out the procedure is qualified and experienced. Examples are: a physical examination, urine collection, blood collection using finger or heel stick methods or venipuncture, temporary dietary restrictions, vaccination and administering of medication. Administering non-radioactive, stable isotopes to subjects in nutritional studies and behaviour and development tests are also generally considered to have negligible risk.

The inconvenience, or burden, of research depends on factors such as the number of procedures or interventions carried out, or the duration of a diet or nutritional regime. Most people don't mind giving small amounts of blood a few times, but baulk at ten collections. When frequent blood collection is required, researchers should make every effort to use an indwelling IV needle, so that only one puncture is necessary. Local anaesthetic cream should be applied when inserted.

It is difficult to express quantitative limits. Different factors are at play here, such as age, patient category and so on. Most experts, however, would agree that, particularly for young children, lumbar punctures, MRI scans and collecting relatively large quantities of blood are not acceptable.

Researchers bear the primary responsibility for justifying why they feel the risks to subjects to be negligible and the burden minimal. It is up to the review committee, then, to decide whether or not to accept their justification. Researchers should include their reasoning in the protocol (and on the ABR (general assessment and registration form)), so that the committee can take it into account when making their own assessment.

The Medical Research (Human Subjects) Act does not allow the study's importance to be considered when deciding on the acceptability of the risk and burden to subjects. In other words, no matter how important the research is, the acceptable limits of risk and burden remain the same. Conversely, however, research of uncertain scientific value is never approved, even if the risk and burden to subjects are minimal.

Assessment and decision

A review committee (METC or the CCMO) must pay special attention to two points when assessing non-therapeutic research involving minors and decisionally incompetent adults that could not be conducted without the participation of persons of the same category as the subject.

- The review committee must carefully assess the reasons cited by the researchers for including minors/decisionally incapacitated adults. These reasons must be stated in the protocol. The objective and the proposed analysis method must specifically address the sample or sub-sample of minors and/or decisionally incapacitated adults.
- Only when the committee has accepted the need for decisionally incapacitated subjects from the research population will it assess the risks and burden of the study, and determine whether they are indeed negligible and minimal, respectively.

In its decision, the review committee must make explicit mention of the fact that it assessed the protocol's compliance with Section 4 of the Medical Research (Human Subjects) Act. The committee will give a positive assessment if it concludes that the research can only be carried out with minors and/or decisionally incapacitated adults. In addition, the risks should be negligible and the burden minimal.

Researchers must take out insurance for all participants in research pursuant to the Medical Research (Human Subjects) Act. If the risks and burden to subjects are minimal, a lower premium may be applied for. In its assessment, the ethical review committee may take into consideration the motivated decision on an application for a reduced premium.

This paper has been distributed to all accredited METCs and is published on the CCMO website: www.the CCMO.nl. The website contains useful information about which types of studies are assessed by the METCs and the CCMO respectively.

Assessment framework for non-therapeutic MRI research involving minors and decisionally incompetent adults

Magnetic resonance imaging is being applied more and more in medical research. Although this technique has many advantages, its disadvantages cannot be denied. In particular, subjects are exposed to a great deal of noise while they are in the scanner, and they must lie still for the duration of the scan. If an MRI scan is performed on minors or decisionally incapacitated adults solely for research purposes, and does not directly benefit the subjects themselves, its burden and risk must be minimal (WMO, section 4, subsection 1). The CCMO has drawn up an assessment framework for internal use, to determine on the basis of the information supplied whether the WMO requirements will be satisfied.

The assessment framework for MRI research involving minors and/or decisionally incapacitated adults is as follows:

- for each protocol, determine whether an MRI scan is absolutely necessary or whether alternative methods could be used to obtain data;
- anaesthetising subjects for an MRI scan carried out solely for research purposes is not acceptable because of the risks associated with general anaesthesia;
- extending the duration of a diagnostic MRI scan while the subject is under general anaesthetic to enable the collection of research data is acceptable (provided the duration of anaesthesia is taken into account);
- MRI without anaesthesia on subjects younger than 8 years: not acceptable;
- MRI without anaesthesia on subjects aged 8-12 years: only allowed provided specific conditions are met, i.e. subjects can first practise in a simulator, the code of conduct of the NVK (Dutch paediatricians organisation) on objections to treatment are complied with, there must be an independent monitor, and a report must be made on subjects' well-being and safety;
- MRI without anaesthesia on subjects aged 12 and older: acceptable, provided they have the opportunity to practise in a simulator;
- MRI without anaesthesia on decisionally incapacitated subjects aged 12 and older: depends on the subject's capacity to understand what an MRI scan involves. Acceptable for comatose or sedated patients.

The minimum age for MRI is set at 8 years because the CCMO believes that this age is the watershed between being able to distinguish a simulator from a real scanner, and being able to understand what a real scan is like after having been in the simulator.

The CCMO will evaluate and if necessary adjust the assessment framework on the basis of a review of independent monitors' reports on the wellbeing and safety of subjects in research approved by the CCMO.

Random sample of risks and burden of non-therapeutic observational research

Accredited METCs assess all therapeutic research involving minors and decisionally incapacitated adults. They also assess most observational studies where the results would not directly benefit the subjects. Intervention studies, which are characterised by a higher degree of risk and burden, are assessed by the CCMO. But some observational studies may place quite a strain on subjects, too. For that reason, the CCMO has been paying close attention to the evaluation of observational studies for some years now.

In order to get a better idea of the invasiveness of observational studies involving minors and decisionally incapacitated adults, the CCMO asked the METCs for their files on all the protocols in this category assessed by them between January and September 2005. The CCMO received 21 files from nine ethical review committees. The number of studies assessed per committee varied from one to six. The CCMO looked at the burden to subjects in the study sample and possible risks. They also checked whether studies did actually establish why the study could only be carried out with decisionally incompetent subjects belonging to the targeted population (a compulsory requirement) and examined the quality of the assessment. On the basis of this review, the CCMO concluded that the burden and risks of invasive observational studies fell well within acceptable limits. However, in one-third of cases, justification for using minors and/or decisionally incapacitated adults in the study was lacking or found to be inadequate.

The CCMO found shortcomings in many study files, especially in the methodologies. The CCMO will discuss this problem with the METCs shortly.

Annexe III g

From: Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research (Strasbourg, 25 January 2005)

CHAPTER V
Protection of persons not able to consent to research

Article 15 – Protection of persons not able to consent to research

1. Research on a person without the capacity to consent to research may be undertaken only if all the following specific conditions are met:
   i. the results of the research have the potential to produce real and direct benefit to his or her health;
   ii. research of comparable effectiveness cannot be carried out on individuals capable of giving consent;
   iii. the person undergoing research has been informed of his or her rights and the safeguards prescribed by law for his or her protection, unless this person is not in a state to receive the information;
   iv. the necessary authorisation has been given specifically and in writing by the legal representative or an authority, person or body provided for by law, and after having received the information required by Article 16, taking into account the person's previously expressed wishes or objections. An adult not able to consent shall as far as possible take part in the authorisation procedure. The opinion of a minor shall be taken into consideration as an increasingly determining factor in proportion to age and degree of maturity;
   v. the person concerned does not object.

2. Exceptionally and under the protective conditions prescribed by law, where the research has not the potential to produce results of direct benefit to the health of the person concerned, such research may be authorised subject to the conditions laid down in paragraph 1, sub-paragraphs ii, iii, iv, and v above, and to the following additional conditions:
   i. the research has the aim of contributing, through significant improvement in the scientific understanding of the individual's condition, disease or disorder, to the ultimate attainment of results capable of conferring benefit to the person concerned or to other persons in the same age category or afflicted with the same disease or disorder or having the same condition;

ii. the research entails only minimal risk and minimal burden for the individual concerned; and any consideration of additional potential benefits of the research shall not be used to justify an increased level of risk or burden.

3. Objection to participation, refusal to give authorisation or the withdrawal of authorisation to participate in research shall not lead to any form of discrimination against the person concerned, in particular regarding the right to medical care.

1999-2000 summary

The main aim of the Medical Research (Human Subjects) Act (WMO) is to protect people who participate in medical research. Medical research involving human subjects in the Netherlands has been regulated since the early 1980s, but the WMO (which came into effect on 1 December 1999) established a legal basis for existing practice.

The WMO provided for a central medical ethics review committee, the Central Committee for Medical Research Involving Human Subjects (the CCMO) which was established on 6 April 1999. The CCMO regulates the accreditation of medical ethics review committees (METCs), maintains a register of research protocols that have been reviewed in the Netherlands, plays a role in monitoring the quality of reviews and functions as an objections and appeals body. The CCMO also assesses certain medical research protocols itself.

The CCMO reports on its activities in annual reports, which also give insight into the practice of reviewing medical research in the Netherlands. The CCMO's first annual report covered the period from 6 April 1999 to 31 December 2000. During this period, it accredited 81 METCs, authorising them to assess medical research protocols involving human subjects. Initially, review committees were required to conduct at least one review per year in order to retain their accreditation. As of 1 January 2001, that threshold will increase to an average of 20 per year, measured over three consecutive years.

Since the WMO entered into force, 1,766 new protocols have been reviewed, of which 1,719 by accredited METCs. During this period, the CCMO assessed 47 protocols, of which 38 concerned research with children and subjects incapable of giving informed consent, seven gene therapy studies, and two xenotransplantation studies. It also gave advice on research involving embryos and gametes. As an appeals body, the CCMO dealt with seven appeals against decisions made by accredited METCs and with four objections to decisions given by the CCMO itself.

The CCMO established contacts with many interested parties and stakeholders soon after it was set up. It also dealt with many questions on the WMO and its introduction. It organised three workshops and four regional meetings with the accredited METCs to discuss issues concerning medical ethical reviews. In March 2000, the CCMO launched its website (www.CCMO.nl), the main pages of which have been translated into English.

In these early years, the CCMO's overriding concern has been to simplify the introduction of the WMO, in cooperation with stakeholders. Thanks to its enthusiasm, the CCMO very soon became the central point of contact for researchers, media, and government. Work was undertaken on a national review procedure for multicentre research, on safety requirements for gene therapy research, and a national review/registration form. The national review procedure for multicentre research resulted in the CCMO's first directive, which will become legally binding as of 1 January 2001. The national review/registration form is expected to be completed later in 2001.

The CCMO has also called for an early revision of the WMO, before its compulsory evaluation in four years' time.

2001 Summary

At the end of 2001, the Netherlands had 77 accredited METCs, four less than in 2000 as some METCs had merged or ceased to exist. The METCs and the CCMO together assessed a total of 1668 protocols in 2001, the vast majority of which (1633 studies) were handled by the METCs. The CCMO itself assessed 35 protocols: 29 studies involving minors and decisionally incompetent adults, and six gene therapy studies. In addition, the CCMO produced three advisory reports regarding research in the field of gametocytes and embryos. As an appeals body, the CCMO dealt with four appeals against reviews by accredited METCs, and five objections to CCMO assessments.

Above all, the CCMO sought to facilitate the implementation of the WMO in cooperation with all parties involved. To this end, the directive on multicentre research became effective on 1 January 2001. This first CCMO directive established a clear review procedure for multicentre research in the Netherlands.

The CCMO also worked on safety requirements for gene therapy research and a national review/registration form. The former culminated in the guidelines 'Beoordeling gentherapie door de CCMO' (Assessment of gene therapy by the CCMO), published December 2001. Gene therapy researchers have the option of requesting a pre-submission meeting in which they can explain their research to the committee and the committee can ask its questions. The assessment guidelines and the pre-submission meeting were aimed at promoting the efficient assessment of gene therapy trials in the Netherlands.

The national review/registration form (the ABR form), developed in 2001, replaced the CCMO registration form and other existing assessment forms. Its use will become mandatory as of 1 March 2002. The purpose of a single nationwide form for both registration and review was to lighten the administrative burden for researchers needing to submit their research proposal for assessment.

In 2001, the CCMO formed a broad committee to advise on guidelines for all accredited METCs on reviewing WMO research. The CCMO also laid down further expertise requirements for METC members. The number of protocols that the METCs must review in order to maintain their accreditation was increased from one to an average of twenty per year, measured over three consecutive years. Only twelve committees had reviewed twenty or more protocols in 2001. This was less than the minimum number of committees that the CCMO considered necessary for a good distribution and organisation of medical assessment work in the Netherlands. The CCMO decided that it would consider its policy if this trend continued.

In 2001, the CCMO started various initiatives to harmonise and (where possible) to improve the quality of review in the Netherlands.

2002 Summary

By the end of 2002, the number of accredited medical ethics review committees (METCs) had fallen to 73, from 81 in 2000. The reduction in accredited METCs was seen as a continuing trend, with great changes expected in 2004, when METCs that have reviewed an average of less than ten protocols per year between 2001 and 2003 will lose their accreditation. In the end, the Netherlands will be left with about 25 to 30 accredited METCs.

Slightly more reviews were conducted in the first 'WMO year', 2000, (1,804) than in 2001 (1,700) and 2002 (1,654). The reduction after 2000 can be explained by the introduction of the multicentre directive which came into effect as of 1 January 2001. Before its introduction, multicentre research was sometimes assessed more than once. The number of reviews in 2002 is expected to increase slightly as a result of forwarded reviews.

The CCMO itself assessed 36 protocols in 2002, compared to 35 in 2001. This number thus remained almost the same. In 34 of the 36 protocols, the research involved minors and decisionally incompetent adults. The CCMO also produced three opinions on research protocols in the field of gametocytes and embryos. The CCMO carefully examined eleven

objections against reviews by accredited METCs, and one objection to an assessment by the CCMO itself.

Efforts were made in 2002 to further harmonise review practices. The General Review and Registration Form (ABR form) was introduced in the spring and replaced the various review forms that had been used in the Netherlands until then. A number of METCs are still using their own questionnaire in addition to the standard form. The CCMO has decided to examine these additional forms to see whether they contain questions that could be included on the ABR form instead.

In 2002, the CCMO directed its attention to improving the review process. An important review instrument is the Manual for the review of medical research involving human subjects (Review Manual) (*Handleiding voor de toetsing van medisch-wetenschappelijk onderzoek met mensen*). The Review Manual forms the basis of the audit currently being conducted by the Netherlands Association of METCs. The CCMO recommended that all METCs which review medicinal studies should add a clinical pharmacologist and a hospital pharmacist to their committee. The CCMO itself engaged a hospital pharmacist in 2002.

The Embryo Act came into effect in 2002 and now regulates the CCMO assessments of research involving embryos. For this reason, an embryologist joined the CCMO. Under the Embryo Act, all research proposals involving embryos in the Netherlands must be submitted to the CCMO for assessment.

The CCMO did not review any new gene therapy protocols in 2002. There was a major setback in the field of gene therapy when two patients in a French gene therapy study developed a leukaemia-like condition that was caused (in part) by the retroviral vector.

In 2002, the CCMO readied itself for a great deal of work connected with the introduction of the EU Directive for Good Clinical Practice (2001/20/EC). This directive is scheduled to come into effect on 1 May 2004 and will require amendments to current Medical Research (Human Subjects) Act. In order to ensure successful implementation of the EU Directive in the Netherlands, a Ministry of Health, Welfare and Sport working group has been established to identify and resolve implementation problems.

2003 Summary

In 2003, there was an increase in the number of research protocols reviewed, by both the accredited medical ethics review committees (METCs) and the CCMO. The Central

Committee assessed almost twice as many protocols in 2003 compared to previous years. The only research field which saw no increase in studies was gametocytes and embryos. The observed increase applied to both single centre and multicentre studies.

As regards research into medicinal products, the increase was attributed mostly to a higher number of phase I and II studies and research outside the scope of medicinal product registration. The number of phase III protocols submitted for review remained more or less unchanged, while there was a drop in phase IV activities. The overall proportion of research initiated by the pharmaceutical industry was similar to 2002: about half of all studies concerning medicinal products reviewed in 2003 were sponsored by the pharmaceutical industry.

There was also a rise in clinical gene therapy research. Five pre-submission meetings were held in connection with gene therapy studies in 2003 – the largest number recorded so far. The purpose of a pre-submission meeting is to enable researchers to give additional information about their plans and for the committee to ask questions in an informal setting before the formal submission of a research protocol. These meetings have not been without effect: better prepared protocols and shorter review periods.

Although firm conclusions cannot yet be drawn, the data suggest that early phase cutting edge clinical research is increasing in the Netherlands. It will be interesting to see whether the rise observed in 2003 continues.

As in previous years, most reviews in 2003 were conducted by a small number of accredited METCs. Many METCs reviewed only a handful of protocols. Ten committees which had conducted very few reviews for several years asked to be removed from the accreditation list. In view of the increasingly high standards set for review by such bodies by society and government, more committees were expected to relinquish their accreditation, while various smaller committees indicated that they were thinking about pooling their resources and merging.

In 2003, other countries were becoming interested in the Dutch medical ethics review system, with a single central body responsible for both supervision of METCs and assessment of certain types of clinical research.

2004 Summary

In 2004, the CCMO continued to work on professionalising the Dutch accredited medical ethics review committees, based partly on the CCMO Directive on the Organisation and Working Procedures of METCs, which came into effect on 1 January 2004. In addition, a greater range of training courses became available for review committee members.

However, top priority in 2004 went to the implementation of the EU Directive on Good Clinical Practice. A large number of people did a great deal of work to pave the way for implementation of this directive, in particular the working party set up by the Ministry of Health, Welfare and Sports and the IMPD steering committee. Both bodies are made up of representatives from all key stakeholder groups in the field. Despite their efforts, it was never certain whether the Directive would actually be implemented in the twenty-five EU member states on 1 May 2004. Chances in the Netherlands were slightly higher compared to other member states, since it had had a supervised system of medical ethics review since 1999. Until 1 May, the CCMO remained confident that, with the active support of all parties, adoption of the EU Directive's provisions should not present many major difficulties to the Netherlands. By the end of 2004, however, the Directive was still being debated in the Senate of the States-General and there was no view to a date when it would become operational in the Netherlands.

Another important aspect in 2004 was the withdrawal of accreditation from 33 METCs. This high number of withdrawals came about as a result of the CCMO policy that every METC had to evaluate at least 10 research dossiers per year, averaged over three years, to keep their expertise up-to-date. No transitional period was provided for either for this policy or for the WMO. The Netherlands still had 34 accredited MRECs at the end of 2004. Expectations were that this number might decrease further as a result of the more stringent requirements.

Most withdrawals proceeded without problems. The majority of the METCs had already decided to relinquish their accreditation themselves and ensured a smooth transfer of the dossiers to associated METCs. Only two committees appealed against the withdrawal. Many committees that lost their accreditation said they could not fulfil the increasingly stringent requirements. Despite the much lower number of accredited METCs, there was little change in the number of research dossiers reviewed by METCs at university hospitals. The considerable increase in these committees' workload that was feared did not materialise. Fewer research dossiers were reviewed in 2004 compared to the 'peak year' of 2003, but more than in 2001 and 2002.

The total number of dossiers submitted by the pharmaceutical industry increased slightly, disproving suggestions that the pharmaceutical industry was abandoning the Netherlands as a location for clinical studies.

The External Review Directive (RET) came into effect on 1 May 2004 and replaced the 'old' multicentre directive. The policy according to which only one METC reviews multicentre research remains unchanged. The CCMO guarantees the independence and expertise of that single review. The new aspect of the directive was that institutional management is now responsible for issuing the local feasibility declaration. The decision to have the institution's 'own' committee reassess research that has already been approved therefore rests with the institution's management.

The Secretaries' Working Group, with secretaries from the accredited METCs and the CCMO, was established in the spring of 2004. The goal of the working group falls within the context of the action programme on Changing Government and is to make METCs more professional. In its first year, the Working Group focused on establishing Standard Operating Procedures (SOPs), standardising the research dossier with a template for the clinical protocol and establishing a functional design for a digital portal. Great progress was achieved in all these areas in a short period of time. Work on the construction of the internet portal started at the end of 2004. The working group aims for the first modules of the portal to be operational when the EU Clinical Trials Directive (2001/20/EC) comes into effect in the Netherlands.

2005 Summary

The main theme of 2005 was transparency in medical research. For some years, the CCMO has monitored the willingness of sponsors to cooperate in the disclosure of core data from research on the CCMO website. This willingness has not been particularly great in recent years. For example, permission for disclosure was granted for less than half of all research dossiers in 2004. This changed in 2005. For the first time, sponsors gave permission for disclosure on the CCMO website for more than half of all assessed research dossiers. The change is largely due to the fact that the editors of a number of influential medical journals now require core research data to be disclosed prior to receipt of the study. Investigators can no longer request publication of their results without disclosure. The editors' requirements have led to a considerable increase in willingness to disclose research data.

Further analysis shows that there are great differences within the group of sponsors. The greatest willingness to disclose data is found when the faculty and hospital sponsored a

study. In approximately three quarters of these cases, consent to disclose research dossiers was given. The pharmaceutical industry was the least enthusiastic, giving permission for disclosure in only 17% of cases. The differences are remarkable because the pharmaceutical industry's clinical research is usually performed in the same faculties and hospitals that have few problems with disclosing information about their research. Only time will tell what policy the institutions are likely to follow and whether these differences will be ironed out.

In 2005, greater transparency surrounding the review of medical research by METCs was another important theme. The CCMO put information on its website about the composition of all review committees and the costs of assessment. The CCMO and the Medical Ethics Review Committees also started work on a new web portal *ToetsingOnline* (AssessmentOnline). This joint initiative, in which researchers will be able to track the assessment of their research protocol on the internet, was scheduled to be finished at the beginning of 2006.

ANNEXE IV

Act of 26 February 1998 containing regulations on medical research involving human subjects (Medical Research (Human Subjects) Act

We Beatrix, by the grace of God Queen of the Netherlands, Princess of Orange-Nassau, etc., etc., etc.,

Greetings to all who shall see or hear these presents! Be it known:

Whereas We have considered that it is desirable, partly on the basis of Articles 10 and 11 of the Constitution, to regulate the conduct of medical research involving human subjects;

We, therefore, having heard the Council of State, and in consultation with the States General, have approved and decreed as We hereby approve and decree:

Division 1. General provisions

Section 1

1. For the purposes of this Act and provisions made pursuant to it, the following definitions shall apply:

a. Our Minister: Our Minister of Health, Welfare and Sport;
b. research: clinical trials in which persons are subjected to treatment or are required to behave in a certain manner;
c. subject: a person as referred to under b;
d. research protocol: the detailed description of proposed trials including their objectives, design, methodology, statistical considerations and organisation;
e. facilitative institution: institution or company where clinical trials take place;
f. the sponsor: the party who commissions the organisation or conduct of clinical trials; an individual, company, institution or organisation responsible for the initiation, management and/or financing of the clinical trial;
g. the investigator: the party responsible for the actual conduct of the clinical trial; a doctor or a person as referred to in section 3 (e) who is responsible for the conduct of the clinical trial at a specific trial site. If the clinical trial is actually conducted by an employee or other assistant, then the party making use of that person's services shall be deemed to be the investigator;

h. committee: a committee recognised in accordance with section 16;
i. central committee: the committee referred to in section 14;
j. Committee for the Safety of Medicines: the Committee for the Safety of Medicines referred to in section 29, subsection 1 of the Medicines Act;
k. other Member States: Member States of the European Union other than the Netherlands;
l. the European Agency for the Evaluation of Medicinal Products: the European Agency for the Evaluation of Medicinal Products established by Council Regulation (EEC) No. 2309/93 of 22 July 1993 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products, (OJ No L 214);
m. multi-centre clinical trial: clinical trial conducted in accordance with a single protocol but at more than one site and by more than one investigator;
n. clinical trial involving medicinal products: any investigation that involves a medicinal product and is intended to discover or verify the clinical, pharmacological and/or other pharmacodynamic effects of any investigational medicinal product, and/or to identify adverse reactions to any investigational medicinal product and/or to study the absorption, distribution, metabolism and excretion of any investigational medicinal product with the object of ascertaining its safety and/or efficacy;
o. investigational medicinal product: any pharmaceutical form of an active substance or placebo which is being tested or used as a reference in a clinical trial, including any product which already has a marketing authorisation but is used, assembled, formulated or packaged in a way different from the authorised form, or is used in the trial for an unauthorised indication or to gain further information about the authorised form;
p. investigator's brochure: a compilation of the clinical and non-clinical data on the investigational medicinal product or products which are relevant to the study of the product or products in human subjects;
q. adverse event: any untoward medical occurrence in a patient or clinical trial subject administered a medicinal product which does not necessarily have a causal relationship with this treatment;
r. adverse reaction: any untoward and unintended response to an investigational medicinal product, irrespective of the dose administered;
s. serious adverse event or serious adverse reaction: any untoward medical occurrence or effect which, at any dose, results in death, is life-threatening, requires

hospitalisation or prolongation of existing hospitalisation, results in persistent or significant disability or incapacity, or produces a congenital anomaly or birth defect;

t. unexpected adverse reaction: an adverse reaction, the nature or severity of which is not consistent with the product information included in the investigator's brochure in the case of an unauthorised investigational product or with the summary of product characteristics contained in the patient information leaflet in the case of an authorised product;

u. informed consent: informed, written, dated and signed consent to take part in a clinical trial.

2. Subjecting persons to treatment or requiring persons to behave in a certain manner purely for their own good shall not be deemed to be a clinical trial as defined in subsection 1 (b).

3. This Act shall not be applicable to clinical trials whose conduct requires authorisation under the terms of the Population Screening Act with the exception of sections 7 and 9, and sections 8, 11 and 33, in so far as these relate to section 7, and to clinical trials where the research protocol under the Embryo Act has been approved by the central committee.

Section 2

1. Clinical trials shall be conducted in accordance with a research protocol written for the purpose.

2. The research protocol shall require approval as follows:

a. by a committee which is competent to give such approval if none of the criteria listed in subsection 2 (b) (2°, 3° or 4°) apply;

b. by the central committee referred to in section 14 where:

1°. a ruling on an application for administrative review is required;

2°. the clinical trials are of the kind referred to in the second sentence of section 4, subsection 1, if such trials will deliberately alter the condition of the subject without being of direct benefit to him or her;

3°. the clinical trials are of a kind which requires review by the central committee in accordance with section 19;

4°. other forms of research designated by order in council whose review by the central committee is desirable in the light of social, ethical or legal issues related to the research.

3. Review of the research protocol shall take place in accordance with Divisions 2, 3 and, in so far as clinical trials involving medicinal products are concerned, 5a.

Section 2a

Any clinical trial, including any multi-centre clinical trial, shall be reviewed by a single competent committee designated for this purpose by the sponsor.

Division 2. Regulations on research involving human subjects

Section 3

The committee competent pursuant to section 2, subsection 2 shall only be empowered to approve a research protocol provided that:

a. it is reasonable to expect that the trial will lead to the advancement of medical science;

b. it is reasonable to expect that the advancement referred to under a could not be achieved without the participation of human subjects or by less radical means;

c. it is reasonable to expect that the anticipated benefit to individual subjects and other present or future patients will be proportionate to the risks and burden for subjects;

d. the methodology of the trial is to be of the requisite standard;

e. the trial is to be performed at suitable institutions and by or under the supervision of persons possessing research expertise, at least one of whom possesses expertise of direct relevance to the procedures involved in the trial in which the subject is to participate;

f. it is reasonable to expect that any payment offered to the subject would not be of undue influence upon the decision as to whether consent should be given for the subject's participation in the trial;

g. any payments to be received by the investigator and the institution at which the trial takes place are reasonably commensurate with the nature, scale and purpose of the clinical trial;

h. the research protocol clearly indicates the extent of the potential benefits of the clinical trial to the subjects involved in it;

i. the research protocol includes suitable criteria for the recruitment of subjects;

j. the trial satisfies all other criteria which may reasonably be set for it.

Section 3a

1. A committee may suspend or withdraw its approval for a research protocol if it has objective grounds for considering that continuation of the trial would lead to unacceptable risks for subjects.

2. Except where there is imminent risk, the committee shall give the sponsor and/or investigator one week in which to express their views before it suspends or withdraws its approval.

3. If a committee decides to suspend or withdraw its approval for a clinical trial involving medicinal products, it shall notify the central committee or Our Minister, if section 13i, subsection 5 applies, and the Committee for the Safety of Medicines of its decision and the reasons for it.

4. The Committee for the Safety of Medicines shall forthwith inform the European Agency for the Evaluation of Medicinal Products and the European Commission of any suspension or withdrawal of approval for a research protocol concerning a clinical trial involving medicinal products and of the reasons for it.

Section 4

1. It is prohibited to conduct trials involving as subjects persons of less than eighteen years of age or persons who cannot be deemed capable of giving informed consent. This prohibition shall not apply to trials which may be of direct benefit to the subjects, nor shall it apply to trials which could not be conducted without the participation of persons of the same category as the subject, provided that the risk associated with participation is negligible and the burden minimal.

2. If a subject involved in trials of either of the kinds referred to in the second sentence of subsection 1 should object to receiving treatment or behaving in the required manner, the person in question shall be excused from participation.

Section 5

It is prohibited to conduct trials involving as subjects persons whose actual or legal relationship with the sponsor or investigator or with the party recruiting the subjects is such that this relationship may reasonably be expected to be prejudicial to the principle of free consent. This prohibition shall not apply to trials which may be of direct benefit to the subjects, nor shall it apply to trials which could not be conducted without the participation of persons of the same category as the subject.

Section 6

1. It is prohibited to conduct trials:

    a. if the subject is of age and if subsection 1 (c) is not applicable: without the subject's written consent;

    b. if the subject is a minor of at least twelve years of age and if subsection 1 (c) is not applicable: without the written consent of the subject and the subject's parents (if they exercise parental responsibility) or legal guardian;

    c. if the subject is at least twelve years of age but cannot be deemed capable of giving informed consent: without the written consent of the subject's parents (if they exercise parental responsibility), or legal guardian, or (if the subject is not a minor) his or her legal representative, or (if no legal representative has been appointed) the person authorised in writing by the subject to act on his or her behalf, or (if no such person is available) the subject's spouse, registered partner or other companion in life, or (if no such person is available) any reasonably accessible children who have reached the age of majority or, if there are no such children, any reasonably accessible siblings who have reached the age of majority;

    d. if the subject is a minor of under twelve years of age: without the written consent of the subject's parents (if they exercise parental responsibility) or legal guardian.

2. If the subject is unable to write, consent may be given orally in the presence of at least one witness.

3. The substitute consent of the persons referred to in subsection 1 at c and d must represent the presumed will of the subject.

4. If the clinical trial can be conducted only in medical emergencies in which the consent required pursuant to subsection 1 cannot be given and if inclusion in the trial may benefit the person in urgent need of medical treatment, procedures to implement the trial may be

undertaken without such consent for as long as circumstances continue to prevent the giving of consent.

5. Before consent is sought, the investigator shall ensure that the person whose consent is required has been informed in writing and, if so desired, in a prior interview, of:

a. the objectives, nature and duration of the trial;

b. the risks which the trial would present to the health of the subject;

c. the risks which premature termination of the trial would present to the health of the subject;

d. the burden which the trial might impose on the subject.

6. The information shall be given in such a way that it is reasonably certain that the recipient has understood its implications. The recipient shall be given sufficient time for reflection to permit him or her to reach a considered decision on the request for consent on the basis of the information provided.

7. The investigator shall ensure that, where subjects are less than twelve years of age or are incapable of giving informed consent, information about the trial is provided by an appropriately trained person in a manner befitting their ability to understand.

8. The research protocol shall specify how the provisions of this section are to be implemented.

9. The subject or, if that person is, pursuant to this section, incapable of giving informed consent, the person who is competent to give substitute consent, may revoke consent at any time without giving reasons. Any person revoking consent shall have no duty to pay damages on that account.

Division 3. Liability and insurance

Section 7

1. The trial shall not be conducted unless at the time of its commencement a contract of insurance has been entered into covering losses due to death or injury resulting from the trial. Such insurance need not cover injury which is inevitable or almost inevitable, given the nature of the trial.

2. Part 10, Title 1, Book 6 of the Civil Code shall apply mutatis mutandis to the insurer's obligation to pay compensation pursuant to subsection 1, insofar as, in view of the nature of the obligation, the purport of the said Part does not oppose such application.

3. Further rules on insurance shall be laid down by or pursuant to order in council. Rules laid down by order in council may include derogations from the provisions of subsections 1 and 2. Rules laid down pursuant to order in council may relate only to changes in sums of money specified in that order which by their nature require regular adjustment. The order in council shall enter into force no less than eight weeks after the date of its publication in the Bulletin of Acts and Decrees. The publication of the order in council shall be notified forthwith to both houses of the States General.

4. The research protocol shall indicate how the requirements of subsections 1 and 6 of this section are to be met.

5. Any liability on the part of the investigator for losses due to the death or injury of the subject shall be shared by the sponsor. Insofar as procedures relating to clinical trials take place at a facilitative institution, the liability referred to in subsection 1 shall be shared by that institution, even if the institution does not itself conduct or perform the research.

6. Furthermore, the clinical trial may be undertaken only if, at the time of its commencement, provision has been made for insurance to cover the liability of the investigator or the sponsor as referred to in subsection 5, or if there is some other adequate guarantee that their obligations with respect to their liability can be met.

7. Subsections 1 and 6 shall not apply to clinical trials sponsored by central government departments or institutions designated by Our Minister. Injured parties shall have the same rights in relation to a central government department or institution which has made no provision for insurance as referred to in subsection 1 as they would otherwise have in relation to insurers pursuant to this section.

8. The liability of the investigator or, in the case referred to in subsection 5, of the sponsor or facilitative institution, may not be limited or excluded.

Division 4. Obligations resting on the sponsor

Section 8

1. The sponsor shall be responsible for compliance with section 2, subsections 1 and 2, and with section 7.

2. Under the circumstances described in section 7, subsection 5, second sentence, the facilitative institution shall share responsibility for compliance with section 2, subsections 1 and 2.

Section 9

The sponsor shall ensure that the subject is able to consult a doctor named in the research protocol who is not involved in conducting the trial, for information and advice regarding the trial.

Division 5. Further obligations resting on the investigator

Section 10

1. In the event of the trial proving to be significantly less favourable to the subject than the research protocol had suggested, the investigator shall without delay notify both the subject (or, if the subject was incompetent under the provisions of this Act to give consent, the person empowered to consent on the subject's behalf) and the committee which was last to review the protocol in accordance with section 2, and shall apply to the said committee for a further review. Under such circumstances, performance of the trial shall be suspended until such time as continuation is approved by the committee in question, unless suspension or cessation would be prejudicial to the health of the subject.

2. The investigator shall similarly notify the committee referred to in subsection 1 if the trial is prematurely terminated, indicating the reasons for its termination.

Section 11

The investigator shall be responsible for ensuring that the subject is informed in good time of the provisions of section 6, subsections 6, second sentence, and 9, and sections 7, 9, 10 and 12, and is kept informed about the progress of the research. Additional information shall be provided upon request. The investigator shall be responsible for similarly informing any other person whose consent is required pursuant to section 6.

Section 12

The investigator shall be responsible for ensuring that the privacy of the subject is respected as far as possible.

Section 13

The investigator shall be responsible for ensuring that before the trial commences those whose professional assistance is required for the conduct of the trial are informed of its nature and aim.

Division 5A. Supplementary rules for clinical trials involving medicinal products

Section 13a

In addition to the provisions of divisions 1 to 5, the provisions of this division shall apply to clinical trials involving medicinal products.

Section 13b

1. All clinical trials involving medicinal products, including bioavailability and bioequivalence studies, shall be designed, conducted and reported in accordance with the principles of good clinical practice.

2. Rules on good clinical practice shall be laid down by or pursuant to order in council.

Section 13c

It is prohibited to conduct gene therapy trials which are intended to result in modifications to the subject's germ line and genetic identity.

Section 13d

Without prejudice to the provisions of division 2, the committee competent pursuant to section 2, subsection 2 may approve a research protocol relating to clinical trials involving medicinal products only if:

a. the sponsor or legal representative of the sponsor is established within the territory of the European Community;

b. the investigational medicinal products or, as the case may be, the devices used for their administration are, except in the case of clinical trials using registered medicinal products, to be made available by the sponsor free of charge;

c. a doctor or dentist registered under the Individual Health Care Professions Act and employed in the provision of health care is to be responsible for the medical care given to the subjects and medical decisions made on their behalf.

Section 13e

Without prejudice to the provisions of division 2, a clinical trial involving medicinal products may be undertaken using subjects who are minors only if:

a. the trial is essential to validate data obtained in clinical trials involving medicinal products using persons able to give informed consent in accordance with the present Act or by other research methods, and the trial presents some direct benefit for the group of patients involved;

b. the corresponding scientific guidelines adopted by the European Agency for the Evaluation of Medicinal Products are followed;

c. the risk referred to in section 4 and the degree of distress are specifically defined and constantly monitored;

d. the committee competent pursuant to section 2, subsection 2 possesses paediatric expertise or has taken paediatric advice on the clinical, ethical and psychosocial aspects of the trial;

e. the interests of the patient will always prevail over those of science and society.

Section 13f

Without prejudice to the provisions of division 2, clinical trials involving medicinal products may be undertaken using subjects who have attained the age of majority but are incapable of giving informed consent only if:

a. the trial is essential to validate data obtained in clinical trials involving medicinal products using persons who are able to give informed consent in accordance with this Act or by other research methods, and the trial relates directly to a life-threatening or debilitating clinical condition from which the subjects suffer;

b. the risk referred to in section 4 and the degree of distress are specifically defined and constantly monitored;

c. the committee competent pursuant to section 2, subsection 2 possesses expertise in relation to the relevant disease and the patient population concerned or has taken advice on clinical, ethical and psychosocial issues in the field of the relevant disease and patient population;
d. the interests of the patient will always prevail over those of science and society;
e. it is reasonable to expect that administering the medicinal product to be tested to the patient in question will produce a benefit outweighing the risks or produce no risk at all.

Section 13g

1. The committee competent pursuant to section 2, subsection 2 shall consider the investigator's brochure when reaching its approval decision and shall decide on any application for approval of a clinical trial within 60 days of receiving that application.

2. Within the period in which it is considering the application for approval, the committee competent pursuant to section 2, subsection 2 may send a single request for information supplementary to that already supplied by the applicant.

3. In the case of clinical trials involving medicinal products for gene therapy or somatic cell therapy or medicinal products containing genetically modified organisms, the period of time specified in subsection 1 may be extended by up to thirty days.

4. The periods of time specified in subsections 1 and 3 shall not apply to the consideration of clinical trials involving medicinal products for xenogenic cell therapy.

Section 13h

1. Any application to a committee competent pursuant to section 2, subsection 2 for approval of a clinical trial involving medicinal products must comply with rules laid down by ministerial order. These rules shall concern the application format and the documentation to be submitted with the application, in particular regarding the information that is to be given to subjects and proper safeguards for the protection of personal data.

2. If the application referred to in subsection 1 relates to clinical trials using registered medicinal products, only the summary of product information as established at the time or registration need be submitted with the application. If the method of administration,

therapeutic indication, patient group or dosage is different from that for which the product is registered, the summary of product information shall be supplemented with information relevant for the clinical trials in question.

Section 13i

1. Clinical trials involving medicinal products may be carried out only if the central committee has not notified the applicant of any grounds for non-acceptance within the period of time referred to in subsection 3.

2. Before commencing any clinical trial involving medicinal products, the sponsor shall notify the central committee and shall submit the investigator's brochure.

3. Within no more than fourteen days of receiving the notification referred to in subsection 2, the central committee may notify the sponsor of any grounds for non-acceptance. In that case, the sponsor may, on one occasion only, amend the intended research protocol in order to satisfy the objections of the central committee. If the sponsor fails to amend the protocol, the clinical trial may not commence.

4. If the notification referred to in subsection 2 relates to clinical trials involving medicinal products for gene therapy, somatic cell therapy, xenogenic cell therapy or medicinal products containing genetically modified organisms, the clinical trial may commence only if the central committee or, if subsection 5 applies, Our Minister has certified in writing that there is no objection to it. In that case, the period of time referred to in subsection 3 may be extended by up to thirty days, provided that under the present Act there is no maximum period of time for the notification of grounds for non-acceptance of trials involving medicinal products for xenogenic cell therapy.

5. Notwithstanding the provisions of subsections 1 and 2, if the review of the research protocol pursuant to section 2, subsection 2 (b) (2°, 3° or 4°) is conducted by the central committee, the notification referred to in subsection 2 shall be made to Our Minister and Our Minister shall decide on the matter with this section applying mutatis mutandis.

6. Rules shall be laid down by ministerial order regarding the format and contents of the notification referred to in subsection 2, the supporting documentation to be submitted, the format and contents of a proposal to make substantial amendments to the protocol and the declaration of the end of the clinical trial.

7. Rules may be laid down by ministerial order regarding the amounts that may be charged to the person who has made the notification referred to in subsection 2 to cover the costs incurred by the central committee or, if section 13i, subsection 5 applies, by Our Minister in relation to the implementation of this section.

Section 13j

1. The central committee or, if section 13i, subsection 5 applies, Our Minister shall notify grounds for non-acceptance of a clinical trial only if the European database already contains information on side-effects of the medicinal product to be tested which pose unacceptable risks to the trial subjects.

2. At the request of the central committee or, if section 13i, subsection 5 applies, at the request of Our Minister, the Health Inspectorate shall verify whether the conduct of a clinical trial involving medicinal products may be expected to be in accordance with the present Act. The provisions of sections 5:12, 5:13 and 5:15 to 5:20 of the General Administrative Law Act shall apply mutatis mutandis.

Section 13k

1. The sponsor may amend the research protocol after the commencement of the clinical trial.

2. If an amendment is substantial and may affect the safety of trial subjects or may change the interpretation of the scientific documents used to support the conduct of the trial, or if it is otherwise significant, the sponsor may make it only if:

a. he has notified the committee competent pursuant to section 2, subsection 2, the body referred to in section 13i, subsection 1 or 5 or, as the case may be, the competent authority of another Member State, whichever was the last to give its approval, of the reasons for and content of the proposed amendment;
b. the committee competent pursuant to section 2, subsection 2 has approved the proposed amendment to the protocol, and
c. the body referred to in section 13i, subsection 1 or 5 has raised no grounds for non-acceptance of the proposed amendment to the protocol.

3. If the body referred to in section 13i, subsection 1 or 5 or the competent authorities of other Member States have raised grounds for non-acceptance of the proposed amendment to the protocol, the clinical trial may proceed only if the sponsor modifies the proposed amendment to the protocol to take account of the objections raised.

4. The committee competent pursuant to section 2, subsection 2 shall decide whether to approve the proposed amendment to the protocol within a period of thirty-five days of receiving it.

5. The body referred to in section 13i, subsection 1 or 5 shall raise any grounds for non-acceptance of the proposed amendment to the protocol within a period of thirty-five days of receiving it.

Section 13l

1. Within ninety days of the end of the clinical trial, the sponsor shall notify the committee competent pursuant to section 2, subsection 2, the body referred to in section 13i, subsection 1 or 5 and, where appropriate, the competent authority of another Member State that the clinical trial has ended.

2. Within a period of fifteen days of any necessary premature termination of the trial, the sponsor shall notify the committee competent pursuant to section 2, subsection 2, the body referred to in section 13i, subsection 1 or 5 and, where appropriate, the competent authority of another Member State that the trial has been terminated prematurely and the reasons for this.

Section 13m

1. The body referred to in section 13i, subsection 1 or 5 shall supply the Committee for the Safety of Medicines with such information relating to clinical trials involving medicinal products conducted in the Netherlands as may have been designated by or pursuant to order in council.

2. The Committee for the Safety of Medicines shall ensure that this information is entered in a European database accessible only to the Committee for the Safety of Medicines, the central committee or, if section 13i, subsection 5 applies, Our Minister, the Health Care Inspectorate, the competent authorities of other Member States, the European Agency for

the Evaluation of Medicinal Products and the European Commission. Rules may be laid down by or pursuant to order in council in relation to the confidentiality of the information contained in the European database.

3. At the substantiated request of any other Member State, the European Agency for the Evaluation of Medicinal Products or the European Commission, the body referred to in section 13i, subsection 1 and 5 shall supply all further information concerning the clinical trials in question other than the data already in the European database.

4. Further rules may be laid down by ministerial order regarding methods of electronic data exchange.

Section 13n

If there are objective grounds for considering that the sponsor or investigator or any other person involved in the conduct of the trial is failing to meet the obligations laid down, the central committee or, if section 13i, subsection 5 applies, Our Minister shall forthwith inform the person concerned and shall indicate the course of action which that person must take to remedy the situation. The central committee or, if section 13i, subsection 5 applies, Our Minister shall forthwith inform both the committee competent pursuant to section 2, subsection 2 that was the last to give an approval decision on the clinical trial in question and the competent authorities of other Member States and the European Commission of the said course of action.

Section 13o

1. The investigator shall immediately report to the sponsor any serious adverse event with the exception of those specified in the protocol or investigator's brochure as not requiring immediate reporting. The immediate report shall be followed by detailed written reports in which the trial subjects are identified by unique code numbers.

2. Adverse events and/or laboratory abnormalities specified in the protocol as critical to safety evaluations shall be reported to the sponsor within the time period specified in the protocol.

3. In the case of reported deaths, the investigator shall supply any additional information which may be requested by the sponsor and the committee competent pursuant to section 2, subsection 2 that was the last to give an approval decision.

4. The sponsor shall keep detailed records of all adverse events which are reported to him by the investigator. This information shall be supplied on request to the Health Care Inspectorate, the central committee or, if section 13i, subsection 5 applies, Our Minister, and the competent authorities of the Member States in whose territory the clinical trial is being conducted.

Section 13p

The sponsor shall ensure that all relevant information about suspected serious unexpected adverse reactions to investigational medicinal products that have proved fatal or life-threatening to a trial subject is recorded, and reported as soon as possible, in any event within a maximum of seven days of first knowledge, to the Committee for the Safety of Medicines, the central committee, the competent authorities in all other Member States concerned, and the committee competent pursuant to section 2, subsection 2, and that relevant follow-up information is subsequently communicated to the said bodies within an additional eight days.

2. All suspected serious unexpected adverse reactions to investigational medicinal products other than those referred to in subsection 1 shall be reported as soon as possible, and in any event within a maximum of fifteen days of first knowledge by the sponsor, to the Committee for the Safety of Medicines, the central committee, the competent authorities of all other Member States concerned and the committee competent pursuant to section 2, subsection 2.

3. The sponsor shall inform all other investigators involved in the clinical trial.

Section 13q

1. Once a year throughout the clinical trial, the sponsor shall supply a list of all suspected serious adverse reactions to investigational medicinal products which have occurred in that year and a report on the safety of the trial subjects to:

a. the Committee for the Safety of Medicines;

b. the central committee or, if section 13i, subsection 5 applies, Our Minister;

c. the competent authorities of the other Member States in whose territory the clinical trial is being conducted;
d. the committee competent pursuant to section 2, subsection 2.

2. The Committee for the Safety of Medicines shall ensure that all suspected serious adverse reactions to an investigational medicinal product which are brought to its attention are entered in the European database referred to in section 13m, subsection 2.

Section 13r

Requirements for the reports referred to in sections 13o, 13p and 13q may be laid down by ministerial order.

Division 6. The committees

Section 14

1. There shall be a central committee for medical research; it shall have at most fifteen members.

2. The members of the central committee shall include at least one doctor, persons with expertise in embryology, pharmacology, pharmacy, nursing, behavioural science, the law, research methodology and ethics, and a person charged with the task of examining protocols specifically from the subject's point of view.

3. An alternate shall be appointed for each member of the central committee.

4. The members of the central committee, including the chair and alternates, shall be nominated by Our Minister and appointed by royal decree for a term not exceeding four years. Our Minister shall appoint a person to act as an observer at committee meetings.

5. The members of the central committee shall appoint one or more deputy chairs from amongst their number.

6. Members and alternates shall be eligible for reappointment for up to two further terms, each of up to four years. At the request of the person concerned, a member or alternate may

be relieved of his or her duties by royal decree prior to expiry of their term of appointment, upon the recommendation of Our Minister.

7. Upon the recommendation of Our Minister, a member or alternate who has not asked to be relieved of his or her duties may be relieved of those duties by royal decree prior to expiry of their term of appointment, under the following circumstances:

a. if he or she fails to discharge adequately the responsibilities associated with membership of the central committee;

b. if he or she must be considered no longer physically or mentally fit to discharge his or her duties.

8. Members and alternates of the central committee shall be paid attendance fees and travel and accommodation expenses, in accordance with rules to be laid down by ministerial order.

9. The central committee shall operate in accordance with rules of procedure which shall be subject to the approval of Our Minister. The rules of procedure shall include a provision that a member or alternate member of the central committee shall not take part in the review of a research protocol if he or she is involved in the proposed trials either as a sponsor or as an investigator. Changes to these rules of procedure shall also be subject to the approval of Our Minister. Approval may not be withheld unless it is reasonable to believe that the work of the committee is not assured or is no longer assured

Section 15

1. The central committee shall have a secretariat; officials shall be appointed to or suspended or dismissed from the secretariat by Our Minister, having heard the central committee. The secretariat shall be under the management of the Secretary of the Health Council of the Netherlands.

2. The secretariat officials shall be answerable to the central committee alone regarding the performance of their duties.

Section 16

1. The central committee shall be empowered to recognise other committees, whose duty it shall be to review research protocols in accordance with provisions made by or pursuant to this Act.

2. The central committee shall not recognise a committee unless the following conditions are met:

a. the members of the committee must include at least one doctor, persons with expertise in the law, research methodology and ethics, a person charged with the task of examining protocols specifically from the subject's point of view and, in the case of the review of clinical trials involving medicinal products, persons with expertise in pharmacy and clinical pharmacology;
b. the members of the committee must meet any further requirements relating to qualifications and experience set by the central committee;
c. the committee's rules of procedure must make adequate provision for cooperation with other experts to enable proper review of the protocols submitted to the committee;
d. the committee's rules of procedure must state the area in which the committee will be active;
e. the committee's rules of procedure must make adequate provision for the committee's independence from the organisation that appointed it;
f. the committee's rules of procedure must make proper provision for procedural arrangements including a provision that a member or deputy member may not take part in the review of a research protocol if he or she is involved in the proposed research either as a sponsor or as an investigator;
g. it is reasonable to believe that the committee will receive for review at least the minimum number of research protocols specified by the central committee.

Section 17

1. The central committee shall notify Our Minister without delay of any recognition granted in accordance with section 16, subsection 1.

2. Our Minister shall arrange for recognition granted in accordance with section 16, subsection 1 to be announced in the Government Gazette.

Section 18

Any change in a committee's rules of procedure shall be notified in writing to the central committee.

Section 19

1. Within six weeks of the submission of a protocol for trials of the kind referred to in section 4, subsection 1, second sentence, which trials do not involve any deliberate alteration to the subject's condition, the committee may refer the protocol to the central committee for review. Under such circumstances, the committee shall notify the party submitting the protocol of its referral.

2. The central committee shall be empowered to require that all protocols for trials of a certain category of the kind referred to in subsection 1 of this section are referred to the central committee for review.

Section 20

The committee shall be entitled to charge the party submitting a research protocol a fee to cover the cost of the review procedure.

Section 21

1. A committee recognised pursuant to section 16 may be required by order in council to consider whether certain forms of research (to be specified in the order), which, pursuant to section 2, the committee in question has previously reviewed, have proved to be significantly less favourable for the subjects than the research protocol had suggested. Under such circumstances, the committee in question may give a further decision on the protocol. Section 10, subsection 1, second sentence, shall apply.

2. Further rules may be laid down by order in council regarding the manner in which committees discharge the duties referred to in subsection 1.

3. Subsections 1 and 2 shall apply mutatis mutandis to the central committee, insofar as the latter is responsible for the review of research protocols pursuant to section 2, subsection 2 (b), (2□, 3□ or 4□).

Section 22

1. The committee shall send the central committee a copy of each decision given in accordance with this Act, together with a copy of the protocol or a synopsis of it. The committee shall also notify the central committee of any notification submitted in accordance with section 10, subsection 2.

2. No later than 31 March each year, the committee shall issue a report of its activities in the previous calendar year. This report shall be submitted to the central committee; copies shall be made available to the general public at cost price.

3. The committee shall cooperate with the central committee in any way which may reasonably be deemed necessary to enable the central committee to perform its duties.

Section 23

Any interested party may apply to the central committee for administrative review of any decision by a committee that does not relate to a clinical trial involving medicinal products.

Section 24

The central committee shall monitor the activities of the other committees and shall be empowered to issue guidelines regarding the conduct of activities they carry out in accordance with this Act. Our Minister shall arrange for publication of such guidelines in the Government Gazette.

Section 25

1. The central committee shall withdraw its recognition of another committee under any of the following circumstances:

    a. if the committee no longer meets the recognition requirements set out in section 16, subsection 2 (a to e);

    b. if the committee fails to discharge adequately its responsibilities arising from this Act;

    c. if the committee's rules of procedure are altered so that they may reasonably be deemed prejudicial to the proper performance of the committee's duties under this Act.

2. The central committee shall be entitled to withdraw its recognition of another committee if the number of research protocols submitted to the committee for review over the preceding two years is lower than the number referred to in section 16, subsection 2 (g).

3. The central committee shall not withdraw its recognition of another committee without first having heard that committee.

4. In the event of the central committee withdrawing its recognition of another committee, the central committee shall notify that committee in writing of its decision. Section 17, subsection 2 shall apply mutatis mutandis.

Section 26

Guidelines regarding the performance of the central committee's duties may be issued by order in council.

Section 27

1. No later than 31 March each year, the central committee shall submit to Our Minister a report of its activities in the previous calendar year. Copies of this report shall be made available to the general public at cost price by the central committee.

(Four-yearly report by central committee to Minister)
2. Every four years the central committee shall submit to Our Minister a report reviewing the central committee's performance of its duties and, if appropriate, proposing changes. Our Minister shall forward this report to the States General.

Division 7. Miscellaneous provisions

Section 28

1. Responsibility for verifying compliance with the provisions laid down by or pursuant to this Act shall rest with officials of the Public Health Supervisory Service designated by decision of Our Minister.

2. Any decision as referred to in subsection 1 shall be published in the Government Gazette.

3. Further rules regarding the verification of compliance with provisions laid down by or pursuant to this Act and relating to clinical trials involving medicinal products may be laid down by or pursuant to order in council.

Section 29

(Repealed 01-12-1999)

Section 30

This Act shall be applied in accordance with the national and international regulations applicable to the civil service regarding the protection of data which must be kept secret in the interests of the State or its allies.

Section 31

1. Notwithstanding section 7, subsection 1 and section 8, subsection 1 of the Coordination (Exceptional Circumstances) Act, if exceptional circumstances should make it necessary, section 32 may be put into effect by royal decree, upon the recommendation of Our Prime Minister.

2. Should a decree of the kind referred to in subsection 1 be issued, a bill regarding the term of the provision put into effect by that decree shall be presented to the House of Representatives without delay.

3. In the event of the bill being rejected by the States General, the provision put into effect in accordance with subsection 1 shall be suspended without delay by royal decree, upon the recommendation of Our Prime Minister.

4. The provision put into effect in accordance with subsection 1 shall be suspended by royal decree, upon the recommendation of Our Prime Minister, as soon as We judge that circumstances allow.

5. Any decree of the kind referred to in subsections 1,3 or 4 shall be published in the manner specified in that decree. Any such decree shall come into force upon its publication.

6. Any decree of the kind referred to in subsections 1,3 or 4 shall in any event be published in the Bulletin of Acts and Decrees.

Section 32 (will enter into force on a date as yet to be determined)

Division 8. Penalty provisions

Section 33

1. Any person who intentionally or unintentionally contravenes a prohibition contained in section 6, subsection 1 shall be liable to a term of imprisonment not exceeding one year or a fourth category fine.

2. Any person who fails to discharge his or her responsibility for compliance with section 2, subsections 1 or 2, or section 7, or who fails to perform a duty referred to in divisions 5 and 5a or fails to follow a course of action as referred to in section 13n shall be liable to a term of imprisonment not exceeding six months or a fourth category fine. Any person who contravenes a prohibition contained in sections 4, 5 and 13c or who conducts a clinical trial without a protocol for which approval has been obtained, or in contravention of such an approved protocol shall be liable to the same penalty.

3. Acts or omissions punishable in accordance with subsection 1 shall be deemed serious offences; acts or omissions punishable in accordance with subsection 2 shall be deemed minor offences.

ANNEXE V

International Covenant on Civil and Political Rights
Update to the third periodic report of the Kingdom of the Netherlands

CONTENTS

1. **Introduction** 210

2. **The Constitution (1999 and 2000 amendments)** 210

2.1 **Fundamental rights in the digital age** 210

2.2 **Corrective referendum** 211

2.3 **Dualism and local democracy** 211

2.4 **Entry into homes** 211

2.5 **Education** 211

3. **Additional activities (public servants)** 212

4. **International Covenant in Civil and Political Rights (CCPR)** 212

4.1 **Article 6: Right to life** 212

4.2 **Article 7: Prohibition of torture** 212

4.2.1 Ban on "Zaanse" interrogation method 213
4.2.2 Medical Research (Human Subjects) Act 214

4.3 **Article 8: Prohibition of slavery** 215

4.3.1 The national rapporteur on trafficking in persons 215

4.4 **Article 9: Right to liberty and security of the person** 216

4.4.1 The Custodial Institutions Act 216
4.4.1.1.Placement in a custodial institution 217
4.4.1.2.Supervision of prisons 218
4.4.1.3.Legal protection 219

4.4.2 Maximum Security Institution (EBI) 219
4.4.2.1 Target group and selection procedure 220
4.4.2.2 Placement in the EBI 221
4.4.2.3 Extension and termination of detention in the EBI 222
4.4.2.4. Miscellaneous 222
4.4.2.5. Detainee Intelligence Information Service 223
4.4.2.6.The regime in the EBI 223

4.4.3 Administrative detention 228

4.5 **Article 10: Treatment of persons deprived of their liberty** 229

4.6 **Article 13: Prohibition of expulsion without legal guarantees** 230

4.7 **Article 14: Entitlement to a fair and public hearing** 234

4.8 Article 17: Right to privacy **235**

4.8.1 Personal Data Protection Act 235

4.8.2 Telecommunications Act 236

4.8.3 The protection of data in the health care 236

4.8.4 Professional secrecy in health care 238

4.8.5 Other legislation 239

4.9 Article 19: Freedom of expression **239**

4.10 Article 24: Protection of the child **240**

4.10.1 Adoption 240

4.10.2 Child care 240

4.10.3 Child sex abuse 241

4.11 Article 25: Right to take part in public affairs **244**

4.12 Article 26: Prohibition of discrimination **245**

4.12.1 The criminal law and discrimination 245

4.12.2 Age discrimination 252

4.12.3 European legislation 256

4.12.4 New legislation 257

4.13 Article 27: Minorities **258**

1. INTRODUCTION

1. This report is an update on Dutch reports up to 1996 and covers the period up to the end of 2000. The general section is followed by an article-by-article description of amendments to legislation and policy changes.

2. THE CONSTITUTION (1999 and 2000 amendments)

In 1999 and 2000 the Constitution was amended on a number of points. The following are of relevance to this report.

2. The institution of National Ombudsman was incorporated in the Constitution as an independent complaints body (new article 78a). The National Ombudsman investigates the actions of central government administrative authorities and other administrative authorities either on his own initiative or on request. He is independent and appointed by the Lower House of Parliament. In addition to central government, all the provincial authorities and over a hundred municipalities come under his authority.

3. The review of the defence provisions in the Constitution (new articles 97 to 100) update these provisions in line with the terminology of the 1983 Constitution. In addition, the right of Parliament to be informed if the government decides to send Dutch troops abroad has now been laid down in the Constitution.

2.1 Fundamental rights in the digital age

4. On 16 October 2000, the government introduced a policy document in Parliament entitled 'Fundamental Rights in the Digital Age'. The document proposes changes to articles 5,7,10 and 13 of the Constitution (the right of petition, to freedom of expression, to respect for private life and to privacy of communication respectively). In addition, it proposes to incorporate into the Constitution a right of access to government information for individuals and a duty of care resting on government to guarantee access to such information.

5. These changes were largely prompted by developments in information and communication technology. The proposals are based on recommendations made by the Commission on Fundamental Rights in the Digital Age, which was set up in 1999. The main aim of the proposed amendments is to formulate the new articles 5, 7 and 13 in such a way as to be independent of whatever technology is involved, which is not the case with the existing articles. This means that article 5 will be applicable to any form of petition, whether written,

verbal or electronic, article 7 to any form of expression and article 13 to any kind of confidential communication. Article 10 was already worded in a neutral manner and so did not require amendment in this sense.

2.2 Corrective referendum

6. After the Upper House rejected in a second reading an earlier proposal for the introduction of a corrective referendum, the government submitted a second bill on this issue in March 2000. This takes the form of an amendment to the Constitution that will incorporate provisions on corrective referendums. If the bill becomes law, a corrective referendum may be held in respect of generally binding regulations (with certain exceptions) enacted at central government and at provincial and municipal level.

2.3 Dualism and local democracy

7. A partial revision of Chapter 7 of the Constitution was announced in the government 's response to the report of the State Commission on dualism and local democracy published on 22 May 2000. The aim of the revision is twofold. First, to make it possible to concentrate the executive function in the municipal and provincial executive respectively. Second, to bring the provisions of the Constitution in line with the dualist principle on which local and provincial government is based.

2.4 Entry into homes

8. A bill amending article 12 of the Constitution (entry into homes) is at present before Parliament. The bill aims to make it clear that entry into a home without the express permission of the occupant is prohibited and to enable the report on the entry issued to the occupant to be waived in the interests of national security. The second reading of the bill is expected to have been completed in the second half of 2000.

2.5 Education

9. In line with the coalition agreement, the Education Council was asked to issue recommendations on possible changes to article 23 of the Constitution in order to provide a statutory basis for inter-denominational schools (a full merger of a public-authority and a private school). The Council issued its recommendations in January 2000. In October 2000 the Government sent its response to the Lower House. As a result, a bill amending article 23 is in preparation and is expected to be put before Parliament in the first half of 2001.

3. ADDITIONAL ACTIVITIES (PUBLIC SERVANTS)

10. In 1997 a system of reporting and registration of additional activities and a ban on certain types of activity (Bulletin of Acts and Decrees 1997, 224) was introduced pursuant to section 125, subsection 1(j) and 1(k) of the Central and Local Government Personnel Act, section 12 (o) and (p) of the Military Personnel Act 1931 and section 50, subsection 1 of the Police Act 1993. Public servants are now obliged to report additional activities that may be of relevance to their duties to the competent authorities, which then register them. Additional activities that stand in the way of the proper performance of an official's duties or the smooth running of the public administration (to the extent that the duties concerned are related to this) are prohibited.

4. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

4.1 Article 6: Right to life

Year	Number of suicides in prison	Total prison population (January 1)
1997	10	11503
1998	10	11500
1999	12	11164
2000	10	11550

11. If a detainee commits suicide, the incident and the circumstances that led up to it are always investigated by the national criminal investigation department (Rijksrecherche).

4.2 Article 7: Prohibition of torture

12. From 17 to 27 November 1997, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited the Netherlands. The CPT visited a number of custodial institutions and police stations, and centres where aliens are detained. The CPT drew up a report of its visit that was sent to the Dutch government in July 1998. In its report the CPT states that it found no evidence of torture in the Netherlands and noted only a few incidents in which government officials had not treated people correctly. The CPT believed that the positive findings in this country were largely due to the high level of education and training of the government officials responsible for law enforcement, the organisational structure and management of the agencies charged with law enforcement, as well as intensive supervision by various bodies of the actions of government officials. The

CPT obtained its information from its own observations and through contact with human rights organisations and the National Ombudsman.

13. Although the CPT was largely impressed by the facilities in the various institutions it visited, it also made a number of recommendations for improving the living conditions and treatment of people in detention. These were mainly concerned with improving detainees' access to medical services, guaranteeing a minimum of one hour's daily recreation outdoors in all institutions, and establishing various registers including a central register noting disciplinary punishments and enforced treatment in institutions for persons subject to hospital orders and a central register recording deportations from Schiphol airport in which force was used.

14. The CPT expressed concern regarding conditions in the Dutch maximum security prison (Extra Beveiligde Inrichting - EBI) in Vught. The CPT asked the Dutch government to institute an independent inquiry into the psychological state of inmates who spend long periods in this prison. The government has complied with this request, and the results of the inquiry are set out in a report entitled Zorg in en om de Extra Beveiligde Inrichting. The investigators concluded that concern for the psychological state of detainees, as expressed in the various policy documents, is reflected in daily routine in the EBI. They also concluded that empirical research into the effects of a maximum security regime on the mental health of prisoners and ex-prisoners was possible, and they presented a plan for such research. The Minister of Justice has since ordered a follow-up study. For a description of the conditions in the EBI see under Article 9.

4.2.1 Ban on 'Zaanse' interrogation method

15. In 1997, when interrogating an individual accused of a serious crime, police in Zaandijk employed a technique that involved applying psychological pressure. As soon as this came to light, the Minister of Justice immediately ordered that the practice should cease. This accorded with the recommendation of the criminal investigation department advisory committee, which held that the method compromised the aim of discovering the truth. The suspect who had been interrogated using this technique was released from detention. Since then, an experiment has been launched in which interrogations of suspects in serious criminal cases - involving offences carrying a sentence of eight or more years of imprisonment - are recorded on video. It provides extra scope for monitoring the treatment of suspects during interrogation and the general conditions in which the interrogation is conducted. The experiment will be evaluated by the Criminal Investigation Department Advisory Committee prior to nation-wide introduction.

4.2.2 Medical Research (Human Subjects) Act

16. On 1 December 1999 the Medical Research (Human Subjects) Act (Bulletin of Acts and Decrees 1998, 161) entered into force. The Dutch Government decided to set up a committee of experts to make recommendations for the statutory regulation of medical research using minors and adults who are incompetent (i.e. without the capacity to consent), on the basis of medical opinion on the need for such research and ethical views on its admissibility. The committee, headed by Professor Meijers, Advocate-General at the Supreme Court of the Netherlands, was asked to issue its report in the light of the applicable provisions of the Constitution and international law. The report's conclusions were adopted by the government, tightened up in some respects, and incorporated into a new version of the bill.

17. The Act now contains the following criteria for medical research in general. A recognised ethical committee must have given its approval. Such approval may only be given if (a) the research protocol demonstrates that the study will lead to the advancement of medical science, and could not be achieved without the participation of human subjects or using less radical methods; (b) the research methodology is of the requisite standard; (c) the study is to be performed under the supervision of persons possessing research expertise and (d) the risk to and burden on the subject will be in proportion to the potential value of the study.

18. Research involving minors and incompetent adults is pro¬hibited. However, this ban does not apply to therapeutic research or to non-therapeutic medical research that can only be conducted using subjects in the category to which the person in question belongs and only if it involves negligible risk and a minimum burden on the individual concerned. Research of this kind must of course conform to the general requirements refer¬red to above. Before a competent minor over the age of 12 may take part in medical research, the minor's own consent and that of his or her parents or legal guardian are required. Minors under the age of 12 and incompetent minors over the same age may be involved in medical research only after written consent has been given by their parents or guardian. Medical research involving incompetent adults requires the written consent of their legal representative or, in the absence of such a person, a person holding written authorisation from the adult in question, or his or her spouse or partner.

19. Incompetent persons who are to be involved in medical research shall be informed in a way they are able to understand. If a person who is incapable of giving informed consent objects to a procedure to which he is subjected as part of a study, he will no longer be

involved in it. The Dutch government agrees with the conclusion reached by the Meijers Committee, based on articles 31 and 32 of the Vienna Convention on the Law of Treaties, that medical research involving incompetent persons which satisfies all the above conditions need not be incompatible with article 7 of the ICCPR.

20. The Dutch government believes that it is in keeping with the object and purpose of the Covenant to allow, under strict conditions, non-therapeutic medical research which is of great importance to the advancement of medical care for minors and incompetent adults, such as people suffering from mental disabilities or senile dementia.

21. Finally, it should be noted that on 4 April 1997, the Netherlands signed the Convention on Human Rights and Biomedicine. The provisions of the Act with regard to research involving incompetent persons are in line with the provisions in the Convention. The bill approving the Convention and the Protocol on the Prohibition of the Cloning of Human Beings will be introduced in the Lower House in 2001.

4.3 Article 8: Prohibition of slavery

4.3.1 The national rapporteur on trafficking in persons

22. On 26 April 1997, a conference of EU justice and equal rights ministers chaired by the Netherlands adopted a declaration entitled 'The Hague ministerial declaration on European guidelines for effective measures to prevent and combat trafficking in women for the purpose of sexual exploitation'. The declaration encourages states to appoint a national rapporteur to report to individual governments on the scale and nature of trafficking in women and the mechanisms involved, as well as on the impact of policy measures. As the initiator of the Hague Declaration, the Netherlands is now the first member state to have appointed such a rapporteur, as of 1 April 2000. The rapporteur, Ms A.G. Korvinus, a former advocate-general, is supported by an office with researchers and a clerical officer. Five ministries contribute funds from their budgets. Nevertheless, the rapporteur is independent and will report to government and make recommendations based on her own views and convictions. The rapporteur and her staff have been given special powers to examine police and criminal records as part of their inquiries.

23. The national rapporteur is responsible for sending an annual report to government containing the following:

- quantitative and qualitative information on the scale and nature of trafficking and the mechanisms involved, including information on current and potential offenders and victims;

- quantitative and qualitative information on the investigation and prosecution of offenders (where necessary in a cross-border context);
- quantitative and qualitative information on the provision of information or assistance to current or potential victims and their repatriation;
- identification of changes in the nature of and approach to trafficking in persons that could serve as a basis for adjustments to national and regional policy and where possible to the national input in international policy.

24. It is essential for the rapporteur's mandate to include helping to promote, within existing frameworks, international co-operation in preventing and combating trafficking in persons. This includes promoting the co-ordination of data collection and management at international level.

25. The recommendations the rapporteur is expected to make to improve the prevention and combating of trafficking in persons may be addressed to central and local government and other administrative authorities, international organisations and non-governmental organisations.

26. The rapporteur's annual report will be published and the government will present it to Parliament. As a result of the activities of the national rapporteur's office, the government will be able to provide more information and a better insight into the scale and nature of trafficking in the Netherlands in following reports.

4.4 Article 9: Right to liberty and security of the person

4.4.1 The Custodial Institutions Act (Penitentiaire Beginselenwet)

27. On 1 January 1999 the Custodial Institutions Act (Act of 18 June 1998, Bulletin of Acts and Decrees, 430) and the new Prison Rules (Decree of 23 February 1998, Bulletin of Acts and Decrees, 111) came into force, replacing the old Prisons Act and Prison Rules.

28. The Act sets out the rights and duties of detainees, which up to now have never been contained in full in one piece of legislation. Enforcing a custodial sentence involves infringing fundamental rights as enshrined in the Constitution and international human rights conventions. The Act sets out the conditions subject to which these rights may be restricted. The right to inviolability of the person, for example, may be infringed by compulsory urine checks or during clothing or strip-searches. Far-reaching restrictions may sometimes be imposed if this is necessary to maintain order and security in the institution. The Act also contains detailed regulations concerning detainees' right of complaint.

29. The Custodial Institutions Act also gives details of the institutions' duty of care. Depriving people of their liberty inevitably means that they can no longer look after themselves or further their own interests. The prison must provide the medical, psychological and social care required by detainees. It must also enable detainees to maintain contact with the outside world.

30. Section 2 of the Act states that the enforcement of a custodial sentence or detention order involves the transfer of the person concerned to a custodial institution. Section 9 of the Act distinguishes between remand centres (huizen van bewaring) and prisons (gevangenissen).
According to section 9, subsection 2, remand centres are intended for:

- any person who is subject to an order for pre-trial detention;
- any person who is required to serve a custodial sentence, the remainder of which is no more than three months;
- any person who is required to serve a custodial sentence and is waiting to be placed in a prison.

Prisons are intended for persons who have received a custodial sentence (section 10). In certain cases, the Minister of Justice may designate an institution as both a remand centre and a prison (section 9).

Custodial institutions or units are classified in five security categories (section 13):

- minimum security
- low security
- normal security
- high security
- maximum security.

31. Section 5 of the Custodial Institutions Act provides that the governor of a custodial institution or unit must establish a set of rules for that institution or unit, having regard to the model and guidelines to be provided by the Minister of Justice.

4.4.1.1 Placement in a custodial institution

32. The Minister of Justice determines the criteria to be applied when assigning detainees to a particular institution or unit (section 13, subsection 3 of the Custodial Institutions Act).

33. The placement or transfer of detainees is effected in accordance with section 15 of the Act. Selection officers are responsible for placement (section 15, subsection 2) and are competent to order transfers. Any decisions to this effect take account of instructions given by the Public Prosecution Service (openbaar ministerie) and by the authorities responsible for imposing the sentence or order (section 15, subsection 3).

34. The governor of an institution or unit determines how detainees are to be accommodated (section 16).

4.4.1.2 Supervision of prisons

35. Under section 6 of the Custodial Institutions Act, the Central Council for the Application of Criminal Law (Centrale Raad voor Strafrechtstoepassing - CRS), formerly known as the Central Advisory Council for Prisons, the Care of Criminal Psychopaths and Rehabilitation (Centrale Raad van Advies van het Gevangeniswezen, de Psychopatenzorg en de Reclassering) is responsible for supervising the enforcement of custodial sentences and orders.

36. The CRS also advises the Minister of Justice on the matters referred to above, while its appeals board is responsible for hearing appeals. The chair of the board must be a member or former member of the judiciary.

37. The members of the CRS are independent, and they are appointed by royal decree. They are experts in various fields, such as medicine, psychology or law. They have unrestricted access to all custodial institutions at all times, and may talk freely with detainees. They must be given any information they request for their visits (article 11 of the Decree regulating the Central Advisory Council for Prisons, the Care of Criminal Psychopaths and Rehabilitation of 16 May 1953).

38. In addition, every custodial institution or unit has a supervisory committee whose duties include supervision of the enforcement of custodial sentences or detention orders in the institution or unit concerned, and the hearing of grievances and formal complaints (section 7 of the Custodial Institutions Act and article 11 et seq. of the Prison Rules). The members of the supervisory committee likewise have unrestricted access to the institution at all times.

4.4.1.3 Legal protection

Objections and appeals against placements or transfers

39. Under section 17 of the Custodial Institutions Act, a detainee may file an objection to his placement or transfer, or against the dismissal of his request for transfer to a particular institution. The selection officer gives him an opportunity to explain his position, unless the objection was deemed inadmissible or manifestly ill-founded or well-founded from the start. Within six weeks the officer must inform him in writing of his decision and the reasons for it. He must also advise the complainant that he can appeal against the decision, and specify the time limit for doing so. Under section 72 of the Act, the complainant may lodge an appeal against the selection officer's decision with the CRS appeals board.

Application for transfer

40. Section 18 of the Custodial Institutions Act allows detainees to apply to the selection officer for placement in or transfer to a particular institution or unit. Applicants are given an opportunity to explain their reasons for the request. The officer must notify the applicant of his decision within six weeks, stating his reasons. He must also inform the detainee that he can appeal against the decision, and state the time limit for doing so.

Complaints and appeals against decisions by the prison governor

41. Pursuant to section 60 of the Custodial Institutions Act, a detainee may file a complaint against a decision concerning him taken by or on behalf of the governor of the prison or unit. He may also complain if the governor refuses or fails to hand down a decision. Such complaints are filed with the complaints committee of the institution in which the decision was taken (section 61). The complainant is entitled to legal counsel or the assistance of a confidential advisor (section 65). The board must hand down a decision within four weeks of receiving the complaint.

42. The prison governor as well as detainees may file an appeal with the independent appeals board of the CRS against a decision of the complaints committee (section 69 of the Act).

4.4.2 Maximum Security Institution (Extra Beveiligde Inrichting, EBI)

43. A new maximum security prison with improved facilities opened in Vught in August 1997. It has four units and a total of 24 places. Though the Hoekstra Commission (1992) had recommended the construction of two such prisons, current trends were such that there was no longer any need for a second, equally large institution. However, to ensure that there would be sufficient capacity, two units of the old temporary facilities were maintained,

providing accommodation for 11 detainees. For some time now, however, this extra capacity has not been needed and merely provides a safety net.

4.4.2.1 Target group and selection procedure

44. As noted above, Chapter IV of the Custodial Institutions Act contains rules for assigning detainees to custodial institutions. The same rules apply to placement in a maximum security prison, except that extra safeguards have been incorporated into the selection and placement procedures. Assignments to the EBI are therefore subject to an additional set of rules, as published in a ministerial regulation of 15 August 2000 (ref. 5041936\00\DJI).

45. A risk profile is used to identify candidates for placement in the EBI. It helps to identify potential absconders and individuals who constitute a danger to society. Only people with the highest scores are considered for placement in a maximum security institution. Placements are never automatic. Each case is examined individually.

46. The EBI in Vught is designated a remand centre (huis van bewaring) and a prison (gevangenis) for males aged 20 and over who are required to serve a sentence of more than six months. A distinction is made between:

- detainees who are deemed likely to abscond from a closed institution and commit further violent crimes, and who would therefore constitute an unacceptable threat to society;
- detainees whose escape would cause great anxiety amongst members of the public and who therefore constitute an unacceptable threat to society; their rating as potential absconders is secondary.

47. The main factors which determine whether a person falls into either of these categories are:

- the views expressed by the Public Prosecution Service at the time of that person's arrest;
- the conclusions reached by the National Criminal Intelligence Division (Centrale Recherche Informatiedienst - CRI) on the basis of all available information about him;
- the nature of the offence he committed and the circumstances of the offence;
- information from external sources (police, probation and after-care board, etc);
- information about his present detention and any previous detentions in the Netherlands or abroad.

48. Detainees are assessed in terms of their likelihood to abscond, taking account of the following factors:

- any previous escape or attempt to escape from a closed institution, especially with the use or threat of violence;
- the prospect of extradition and whether the person in question objects to being extradited or the custodial sentence he would or could expect to serve in the country to which he would be extradited;
- the length of the sentence he still has to serve, either in the Netherlands or elsewhere (only a term of several years is deemed an indicator);
- information or tip-offs from external sources indicating that he is planning to escape with or without help from outside, collected by the CRI's Detainee Intelligence Information Service (GRIP); a public prosecutor from the National Public Prosecutors' Office (Landelijk Parket) checks the reliability, validity and present relevance of any such information.

49. The main determinants as to whether a detainee constitutes a danger to society are:

- the seriousness, nature, and political or social sensitivity of the offence of which he was convicted, particularly if it constituted a serious sexual or violent crime or an offence under the Opium Act (Opiumwet) in the Netherlands or abroad;
- the circumstances surrounding the charges or conviction; the likelihood of the detainee resorting to reprisals or committing further serious offences.

4.4.2.2 Placement in the EBI

50. In principle, placements in the EBI are made from an ordinary custodial institution. The governor of the institution submits a proposal to the selection officer (formerly known as the prison advisor, or penitentiair consulent), giving reasons why the person concerned should be in the EBI.

51. Before submitting the proposal, the governor requests information about the person concerned from the secretary of the EBI selection board. The secretary obtains such information from various sources including the CRI and the Public Prosecution Service and passes it on to the governor. The governor then discusses his proposal with the detainee. Finally, he completes his report by adding the detainee's comments and any objections he may have, and submits his proposal to the selection board.

52. The selection officer considers the proposal and consults with the governor. If it is the detainee's first placement from a custodial or closed institution, he is interviewed by the

selection officer, who draws up his own report on the governor's proposal and submits it to the selection board secretary. The report again includes the detainee's comments. If the detainee is serving a long sentence or if a psychologist considers it necessary, it may be forwarded to the Prison Selection Centre (Penitentiaire Selectiecentrum), which is responsible for issuing recommendations on the psychological aspects of the enforcement of custodial sentences and orders. The Centre is always consulted about first placements.

53. The case is subsequently discussed by the selection board, chaired by the selection officer. The board comprises a representative of the Public Prosecution Service, a psychologist and a representative of the board of governors of Nieuwe Vosseveld Prison in Vught. The board is assisted by a number of officials, including a representative of the CRI.

4.4.2.3. Extension and termination of detention in the EBI

54. Every detainee in the EBI has his case reviewed at six-monthly intervals to determine whether the placement is still appropriate. If necessary, his placement is extended for a further six months. The prison governor prepares a written report before each review. For this purpose he consults the secretary of the selection board, who obtains information from the Public Prosecution Service and the CRI. In all other respects the procedure is the same as the placement procedure.

55. If new facts emerge, relating for instance to a criminal case or a request for extradition, or if any change occurs in a detainee's circumstances, the prison governor may submit a proposal to the selection officer between these reviews to the effect that the detainee should be removed from maximum security.

4.4.2.4 Miscellaneous

56. If a detainee in the EBI is convicted by a final and conclusive court judgment, a decision is taken as soon as possible regarding the type of prison he should be assigned to, and whether he should remain in the EBI. In principle, a detainee whose remaining sentence does not exceed 18 months is transferred to an ordinary closed institution, except possibly in the following circumstances:

- if there is a prospect of his being extradited;
- if he is still deemed to constitute an unacceptable threat to society;
- if he absconded or attempted to abscond in the preceding 12 months or if his conduct constituted a threat to order and safety in the institution;
- if the CRI or the Public Prosecution Service are in possession of currently relevant information suggesting that he might still abscond.

57. Very few of the 40,000 people detained in custodial institutions in the Netherlands each year are assigned to the EBI. The average is between 25 and 30. The number at present is 18.

4.4.2.5. Detainee Intelligence Information Service (Gedetineerden Recherche Informatiepunt - GRIP)

58. In 1994, the Detainee Intelligence Information was established as a division of the CRI in order to improve cooperation between the Public Prosecution Service, the police and the Custodial Institutions Service (Dienst Justitiële Inrichtingen) of the Ministry of Justice with a view to achieving a systematic and consistent security regime for detainees who are rated as potential absconders or as constituting a danger to society. The GRIP collects all incoming information for review and processing.

59. In 1999, the GRIP received 151 tip-offs or reports concerning potential escapes. In 15 cases, the governor of the institution concerned consequently recommended maximum security placements, which were effected in five of those cases. In the remaining ten cases, the selection officer determined that the person in question did not satisfy the criteria for a maximum security placement.

4.4.2.6 The regime in the EBI

60. The Custodial Institutions Act and the Prison Rules apply in full to detainees in the EBI, giving them the same rights and obligations as detainees in ordinary institutions. Their daily programme, for instance, is the same as that in other institutions (cf. article 3, paragraph 2 of the Prison Rules, which provides that their daily programme, like that in the standard regime, shall occupy 83 hours a week). The number of hours set aside for activities and visits differs (43 hours in the standard regime, 18 hours in the maximum security regime). But in practice, detainees in the EBI are offered an activity programme of 55 hours - more, in fact, than under the standard regime. However, there are differences in the way these activities are organised. A number of security measures are built into the regime, and detainees are under surveillance at all times outside their cells. These special arrangements are set out in the EBI Model Regulations (Regeling model huisregels EBI) of 12 October 1998, 715635/98/DJ, Government Gazette 1998, no. 233.

61. Subject to the provisions of the Custodial Institutions Act, the EBI imposes a security regime aimed at preventing detainees from escaping or taking hostages among prison staff

or any other persons with whom they come into contact. Situations in which hostages could be taken are consistently avoided and special security measures have been introduced for this purpose.

62. The main features of the regime are as follows:

- screening of all contacts with the outside world; all correspondence and telephone calls are screened except those with privileged contacts; detainees must be separated from their visitors by a transparent partition ('closed visits');
- members of their immediate families, spouses and partners may visit once a month without being separated by a partition ('open visits'), although physical contact is restricted to a handshake on arrival and departure; telephone conversations and conversations during visits are screened, recorded, and translated if necessary; for security reasons, conversations must in principle be held in a standard European language, or Turkish or Arabic;
- only one detainee at a time may come into contact with staff, and at least two staff members must be present; for this purpose, special corridors have been built leading to areas where group activities take place; these areas are under camera surveillance or supervised by staff who are physically separated from inmates by a partition.

63. Other features of the regime:

- detainees who leave the premises must be handcuffed, for instance when going to court or for hospital treatment; they may also be handcuffed inside the institution, in areas where they might have access to objects with which they could injure staff or take hostages, for example when visiting the barber or the clinic, or when being escorted to open visits;
- cells are inspected daily; strict rules apply concerning the objects detainees may have in their possession or keep in their cells;
- no more than four people at a time may take part in group activities;
- detainees are not obliged to work, but they are given the opportunity to work in groups;
- they may take educational courses individually and by correspondence under the supervision of a tutor;
- library books can be requested by computer;
- a form is provided for ordering food and beverages, and such orders are subsequently delivered;
- detainees may take music and drawing lessons on an individual basis;

- they can take part in sport at least twice a week; they may also use gym equipment after completing their work;
- they can spend at least one hour a day outdoors; they may also use the exercise yard at fixed times during recreation periods in their programme;
- they are entitled to spend at least six hours a week engaging in group recreation; they may also use the exercise yard at specified times, and the kitchen on an individual basis;

in practice, efforts are made to enable detainees to take part in recreational activities every day, and thus to spend longer and more frequent periods of time outside their cells.

Contact with staff and other inmates

64. Detainees are physically in the presence of prison staff several times each day. They must be alone on such occasions, and at least two members of staff must be present. They can also contact staff by intercom from their cells or during activities. The staff are trained by specialised external agencies to develop and maintain personal contact with detainees. To increase spontaneous contact between staff members and detainees, the governors have submitted plans to the Prison Service Department (Directie Gevangeniswezen) proposing modifications to the building which would enable staff to walk around the exercise yard and come into contact with detainees. A similar arrangement in the temporary EBIs proved effective in this respect.

65. Article 3 of the Prison Rules provides that detainees in the EBI must be offered an activity programme covering at least 18 hours a week. As stated above, however, detainees can take part in activities for an average of 55 hours a week. Group activities are organised for a maximum of four people, with the six assigned to each unit rotating. No contact is allowed between detainees in different units. Group activities are supervised with the aid of cameras or else by staff who are physically separated from the detainees.

66. Detainees have contact with various care workers (the medical team, a psychologist, a social worker and a spiritual counsellor) (see 'Maintaining a healthy psychological and social climate').

Clothing search (frisking) and strip-search

67. Pursuant to section 29 of the Custodial Institutions Act, the governor may frisk or strip-search detainees on their arrival at or departure from the institution, before or after they have

received a visit, or at any time he considers such action necessary in the interests of maintaining order or safety in the institution.

68. Pursuant to the EBI Regulations, detainees may be frisked in any situation which involves contact with staff to ensure that they are not in possession of objects which could be used to inflict injuries or take hostages. The building has special corridors through which detainees may proceed unescorted, except in certain cases, to take part in activities. The introduction of this system has significantly reduced the number of times that detainees need to be frisked.

69. The EBI Regulations further provide that detainees may be frisked or strip-searched:

- in areas where they would have access to dangerous objects, such as the dentist's surgery, the barber's or the clinic; the aim is to ensure that they do not come into possession of such objects;
- after open visits; the aim is to ensure that they do not receive objects from their visitors;
- once a week, as part of a thorough cell inspection, which involves a full inspection of all their possessions; the strip-search is necessary to ensure that nothing is concealed on their person.

Contact with relatives and others

70. Chapter VII of the Custodial Institutions Act regulates the frequency and manner in which detainees can maintain contact with the outside world. Pursuant to the EBI Regulations, they may correspond with friends and relatives, telephone friends or relatives twice a week for ten minutes, and receive one visit a week for an hour. Access to the telephone once a week is the standard set by the Custodial Institutions Act.

71. Section 38(4) in conjunction with section 36(4) of the Custodial Institutions Act sets out the grounds on which a detainee may be barred from contact with a particular person, and provides that all contacts may be subject to surveillance. The Act states that they must be told why their visits are subject to surveillance and what form it will take: this information is accordingly set out in paragraph 3.8.2.1 of the Annexe to the EBI Regulations. Similar though less stringent rules apply in ordinary institutions. The Regulations may also specify where visits should take place and whether they must be held individually in separate rooms or communally in a hall. They should also state what conditions apply (e.g. whether open visits are allowed).

72. The Regulations contain further provisions governing contact between detainees in the EBI and the outside world. All personal contact is subject to surveillance.

Reasons for security measures

73. The main threat to the security of an institution comes from detainees' contacts with the outside world. Although no escapes involving the use of force have occurred in the new maximum security prison, potentially useful tip-offs are received several times a year concerning planned abscondments, with or without outside help, notwithstanding the stringent security. Detainees constantly seek ways of communicating with the outside world without being monitored. The authorities must be able to screen their contacts to prevent them from absconding with help from outside. Special measures must be taken when detainees need to leave the institution, for instance for a court hearing or hospital treatment. In these circumstances, the security of the prison building is ineffective.

74. Bearing in mind that most abscondments from maximum security institutions in the past took place with outside help, that several serious attempts have been made even in maximum security prisons, and that detainees or their associates have planned escapes with the use of extreme violence, the rules governing contact with the outside world cannot be relaxed without increasing the security risk to an unacceptable degree. Strict regulations governing such contact, based on the principle that all contact with the outside world must be subject to surveillance, is a vital aspect of the institution's overall security. Allowing more physical contact during visits would jeopardise security, for example by making it difficult to ensure that no objects are being passed between detainees and their visitors.

75. The problem cannot be prevented by frisking visitors before a visit and strip-searching detainees afterwards, as these measures do not necessarily prevent objects from being smuggled into the visiting area. Small objects concealed in a person's clothing are not always detected. Objects can even remain hidden in a strip-search. There have been many incidents of detainees ingesting drugs and other objects (such as wrapped explosives) in order to smuggle them into the institution.

76. More physical contact would also allow detainees to exchange unscreened communications with their visitors, for instance by whispering information that would be inaudible to the prison officers and beyond the range of recording equipment. The authorities regularly find evidence that detainees continue to seek ways of exchanging unscreened communications with the outside world. Some of their attempts to do so have yielded potentially useful information about escapes or plans to secure their release from outside.

77. Allowing detainees more physical contact with children or infants would allow children to be used to convey messages or bring objects into the visiting area. Frisking them more thoroughly as a means of preventing this problem would not be an acceptable option, as this would be considered highly unpleasant by both the child concerned and the prison staff.

Psychological and social climate

78. Detainees have the right to consult nursing staff, a doctor, a psychologist, a psychiatrist, a social worker and a spiritual counsellor. Weekly meetings are held at the institution, attended by the psychiatrist, the psychologist, the medical staff and the rehabilitation officer. They discuss the personal wellbeing of each detainee weekly or once a fortnight and give advice on the treatment of each individual.

79. In addition, the prison authorities try to achieve a favourable social and psychological climate in the institution, and encourage opportunities for contact between staff members and detainees. As mentioned above, the staff are trained by specialised external agencies to develop and maintain personal contact with detainees. They have contact with detainees several times a day.

80. Moreover, consultations are held with external specialists every two months to review matters concerning the institution in general, and the atmosphere in particular. The same matters are discussed four times a year with the Ministry of Justice.

81. As already mentioned in § 4.2, an independent inquiry into the psychological state of inmates who spend long periods in the EBI, is currently made.

4.4.3 Administrative detention

82. Since 3 May 2000, the Municipalities Act has conferred new powers on mayors enabling them in the event of large-scale disturbances to detain groups of people committing breaches of the public order. Such detention is subject to strict conditions and is limited to a maximum of 12 hours. It transpired during the European summit in Amsterdam in 1997 that existing legislation provided insufficient scope for temporarily detaining groups of people in such situations with a view to maintaining law and order. What is more, the measures available were largely reactive, making them less useful where the aim is to maintain order.

83. The new powers may only be used in the event of rioting, other serious disturbances, disasters or serious accidents, or if such events seem extremely likely. The Euro 2000

football championship that took place in June 2000 in the Netherlands and Belgium was viewed, at the time when the amendment to the Act was being drafted, as a situation in which the new powers might be needed. However, this was not the case, nor have the powers been used to date. Another restriction on the use of these powers is that they may only be exercised against persons who are failing to comply with a regulation aimed at maintaining public order that is laid down in a municipal bylaw. What is more, detention must be necessary to prevent the continuation or repetition of the actions in question and there must be no other reasonable way of ensuring compliance. Detention may be extended for a maximum of twelve hours. Finally, special proceedings before the president of the district court have been provided for in such cases. The rule is that the president is obliged to hear the person concerned if possible while he/she is still in detention. Another requirement is for the president to give judgment immediately after he has heard the parties.

4.5 Article 10: Treatment of persons deprived of their liberty

Psychiatric patients

84. There are 47 mental health institutions in the Netherlands. About 15% of the patients are admitted under the Psychiatric Hospitals (Compulsory Admissions) Act (Bulletin of Acts and Decrees, 669) that entered into force in 1994. Committal under this Act is permissible only if the individual poses a danger to one or more persons - including him/herself - or to the general safety of persons or property.

Death of a prisoner in the maximum security institution

85. On 15 September 1999 a prisoner was killed in the maximum security institution (EBI) in a fight between two prisoners during the out-of-cell period. The fight lasted for only about two minutes, so that prison officers, who were physically separated from the prisoners, were unable to intervene in time. The national department of criminal investigations investigated the circumstances of the prisoner's death and concluded that staff had not been at fault. Medical assistance had been provided within a very short time. Of course, criminal proceedings have been brought against the prisoner who was responsible for other prisoner's death.

86. Staff employed at the EBI receive special instructions because the risk of inmates escaping and committing further violent crimes poses an unacceptable threat to society. At least two prison officers must be present to handle individual detainees. During out-of-cell time, staff are not in principle allowed to share the same space as inmates; this rule is intended to prevent them being taken hostage.

4.6 Article 13: Prohibition of expulsion without legal guarantees

87. The general principles of policy on aliens remain unchanged. The Netherlands pursues a restrictive policy on admitting aliens, with the exception of refugees. Admission is possible on the following grounds:
(a) International obligations (Convention relating to the Status of Refugees, human rights conventions);
(b) Substantial Dutch interests;
(c) Compelling reasons of a humanitarian nature.
The policy rules are laid down in the 1994 Aliens Act Implementation Guidelines.

New Aliens Act
88. In response to recent developments, however, the Government has decided to amend the Aliens Act once again, the main aim being to achieve a shorter and more streamlined asylum procedure. The new Aliens Act will enter into force on 1 April 2001.

89. The most important changes relate to the asylum procedure. Some aspects of this procedure, however, will remain unchanged. As under the current Aliens Act, asylum seekers will be eligible for a residence permit on the grounds of international obligations (including the Geneva Convention and the European Convention on Human Rights), on grounds of compelling reasons of a humanitarian nature, or because return to the country of origin would constitute an exceptional hardship because of the overall situation there.
The main changes are as follows:

- In the current procedure, rejected asylum seekers can lodge an objection and ask for their case to be reconsidered. This administrative objections phase will now cease to exist. Decisions on applications must be made within six months, and rejected applicants may appeal through the courts. They may remain in the Netherlands pending the outcome of this appeal; there is no longer any need to obtain a separate decision to this effect. The abolition of the objections phase makes it important to improve the quality of the Immigration and Naturalisation Service's (IND) decisions on applications. To achieve this, asylum seekers will be given the opportunity to clarify their reasons for seeking asylum and to respond to a stated intention to reject their application (if this intention exists) before this is finalised. The IND will take this response into account in making its decision. The decision will make it clear how the

alien and the IND view the application, providing a sufficient basis for the court to rule on the lawfulness of the decision.

- The new Act introduces the possibility of appeal to the Council of State.
- Rejected asylum seekers will automatically be under an obligation to leave the Netherlands within a set period. The rejection will also automatically end entitlement to accommodation and other facilities as well as empowering the authorities to evict the persons concerned and expel them from the country.
- The Act provides for a ministerial order extending the normal period for decision-making for certain categories of aliens from six to eighteen months. This option can be used if a brief period of uncertainty is expected regarding the situation in the country of origin, or if the situation in the country of origin is expected to improve in the short term, or if the number of applications submitted is so large that the IND cannot decide on all of them within the set six months.
- Every asylum seeker whose application is successful will be given the same temporary permit with a maximum of three years, to which a package of entitlements will be attached. There will be only one asylum status. At present there are three different statuses, each with its own package of entitlements. This gives rise to much litigation. Under the new Act, there will be no further litigation once someone has been granted a temporary permit, as there is only one status. However, after three years asylum seekers may qualify for a permanent residence permit. This means there will be two types of residence permits: a temporary one, possibly followed three years later by a permanent one.
- In the new system, all asylum seekers admitted on a temporary basis will have the same rights and entitlements. These entitlements are to a large extent determined by international obligations. Holders of temporary permits will be allowed to take paid employment. They will also be eligible for student grants and housing. Family reunification will be possible, but only for permit holders with an independent income at least as high as social assistance level, which is a stricter requirement than the present 70% of that level. As under the current situation, applications must be submitted from another country. If necessary, family ties will be determined by DNA analysis.
- The new Act also provides for measures for supervision, and for the restriction and deprivation of liberty. Under the current Aliens Act (section 19), officials can use their powers only if they have 'concrete indications suggestive of illegal residence'. In practice this means that there is scarcely any active supervision of aliens in the streets, as such persons would seldom manifest concrete indications of illegal residence. For this reason, it has been proposed changing the criterion to 'if facts and

circumstances exist that give rise to a reasonable suspicion, on objective grounds, of illegal residence'. This criterion encompasses safeguards against the discriminatory use of these supervisory powers.

Compulsory Identification Act

90. The Compulsory Identification Act entered into effect as from 1 June 1994. As a result, two amendments have been made to the Aliens Act. The first is the abolition of the old requirement stipulating that aliens must always carry on their persons a document indicating their residence status. The second is an amendment to section 19 of the Aliens Act, whereby it is no longer permissible to stop persons 'who may reasonably be assumed to be aliens', unless there are 'concrete indications suggestive of illegal residence'.

91. In 1997 the supervision of aliens was evaluated on the basis of the changes to section 19 of the Aliens Act. From this evaluation it appeared that the amended section 19 created a clearer framework for the supervision of aliens. This supervision is not arbitrary; it is carried out only where there is a genuine likelihood of encountering illegal aliens.

92. No evidence emerged from the evaluation to suggest that either the police or the Royal Military Constabulary acted in a discriminatory way in the application of section 19 of the Aliens Act. It emerged that very few complaints have been submitted concerning discriminatory conduct on the part of the police. Shortly after the entry into effect of the Compulsory Identification Act, the National Bureau against Racism set up a project group to look at complaints about the application of section 19 of the Aliens Act. This project group has since been disbanded because there were not enough complaints.

The obligation to renounce other nationalities in the case of naturalisation

93. On 1 October 1997, the obligation for aliens - with the exception of a large number of specified categories – to renounce their original nationality upon naturalisation as Dutch nationals was reintroduced. The exempted categories are listed in a policy circular. This change of policy was suggested by the Lower House of Parliament. The basic principle is that it is preferable for people to have a single nationality unless objective reasons exist for permitting more than one.

Benefit Entitlement (Residence Status) Act

94. On 1 July 1998 the Act of 26 March 1998 entered into effect, amending the Aliens Act and certain other legislation to link aliens' entitlement to provisions, services, benefits, exemptions and licences from administrative bodies to lawful residence in the Netherlands

(Bulletin of Acts and Orders 1998, 203). This is known as the Benefit Entitlement (Residence Status) Act, and is designed to put an end to a situation that had arisen in the Netherlands and that was deemed wrong and undesirable. In the 1970s and 1980s it transpired that aliens who were not entitled to live in the Netherlands nonetheless succeeded in prolonging their actual residence in this country, partly because they were entitled to claim state provision such as unemployment, invalidity and social assistance benefit. In the ensuing situation, the government's policy of combating illegal residence in the Netherlands was thwarted by the fact that eligibility to benefit from such collective schemes was not subject to any check on lawful residence.

95. The aim of the Benefit Entitlement (Residence Status) Act is to ensure that the government is not actually assisting illegal aliens to prolong their illegal stay in the country by providing them with benefits and services without checking whether they are legally resident.

Link between legal residence and entitlement to services

96. The Benefits Entitlement (Residence Status) Act links entitlement to collective services provided by the government, including exemptions and licences etc., to aliens' right to remain in the country. The main rule of the Act is that an alien residing illegally in the Netherlands cannot claim entitlement to any collective services. There are three exceptions to this rule, which will be discussed below. The entitlements of aliens who are legally resident in the Netherlands depend on the nature of their residence status. An alien who has been admitted to the Netherlands unconditionally is entitled to the same benefits and services, in principle, as a Dutch national. Someone admitted for a short stay does not in principle have any right to benefit from collective provision.

97. As of 1 July 1998, residence status is checked before someone without Dutch nationality receives any benefit or other provision. All claims submitted by persons lacking the required residence status are refused, except for the special cases listed below. Since 1 July 1998 the Aliens Entitlement (Specified Categories) Regulations provides for benefit in lieu of social assistance plus help with medical expenses for four categories of aliens lacking the requisite residence status: probable victims of trafficking in women, witnesses/informants regarding trafficking in women, persons engaged in family reunification/formation, and former or current asylum seekers who submitted an application for residence on humanitarian or medical grounds before 1 July 1998 and whose entitlement to social assistance was cancelled under the terms of the Benefits Entitlement (Residence Status) Act.

Exceptions

98. Certain services are available to all aliens, regardless of residence status. These all relate to education, health care or legal aid.

(1) Education

All minors are entitled to education up to 18 years of age, regardless of residence status. The school does not verify whether or not the child is legally residing in the Netherlands. If an alien over the age of 18 applies to be admitted to an educational establishment, however, the institution must make sure the applicant has the required residence status before admitting him or her.

(2) Health care

The Act regulates not access to health care, but how that care is paid for. The basic principle is that aliens residing unlawfully in the country must pay their own medical bills. They may take out private medical insurance. An exception has been made to this rule for essential medical care and preventive measures to protect public health. An Illegal Aliens Fund has been set up to pay providers of essential medical care to illegal aliens who are unable to recover the costs. In this context, 'essential' means care given in a life-threatening situation, or to prevent such a situation arising, or to prevent the loss of essential functions. It also includes situations involving danger to others (e.g. in the case of tuberculosis and other infectious diseases, psychological disorders involving aggressive behaviour, and care surrounding pregnancy and childbirth). Preventive health care for children and the vaccination programme are also paid for out of this fund. In other words, the children of illegal aliens have access to preventive care of this kind.

(3) Legal aid

All illegal aliens are eligible for legal aid, whatever legal proceedings they are involved in. Residence status is not looked at before providing legal aid.

4.7 Article 14: Entitlement to a fair and public hearing

99. As indicated in the previous periodic report, the Act on the criminal and disciplinary law applicable to members of the armed forces was thoroughly amended in 1991. The amendments abolished the court martial system, introduced a sharp distinction between disciplinary and criminal offences (at the same time granting rights of due process), removed the death penalty from the Military Criminal Code, and established specific definitions in the realm of disciplinary offences.

100. In January 2000, the Act on military criminal and disciplinary law was amended again, this time on the basis of recommendations made by a committee established shortly after 1991 to evaluate the practical effects of the previous amendments. However, unlike the amendments of 1991, the most recent changes largely concerned disciplinary law. The most noteworthy amendment was the introduction of an internal appeals procedure, under which any accused member of the armed forces must first appeal to his commanding officer. This allows members of the armed forces to gain an initial ruling on appeal much sooner than at present. They retain their right, of course, to lodge an appeal with the military division of the district court if the internal procedure does not provide an acceptable outcome.

4.8 Article 17: Right to privacy

4.8.1 Personal Data Protection Act

101. A new Personal Data Protection Act (WBP, Wet Bescherming Persoonsgegevens) will enter into force in 2001 to replace the present Act (WPR, Wet Persoonsregistratie). The WBP implements the EC Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Directive 95/46/EC in turn was inspired by the Council of Europe Convention no. 108 on the protection of individuals with regard to the automatic processing of personal data. Contrary to the WPR, the WBP applies the same regime to both public and private sector. The WBP governs all processing of personal data, i.e. any operation concerning personal data, including the collection, filing, storage, retrieval, merging, disclosure an erasure of personal data.

102. Two notions play a key role in the WBP: the lawful processing of data and transparency. According to the WBP, personal data van only be processed lawfully if processing is necessary for the performance of an contract to which the individual concerned is party. Personal data may only be collected for specific, explicitly defined an legitimate purposes. Certain categories of data, in particular those relating to race, political convictions and health, may not be processed at all, unless some very strict conditions are met.

103. As far as transparency is concerned, the starting-point of the WBP is that the individual concerned must be informed about how his personal data are used. The WBP grants individuals the right of access to data kept about them, which includes the right to request that data be corrected, supplemented or blocked. Under the terms of the WBP, responsible parties are obliged to inform persons whose data they have collected about, for instance, their own identity and what use will be made of the data collected. This obligation applies both when the information has been obtained from the person concerned as well as when it

has been obtained in a different way. The latter obligation need not be fulfilled if it involves a disproportionate effort.

104. The WBP establishes a Data Protection Commission, charged with monitoring the processing of personal data in conformity with the WBP. The WBP requires the responsible party to notify processing operations to the Data Protection Commission. A large percentage of processing operations will be exempted from this obligation. Exemptions include club membership and subscription records, and the records kept by e.g. general practitioners and lawyers.

105. The Commission has been granted the power to apply sanctions to individuals or companies that violate certain provisions of the WBP. The Commissions's activities will be governed by safeguards provided for in the General Administrative Law Act. An individual or company to whom such a sanction is applied may appeal through the courts.

106. As noted in section 2.1.1 above, the Government proposed amendments to e.g. Articles 10 and 13 of the Constitution in its policy document 'Fundamental rights in the digital age'. The most important changes to the protection of the right to privacy were informed by the need to keep this protection up to date given the scope for infringements of privacy afforded by the new digital age. Article 10 is expected to be amended to this end in the near future. Article 13 will probably be amended too, to ensure that the right to confidential communication extends to new modes of communication.

4.8.2 Telecommunications Act

107. The Telecommunications Act entered into effect on 15 December 1998. It partly implements the EC Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector. Its relevance to the protection of the right to privacy is that it provides for the competent authorities to be allowed access to telecommunications for public order and security reasons. These matters are regulated in the Act together with provisions that serve explicitly to protect privacy. Suppliers have a general duty of care, for instance where it comes to using data for commercial ends and protecting automatic number identification services.

4.8.3 The protection of data in the health care

108. In the Netherlands, Article 10 of the Constitution obliges the legislature to draft a general protection of privacy act covering the collection and storage personal data, the use of recorded data, the right of access to recorded personal data and the right to amend them.

The Personal Data Protection Act, which came into force on 1 July 1989, covers all collections of data stored systematically for efficient information retrieval. In 2001 this Act will be replaced by the new Personal Data Protection Act. This Act is the consequence of the implementation of the Directive 95/46 EC of the European Parliament and the Council of the European Union on the processing of individuals with regard to the processing of personal data and the free movement of that data. A collection of medical records kept by a health care professional that is not covered by this Act is in any case covered by the provisions of the Medical Treatment Contract Act.

According to the Personal Data Protection Act, data can only be collected or recorded for a specific purpose, and there must be reasonable grounds for keeping the records. The data may be used only for the purpose in question, and only legitimately acquired data may be stored. The emphasis is mainly on self regulation (with more detailed rules governing protection of privacy and access to data). Two of the Acts provisions are particularly relevant to the health sector. Supplementary rules have to be drafted for the storage of medical and psychological data, and institutions can be obliged to draft a set of rules for the functioning of the records' system. People on whom data are recorded have the following rights: to be notified when data are first recorded, to receive on request an overview of the data and information on their source, to have incorrect, incomplete or irrelevant data corrected, completed or destroyed, respectively, and to receive on request a list of the third parties that received data in the previous year.

According to the Medical Treatment Contract Act, health care professionals are obliged to keep medical records and to add the patient's comments to them. Patients are not entitled to amend the data, which is possible under the Personal Data Protection Act. Neither Act incorporates the right to refuse to allow data to be recorded. Under the Medical Treatment Contract Act, the patient can require data to be destroyed, except when this would violate the interests of a third party, for instance in the case of prevention of contagious disaeses. The Medical Treatment Contract Act allows for records to be kept for a set term of at least 10 years, after which they must be destroyed unless there are important reasons for not doing so. Further, the Medical Treatment Contract Act requires that medical examination and treatment be conducted in provacy, unless the patient requests the presence of a third party (article 459).

Access to data by Third Parties

109. The Medical Treatment Contract Bill in the Netherlands allows the information contained in medical records to be supplied to third parties only with the patients permission or when required by law. Specific permission is not required for giving information to persons (e.g., other doctors) who are directly involved in the treatment of the patient. In addition, the

Personal Data Protection Act provides for the communication of information by a data bank in the pursuit of its aims.Data under medical secrecy may not be communicated; in general, the consent of the patient is required before information can be given to relatives, and such consent cannot be assumed.

Transmission of Data for Research

110. In the Netherlands. the Personal Data Protection Act allows information to be supplied for epidemiological and other research without the patient's permission, provided that the patient's privacy is not unduly infringed. Information may also be supplied with the individual's consent. The Medical Treatment Contract Act is stricter on this point. Personal medical data may be supplied only for research that serves a health care purpose. Data may be provided without the consent of the patient only when: it is virtually impossible to obtain consent, the research is in the public interest, the data are essential to the research and there is no undue infringement of personal privacy. Procedural safeguards to this effect are under consideration.

4.8.4 Professional secrecy in health care

111. In the Netherlands, the obligation to maintain confidentiality in health care derives from criminal law (which makes it an offence to break secrecy where a professional duty to maintain it exists), administrative law (the legislation on health care professions) and contract law. According to the Medical Treatment Contract Act, information can only be given to a third party with the consent of the patient or when required by law.

The right of patients to have information relating to them kept confidential also has its roots in human rights. At present, doctors, dentists, pharmacists, midwives, pharmacy assistants, nurses and auxiliary nurses have a professional obligation to maintain confidentiality. The new Individual Health Care Professions Act extends this obligation to other professionals, including psychologists and psychotherapists. Further, professional confidentiality runs almost parallel to the right of health care professionals to refuse to answer questions in court proceedings, whether civil, criminal or administrative. This constitutes an exception to the general obligation to testify in court and implies an exception from the duty to notify the police of serious criminal offences.

Exceptions to secrecy

112. Secrecy may be broken in the Netherlands when the patient gives his or her consent, when it is required by law and when obligations conflict. Failure to maintain secrecy in the event of conflicting obligations is not explicitly regulated by law, but may be challenged either in a criminal court or by a medical disciplinary board. In general, health care professionals

are entitled to divulge information if maintaining secrecy may entail serious consequences for the patient or for third parties, or is detrimental to the public interest. The decision is left to health care professionals, after weighing the different interests involved.

4.8.5 Other legislation

113. The Benefit Entitlement (Residence Status) Act of 26 March 1998 makes it possible for different public authorities to exchange information (see section 4.6). To foster the reintegration into the labour market of persons previously declared unfit to work, the Continued Payment of Salary (Sickness) Act (WULBZ) entered into effect on 1 January 1996, and the Invalidity Insurance (Differentiation in Contributions and Market Forces) Act, otherwise known as the 'Pemba Act', entered into effect on 1 January 1998.

114. In the sphere of criminal investigations, the Special Investigative Powers Act entered into effect on 1 February 2000. This act sets standards of due care for investigative methods that could violate individuals' fundamental rights.

4.9 Article 19: Freedom of expression

115. The Media Act and the Media Decree have been amended many times since they first entered the statute books. Two recent developments are worth mentioning. The amendment of the Media Act often referred to as the Concessions Act (Bulletin of Acts and Decrees 2000, 138) is designed to improve the efficiency of public broadcasting. It ended the system of granting concessions to each company within the public broadcasting sector; instead, a single concession is now granted to public broadcasting as a whole. Attached to this concession is an explicit task, embracing some of the principles underlying the Media Act. The act has also made it easier for new organisations to join the public broadcasting system.

116. The second development that is relevant to freedom of expression is a bill currently before the Upper House of Parliament, to amend the Media Act and the Criminal Code and to repeal the Film Censorship Act (Parliamentary Papers 26 841). Public performances open to minors under 16 years of age can be regulated by law on the basis of Article 7, paragraph 3 of the Constitution, to protect good morals. The regulation may call for prior scrutiny of the content of an individual production. Where films are concerned, this prior scrutiny is currently provided for by the Film Censorship Act. The Media Act currently provides that films deemed unsuitable, under the terms of the Film Censorship Act, for minors aged under 12 or 16 may not be shown on television before 20.00 hours and 22.00 hours respectively. The proposed amendment is based on the principle that every audiovisual product must be labelled, under

the responsibility of the branch initially responsible for marketing it, according to any possible harm attached to showing it to minors. This self-regulation should extend to all visual material deemed harmful to young viewers. To implement the obligations arising from the EU 'Television without Frontiers' Directive, the bill includes an amendment to the Media Act introducing a harmonised system of self-regulation for television programmes.

117. As noted in section 2.1.1, the Government recently put before Parliament a draft amendment to e.g. Article 7 of the Dutch Constitution on freedom of expression. It proposes replacing the current Article 7, which differentiates according to media type, with a general fundamental right to freedom of expression that does not incorporate such differentiation. In light of developments in information and communications technology, the Government believes that it is no longer valid to protect a fundamental right to differing degrees on the basis of such distinctions. Another important part of the proposal is to expand the protection accorded by Article 7 to explicitly include freedom of distribution and access. The provisions that restrictions on the right to publish thoughts or other information may only be imposed by act of parliament, and that no one shall require prior government permission for such publication, are to be retained. One consequence of the latter is a total ban on government censorship.

4.10 Article 24: Protection of the child

4.10.1 Adoption

118. On 1 October 1998, the Convention on the Protection of Children and Cooperation in respect of Intercountry Adoption, concluded on 29 May 1993 in The Hague, came into effect in the Netherlands. The Act implementing the Convention and the amended Placement of Foreign Foster Children Act are appended to this report. The Convention obliges each signatory state to designate a central authority responsible for such matters in its territory and to cooperate with the central authorities in other states. The Netherlands has designated its Minister of Justice as its central authority.

119. In the Act implementing the Convention, the Netherlands has made use of the opportunity provided by the Convention to delegate some of the central authority's tasks to licensed bodies, as defined in the Placement of Foreign Foster Children Act. The Minister of Justice grants licences to these bodies to mediate in intercountry adoption cases. They assist people wishing to adopt, both before and after they have taken a child into their homes. The body keeps a file on each case in which it mediates. If the child in question is the first foreign child the parents have adopted, they are obliged to attend general information

sessions on the placement and adoption of foreign children provided under the auspices of the Minister of Justice by the Centre for Information on the Adoption of Foreign Children.

4.10.2 Childcare

120. Government policy aims to create 71,000 extra places in day nurseries by the end of 2002. This will mean almost doubling the 89,000 places that were available when the present Government took office in 1998. The number of places available has now passed the 100,000 mark, but it needs to reach 160,000 by the end of 2002.

121. To achieve this expansion, the number of day nurseries has to be increased from 3,000 to 5,000, and a large number of new personnel must be taken on. Many are hard at work on the necessary preparations: from the day nurseries themselves, municipalities, and organisations representing employers and employees to entrepreneurs, housing associations and property developers. The Government is supporting the expansion in capacity by making extra funds available and boosting construction. The Government has increased the Childcare Guarantee Fund from 10 to 35 million guilders. This will enable more organisations to invest more money.

122. The Coalition Agreement announced plans to draft a statutory framework for childcare facilities. Childcare has grown into a fully-fledged, autonomous sector with a turnover exceeding 1.4 billion guilders, and the necessary statutory framework is now to be provided in the form of the Childcare (Basic Provision) Act. The basic principles of the new legislation involve prioritising parents' demand and children's interests. This will be reflected in the choice of a demand-led funding system combined with a clear quality control system regulated at national level. The current mixed model of supply funding through municipalities and demand funding through tax facilities for businesses and parents has become very complicated. The new Act will clearly define responsibilities and funding structure on the basis of a demand-led system. Demand funding is a useful instrument here. This leaves parents themselves free to choose a day nursery for their children. They can then apply to the authorities to have some of their expenses reimbursed.

123. Children's interests are best served by the provision of high-quality childcare. The new Act regulates the national basic quality requirements that all childcare centres must meet. Local authorities retain responsibility for supervision. They in turn will be subject to an umbrella supervisory structure at national level. This construction will ensure that supervision is safeguarded and properly monitored at national level.

4.10.3 Child sex abuse

Preventing and combating child sex abuse

124. On 19 July 1999 the Government issued a policy document on ways of combating child sex abuse and sexual violence against children, which describes all current and proposed measures in this area. The policy document grew out of agreements made in Stockholm in 1996 at the World Congress Against the Commercial Sexual Exploitation of Children. As a follow-up to this policy document, a national action plan to combat child sex abuse ('NAPS') was presented to Parliament on 21 April 2000, setting out the current and proposed measures in greater detail.

125. NAPS tackles all aspects of the problem, from the commercial sexual exploitation of children to child sex abuse and violence against children by relatives and acquaintances. The aim is to arrive at an integrated approach to the problems surrounding child sex abuse.

126. The approach calls for action by government bodies, other institutions and private individuals in the areas of prevention, aid, law enforcement, and regulation and cooperation at national and international level. Matters such as registration, public information campaigns, staff training and research will also receive attention.

Prevention

127. There have been numerous developments in the preventive sphere. There are enough Child Abuse Advisory and Reporting Centres to cover virtually the entire country. The ongoing 'Communities that Care' projects and Parenting and Support programmes both stress the importance of early warning mechanisms. Furthermore, school managers and competent authorities are obliged to report to the authorities any cases of sex abuse or sexual harassment that come to their attention.

128. Finally, the instruments at the disposal of the Child Care and Protection Board are being upgraded to make it possible to detect abuse at an early stage. Aside from prompt detection and intervention, it is also essential to teach children assertiveness. Projects are being set up to teach children how to react to any misuse of authority.

Aid

129. In addition to the Child Abuse Advisory and Reporting Centres, a great deal has been invested in developing Youth Welfare Centres, which give carefully chosen referrals to young people such as sex abuse victims to ensure they receive appropriate help. For the rest, the

knowledge possessed by general practitioners, health centres, hospitals (including accident and emergency departments) and school doctors about child sex abuse is essential.

130. The further development of special diagnostic techniques, for instance in cases of suspected child sex abuse, merits special attention, in particular where special groups such as abused boys, disabled children and very young children are involved.

Law enforcement

131. In the fight against sex crimes, there is an increasingly well-structured and professional system of investigations and prosecution. Child pornography (including the Internet), trafficking in children and illegal prostitution are areas receiving special attention. The resource sharing to fight child pornography project is helpful here. The National Criminal Intelligence Service now has a national database of visual evidence in the area of child pornography. The Amsterdam-Amstelland region is working on a special application of this database to support operational investigations.

132. A project team has been set up within the National Police Agency, comprising fifteen investigators whose task it is to track down incriminating evidence on the Internet. An investigation is currently under way to investigate the feasibility of devising an autonomous computerised system that could identify criminal offences electronically, using image and word recognition.

133. Liaison with the providers' own child pornography hotline has prompted fifteen criminal investigations thus far. The investigation of all kinds of sex crimes is being intensified. Every public prosecutor's office now has a public prosecutor who deals specifically with sex crimes.

134. Talks have been held with the Dutch Association of Internet Providers about the forthcoming statutory regulation making it obligatory to disclose to the authorities the names and full addresses of all those who provide or use any site containing child pornography. This will make it easier to prosecute people who distribute incriminating material, via the Internet or otherwise, or who have such material in their possession.

Legislation

135. Legislation has been enacted in which the penalty clauses concerning child-prostitution have been tightened. New legislation has been drafted to tackle child abuse. The age limit concerning child pornography will be increased from 16 to 18 years. So-called virtual child pornography will be made punishable. The provision that the public prosecutor cannot take

action against anyone suspected of sexual acts with a minor between twelve and sixteen years of age unless someone concerned has lodged a formal complaint will be abolished. Furthermore, persuading a child to engage in sexual activity without having physical contact with another person is to be made a criminal offence. Residents of the Netherlands who commit sex crimes abroad can now be prosecuted in the Netherlands. Changes are being made to the legislation governing the issue of certificates of good behaviour (verklaring omtrent het gedrag) to prevent persons convicted of sex offences from working with children or in other high risk situations.

Activities and results

136. NAPS has a three-year implementation period. A project team has been set up for the active supervision of this implementation. The project team will check that the planned activities are actually carried out, that targets and results are achieved, and that time limits are not exceeded. NAPS embraces, among other things, the following activities and subjects:

- Prevention of child sex tourism, sex abuse by relatives and acquaintances and other forms of child sex abuse, including repeat offending. It works by liaising with travel companies, drawing up protocols for co-operation on early warning and developing e.g. a selection instrument for young sex offenders;
- Providing help for victims and offenders, for instance by further developing programmes to change the behaviour of paedophiles, and by making aid more accessible to special groups such as unaccompanied minor asylum seekers and the disabled;
- Law enforcement, with special emphasis on child pornography and the Internet, trafficking in children, illegal minor prostitutes and the professionalisation of the police and public prosecution service;
- Legislation for instance to raise minimum age limits and to bring certain acts within the ambit of the criminal law;
- International cooperation in the fight against child pornography, child prostitution and trafficking in children;
- Public information campaigns to improve awareness of sex abuse among the public at large and among specific target groups such as soldiers on peace operations;
- Staff training (e.g. in the police, judiciary and medical profession);
- Research, e.g. to identify new destinations favoured by those engaging in child sex tourism, and to extend supervision periods;
- Registration, to improve the harmonisation of registration methods and various other systems.

4.11 Article 25: Right to take part in public affairs

137. The last municipal elections were held in 1998. At these elections a total of 10,156 municipal councillors were elected, 150 of whom were from ethnic minorities. The 1994 figures were 76 out of 11,117. Although in itself a modest result, this proportion does represent an upward trend.

138. The nationalities/ethnic origins of the 150 town councillors from ethnic minorities are as follows:

Turkish	24
Moroccan	21
Italian	1
Zaïrian	1
Philippine	1
Armenian	1
Ghanaian	1
Greek	1
Surinamese	33
Antillean/Aruban	8
Moluccan	7

These figures are only approximate. Exact figures are unavailable, as local councils are not obliged to disclose information regarding their national or ethnic composition.

139. In paragraph 180 of the third periodic report of the Kingdom of the Netherlands (concerning article 25 of the Convention), Section 21 of the Municipalities Act is mentioned. This is not correct; a reference should have been made to Section 10 instead.

4.12 Article 26: Prohibition of discrimination

4.12.1 The criminal law and discrimination

Increases in the sentences imposed for discrimination

140. The Government has proposed increasing the maximum sentences that can be imposed for persistent forms of racial discrimination. This will necessitate amending the Criminal Code. Consideration is now being given to how to implement this proposal for heavier sanctions for systematic discrimination in the Criminal Code.

Guidelines for discrimination cases

141. Criminal law is the last resort in the fight against discrimination. If anti-discrimination legislation has clearly been breached, however, the authorities must resort to the criminal law to protect the public. The Guidelines for discrimination cases for the police and public prosecution service which took effect on 1 September 1997. The Guidelines were subsequently amended (Aanwijzing Discriminatie & Richtlijn voor strafvordering 'discriminatie') as of 1 April 1999. The Guidelines are intended to promote a consistent and resolute application. They are based on an active investigation and prosecution policy. Their basic premise is that any violation of the anti-discrimination provisions in the Criminal Code will meet with a response under the criminal law as soon as possible, providing that the technicalities of the case permit. They also stipulate that in cases of offences under ordinary law in which discrimination is a background factor, the public prosecution service must emphasise this involvement in its closing remarks and include it as an aggravating circumstance when deciding what sentence to demand.

142. The clause requiring the police to draw up a report on each individual complaint has been retained. The police can decide against doing so only after prior consultation with the public prosecution service, and only where the latter deems that no discrimination punishable under criminal law has taken place. The Guidelines note explicitly that it is important to have a clear picture of the nature and extent of local discrimination problems, and that registration - in particular with the police - is an important prerequisite for achieving this.

143. Both the police and the public prosecution service have liaison officers and/or co-ordination points for discrimination cases. Each public prosecutor's office at a district court has someone designated "discrimination public prosecutor", and each equivalent office attached to an appeal court has a "discrimination advocate-general". These 19 public prosecutors and 5 advocates-general responsible for discrimination cases meet annually to exchange knowledge and information. At these meetings, topical issues are discussed and recent judgments and changes in legislation reviewed.

144. Regarding complaints about discrimination by the police itself, the Guidelines now provide that the same prosecution policy applies to police officers as to others. This means that in these cases, too, action under the criminal law is the proper course to take.

Collaboration between police, public prosecution service and anti-discrimination centres

On 20 February 1997 a conference took place under the auspices of the National Bureau against Racism (LBR) on the theme "Co-operation between the police, the public prosecution

service and anti-discrimination centres". The conference was attended by a number of representatives of all these bodies. Co-operation between the parties involved, with each one taking responsibility for its share and adopting an active role, is an essential precondition for an effective fight against discrimination. Regular consultations between the various bodies involved, and including local government, are essential to the pursuit of a responsive investigation and prosecution policy. The aim of the conference was therefore to formulate recommendations to improve co-operation between the public prosecution service, police and anti-discrimination centres. The recommendations centre, in brief, on the following themes:

(a) Commitment within the police, public prosecution service and anti-discrimination centres to acknowledging the seriousness of the problem, and the collective will to take measures to stamp it out;

(b) Professionalism, e.g. establishing long-term co-ordination points for discrimination cases within the public prosecution service and police;

(c) Improving the level of knowledge within the police and public prosecution service regarding the definition of discrimination and the relevant legislation and regulations;

(d) Registration, communication and structural consultations at regional and national level.

145. On the basis of the results of the February conference, it was also decided to strengthen ties between the public prosecutors and advocates-general with special responsibility for discrimination cases. They now meet at least twice a year to exchange knowledge and information. It was also decided to set up a National Discrimination Expertise Centre, which will be discussed below.

146. The past few years have seen a marked increase in collaboration between the different actors in the field. This is confirmed by a limited survey conducted by the National Office of the Public Prosecution Service (Parket Generaal; a support service for the Board of Procurators General, College van Procureurs Generaal). This survey revealed that nine districts had for some time been conducting regular consultations between the public prosecution service, police and anti-discrimination centres.

147. The results show that the parties concerned believe the consultations to be a good basis for cooperation which can help tackle discrimination effectively. The regular meetings between police, public prosecution service and anti-discrimination centres focus on several key issues.

The Partnership Training Project

148. Promoting cooperation between the actors involved in fighting racism and discrimination is also the aim of the Partnership Training Project in which the public prosecution service participates. The Project was set up in the Rotterdam-Rijnmond region as a result of close collaboration between the police and Rotterdam's anti-discrimination centre RADAR. The target groups are the police, the public prosecution service, anti-discrimination centres, municipal authorities and organisations within migrant communities. The project aims to achieve partnerships at regional level, analogous to the Rotterdam method, to foster an active and energetic approach to fighting racism and discrimination. Another aim is to help increase the professionalism of the people and organisations involved, and the police services in particular.

149. To achieve this, a training project has been developed to encourage cooperation and to provide the necessary foundation for it. The training course is concluded with a "contract" or declaration of intent, which is signed by the participating parties. One of the project's aims is to make a number of practical instruments that have been developed in Rotterdam (including a handbook, a manual, and training courses at management and operational level) available to the new partnerships, which can adapt them to local needs and circumstances.

150. The body participating in the project on behalf of the public prosecution service is the National Discrimination Expertise Centre. The other participants are Rotterdam-Rijnmond police, the municipality of Rotterdam, RADAR, the National Police Selection and Training Institute and the National Bureau against Racism. The project receives a subsidy from the European Union. The training courses are already under way in several regions.

The National Discrimination Expertise Centre (attached to the public prosecution service)

151. In the autumn of 1997, the Board of Procurators-General decided to set up an expertise centre, a permanent facility for the public prosecution service which would be able to answer substantive legal questions relating to the fight against discrimination and right-wing extremism. The Centre formally started work on 1 September 1998. Its objective is to optimise the public prosecution service's enforcement of criminal law in relation to discrimination. Its primary tasks are to develop, maintain and organise expertise, for instance by contributing to symposiums and training courses; to inform and advise the public prosecutors' offices at district courts; to co-ordinate current investigations and prosecutions; to organise the regular consultations that take place between public prosecutors and advocates-general with special responsibility for discrimination matters; to contribute to the

development of national policy; to draft and distribute manuals, strategic plans etc. aimed at improving local law enforcement.

152. The National Discrimination Expertise Centre is attached to the public prosecutor's office at Amsterdam district court. Currently its staff consists of one part-time public prosecutor and one full-time policy officer.

National police "discrimination officer"/National Consultative Platform

153. At the end of 1997, the board of chiefs of police designated a national police "discrimination officer" with the aim of achieving national coordination within the police service too, as well as gathering knowledge and experience gained in matters relating to this issue. The "discrimination officer" functions as a national liaison point for the public prosecution service and others; one of his/her responsibilities is to improve the registration and information supply within the police in relation to discrimination cases. It has since been decided to set up a National Consultative Platform between the national "discrimination officer" within the public prosecution service (i.e. the chief public prosecutor for Amsterdam, to whose office the National Expertise Centre is attached), the national "discrimination officer" within the police, and the manager of the relevant police force (in this case, the mayor of Zaanstad).

Registration

154. One of the problems discussed during the working conference in February 1997 was the poor registration of discrimination cases. The problem centres less on the registration of offences against legislative provisions that deal specifically with discrimination (articles 137c-g and 429quarter of the Criminal Code) than on offences under general law with a racist or discriminatory background. Neither the police nor the public prosecution service could supply a comprehensive overview of cases of this kind, as emerged from the letter of 30 June 1997 from the then Minister of Justice to the Lower House of Parliament. This picture was confirmed in the Racism and Right-wing Extremism Monitor (first report) that the Minister of the Interior presented to the Lower House on 21 October 1997. The member of the Board of Procurators-General with special responsibility for discrimination matters then brought the issue to the attention of the chair of the Board of Police Commissioners. The registration of incidents with a racist or discriminatory background is now given special attention by the national discrimination officer within the police. Amsterdam police are currently developing a registration system tailored specifically to cases of this kind, for use nationwide. This registration will be interchangeable with that of the National Discrimination Expertise Centre of the public prosecution service. It is believed that this system will provide a good and

reliable overview of incidents with a racist or discriminatory background. At present, the National Discrimination Expertise Centre of the public prosecution service can provide information about the number of cases that were dealt with as of 1998.

Political parties/right-wing extremism

155. In September 1996 the Board of Procurators-General adopted a document entitled "Handbook on violations of public order by extreme right-wing groups" (entered into effect on 1 December 1996). This handbook contains practical recommendations and information concerning action to be taken by the police and the public prosecution service in the event of the undermining of public order, or the threat of such, by right-wing extremists.
After certain left-wing politicians had received written and/or telephone threats from right-wing extremists, Amsterdam police - at the request of the public prosecution service - drew up a set of guidelines for use in such cases. These guidelines were distributed among political representatives at national, provincial and local level. At the same time, it was agreed that the political party concerned (the Green Left Alliance or Groen Links) would inform the National Office of the Public Prosecution Service of any reported incidents directed against their members of parliament or of provincial or municipal authorities. In addition, on 2 March 1998 the Board of Procurators-General wrote a letter to the chief public prosecutors and the public prosecutors and advocates-general with special responsibility for discrimination matters, asking them to raise this matter with the police (with liaison officers, for instance) and to ensure that any cases of threats and/or other forms of violence against or harassment of members or representatives of political bodies reported to the police receive special attention and that they be treated with the greatest possible care.
By letter of 30 June 1997 the then Minister of Justice informed the Lower House of the findings of an investigation spanning the years 1993-1996, by the public prosecution service in collaboration with the Internal Security Service, to discover whether there is any discernible pattern or system underlying crimes of violence committed by extreme right-wing organisations or their supporters.

155. This investigation led to the cautious conclusion – based on the information available - that violence by right-wing extremists is limited in extent and does not appear to be increasing in frequency, intensity or the degree of organisation involved. This picture was confirmed by the reports on racist violence issued by the Willem Pompe Institute of Utrecht University and by the Ministry of Justice's Research and Documentation Centre, which were drawn up at the request of the Minister of the Interior, and about which the Lower House was informed by letter from the Minister of the Interior of 7 May 1997. These reports were

requested because of a need to gain more insight into the background, causes and extent of racist incidents and the type of perpetrators involved.

156. As from 1 September 1998, all action taken under criminal law in response to expressions of discrimination by extreme right-wing groups and individuals has been coordinated by the National Expertise Centre on Discrimination. The principles laid down by the Board of Procurators-General as the basis for action against right-wing extremism still apply without qualification: all reported incidents are investigated and lead to prosecution if sufficient evidence exists. In no case is the potential for martyrdom or the exploitation of publicity to be used as an argument to refrain from prosecution.

157. In tackling discriminatory acts by right-wing extremists, the police and public prosecution service focus primarily on natural persons. If, however, a political party - as a legal entity - is guilty of discrimination, the legal entity and its directors are also prosecuted. A legal person whose object or activities are in breach of public policy may be proscribed and dissolved following an application by the public prosecution service (art. 20, book 2, Civil Code). The Netherlands Government is of the opinion that great restraint should be exercised in deploying this instrument against political parties. Banning a party means making it completely impossible for the party to function. This deals a serious blow to the political system, in which political parties are vital links between politics and the general public. The Government therefore believes that this instrument should be resorted to only in the case of a very serious, systematic disruption of the democratic process.

158. In November 1997, partly in consequence of the conviction of the political party Centrum Partij '86 (CP '86) by a final and conclusive judgment on 30 September 1997, the public prosecution service decided to apply for the proscription and disbanding of this party. Given the convictions of the party and the members of its executive, and in the light of the party's manifesto, newspapers and other publications, the public prosecution service considered that there were sufficient grounds on which to state that CP '86 "behaves in an intimidating and inflammatory manner in respect of political parties and groups that protect the interests of aliens. Where a political party operates as a racist organisation and constantly advocates that certain groups of people should be discriminated against within our society, whereby violence is not shunned and divisions between groups within our society are dangerously accentuated, this party's interest in its continued existence is outweighed by the need to protect the interests of others, who are the victims of these practices". On 18 November 1998 Amsterdam district court declared CP '86 an illegal party and dissolved it. The court considered as follows:

"The public prosecutor rightly stated in her advisory opinion that this legal remedy [proscribing and dissolving a party] must be used with restraint. For diversity of political parties and freedom of expression and association are among the very foundations of our constitution. [...] The mere infringement of one or more prohibitions by a legal entity is not sufficient reason to proscribe it. Such infringements must have become a regular part of the modus operandi to be classified as activities; furthermore, these activities must be so serious as to fall within the scope of this article. [...] It also appears from the party's object and explanatory comments on it, from its manifesto, the passages that have been quoted from the party's propaganda material, the party newspapers, and the way in which the party sought publicity [...] that the purpose of this activity on the part of the NVP/CP '86 was none other than to arouse and incite, or to foster, discrimination against ethnic minorities. As observed at point 4.3. above, this should be defined as contrary to public policy within the meaning of Book 2, article 20, paragraph 1 of the Civil Code".

Discrimination on the Internet

159. A Reporting Centre for Discrimination on the Internet (MDI) has been active since 27 March 1997. Launched with a start-up subsidy from the Ministry of the Interior as part of the European Year against Racism, the MDI is a project set up under the auspices of the Magenta Foundation and staffed by volunteers. The MDI concerns itself with the fight against racism on Dutch-language Internet sites. It assesses each report it receives: if it decides that a particular utterance may constitute a criminal offence, it sends a warning, asking the person who has placed or distributed the utterance to remove it. If this request is ignored, the MDI reports the matter to the public prosecution service and informs the provider that it has done so. In this way, the MDI tries to prevent the distribution of discriminatory and/or racist utterances and to reduce their number. It appears from the MDI's annual reports that requests for removal are generally complied with. In its 1999 Annual Report the MDI notices a substantial increase in the number of discriminatory utterances reported to it. This increase can partly be explained by the huge increase in the number of people using internet and also by the fact that more and more internet users find their way to the MDI.
Since 1997 the Ministry of Justice and the Ministry of the Interior & Kingdom Relations have granted the MDI an annual subsidy to enable it to continue its work.

4.12.2 Age discrimination

160. The last 20 years have seen a trend in the Netherlands which has now reached the point where only one in three people between the age of 55 and 65 still works. If people are both living longer and having a shorter working life, they are able to enjoy their retirement for longer. The burden of funding retirement pensions is therefore becoming heavier. This is all

the more relevant since the number of older people is set to increase considerably over the next few years. An increase in the number of people between the age of 55 and 65 in employment is therefore essential to maintain the system of social security, including the pension system, and to guarantee lasting economic growth.

161. A structural increase in labour market participation calls for a structural approach. The social partners are to a significant extent responsible for ensuring such an approach is taken. By adopting an age-aware personnel policy, improving the employability of employees, converting early retirement schemes into flexible retirement schemes and pursuing sound policy on working conditions, both employers and employees have many instruments at their disposal to limit number of older workers retiring and to promote the number of entrants into the labour market.

162. The Dutch government has already introduced policy and enacted legislation to promote the participation of older workers. Examples are: the Disability (Reintegration) Act (Wet op de (Re)integratie Arbeidsgehandicapten, REA), a training allowance for older workers, and amendments to the Unemployment Insurance Act (Werkloosheidswet, WW), such as the review of the daily earning regulations and the opportunity to carry out experiments on the basis of the Unemployment Insurance Act. The covenant on employment-related pensions built up throughout the individual's working life (Convenant inzake de arbeidspensioenen) agreed between the government and the Labour Foundation on 9 December 1997 stated that obstacles to participation in pension schemes by those in the 55 to 65 age group would be eliminated wherever possible. The withdrawal of the previous regulations on older workers (1995) and the introduction of the compulsory registration of newly unemployed persons of 57.5 years and over as of 1 May 1999 are examples of government policy to raise permanently the level of participation among older workers. The introduction of the Prohibition of Age Discrimination in Employment Bill is of considerable significance for the government's enabling policy. The Government recently sent to Parliament a statement regarding the opportunity to take steps involving the different forms of contribution differentiation in unemployment benefit.

163. A further intensification of policy efforts is required to augment the measures already taken. This focuses on limiting the number of older workers retiring and on promoting the number of entrants into the labour process. The main Dutch government proposals are listed below:

- legal entitlement to discontinuity in pension schemes. If an employee wishes to take a step down in his or her career, none of his or her pension rights may be lost over the

period up to that date. Problems of that kind can exist in final salary schemes, which are the most common pension schemes in the Netherlands. This can be achieved by introducing an entitlement to discontinuity, as has been done in many pension schemes;

- converting early retirement schemes into pre-pension schemes. Agreements have already been reached in several sectors on converting early retirement schemes to pre-pension or flexible pension schemes. However, a number of sectors are still dragging their feet. The government therefore finds it necessary to make it quite clear that, structurally speaking, early retirement schemes are not an option in an ageing society. Fiscal provision for early retirement schemes will be abolished over the next few years. The statutory regime for the fiscal treatment of early retirement schemes, pre-pension schemes and transitional arrangements to be drawn up for the conversion of early retirement schemes to pre-pension schemes will come into force on 1 July 2002;
- financial incentives for employers. Policy aimed at reintegrating older workers into the labour process should be stepped up, for example by extending the range of the existing scheme for reducing contributions payable by employers of long-term unemployed persons once they have re-entered the labour process;
- adjustment of the accumulation of pension rights in the event of disability and unemployment. Government policy aims to reduce the obstacles to reintegration as far and as swiftly as possible. Continued accumulation of non-contributory pension rights in the event of disability and unemployment is important in this connection, as it can provide an incentive not to take part in the labour process. Non-contributory continuation means reintegration is not always profitable, given that in the years thereafter pension rights are built up less quickly. The Government has called upon the Labour Foundation to come up with a solution to this problem within a period of three years. If this appeal does not provide satisfactory results, the government intends to take swift statutory measures.

164. The Minister of Health, Welfare & Sport has continued efforts to eliminate unjustified age restrictions in the constitutions and rules of procedure of organisations subsidised by her Ministry. As a result, virtually the only age limits remaining are those connected with an organisation's objectives (e.g. organisations for the elderly or for young people).

165. The National Bureau against Age Discrimination (LBL) is now working on a theoretical framework to show when age restrictions are (and are not) justified. The idea is to provoke a

public debate designed to redefine the social norm underlying the imposition of justified age restrictions.

Promoting the participation of older workers in the labour process
Discrimination based on age and disability

166. Increasing attention is being paid in the Netherlands to discrimination on the grounds of age and disability, both of which the Dutch government regards as important issues. In 1996 a bill against discrimination based on age in relation to selection criteria and recruitment conditions was sent to Parliament. Although the Lower House took a positive view of the bill, it was decided that a more wide-ranging approach should be taken to the substantive scope of the legislation. The bill was therefore withdrawn in April 1999 to be replaced by the Prohibition of Age Discrimination in Employment Bill (Wet verbod op leeftijdsdiscriminatie bij de arbeid) in November 1999. The material covered by the new bill is broader and includes help in finding employment, vocational training and promotion. This bill is currently before the Lower House.

167. When discussing the results of a study to determine whether disabled people suffer from discrimination and, if so, whether such discrimination occurs to such an extent as to justify legislation against it, the government decided in 1996 that legislation against discrimination based on disability should be developed. As there was little understanding of the consequences of such legislation, a special draft bill was drawn up first. In 1998, the present government decided to examine the possibility of transforming the draft bill into a bill, and it announced recently that a bill will be sent to the Council of State in 2001.

168. The process of preparing the disability bill and the debate in Parliament about the Prohibition of Age Discrimination in Recruitment and Selection Bill were influenced by a Council Directive establishing a general framework for equal treatment in employment and occupation adopted by the European Union on 17 October 2000. This directive forces Member States to take appropriate measures to combat discrimination on the grounds of age and disability, for example. The final wording and scope of the bills on discrimination based on age and disability derive largely from this directive.

169. Numerous organisations, many of which work together in the National Consultative Forum on Age Discrimination, are trying hard to abolish age discrimination. The government will provide funding for these organisations where possible. The LBL, established in 1994, which studies the legal and social aspects of age discrimination, plays a key role in these efforts. The LBL is working to increase understanding of these aspects of age discrimination,

to encourage debate on the question of age limits in legislation and to study requirements for education.

170. The Integrated Action Programme on Policy on the Elderly 1995-1998 sets out the basic principles governing policy on the elderly and outlines an extensive list of action points.

171. The Ministry of Health, Welfare & Sport is encouraging the abolition of age limits by calling on all publicly-funded organisations to abandon the practice of making unjustified age distinctions. In 2001 a study will show whether and to what extent these organisations have amended their constitutions and rules.

172. The Netherlands is already bound by the requirement of equal treatment contained in article 26 of the ICCPR, which is enshrined in article 1 of the Dutch Constitution and elaborated in the Equal Treatment Act. The 12th Protocol to the ECHR makes no difference to national legislation or to the government's existing commitments. The Protocol does mean that it is possible to submit an application to the European Court of Human Rights citing discrimination on one of the grounds specified. A judgment by the Court of Human Rights is binding and must always be followed.

173. The Political Parties (Grants) Act entered into force in 1997, providing that parties which have been convicted of discrimination by a final and conclusive judgment can have their grants withdrawn or can be denied air time.

4.12.3 European legislation

Implementation of article 13 EC Treaty

174. The European Commission put forward three proposals in 1999 to implement article 13 of the EC Treaty (the anti-discrimination provisions). The proposals were developed in three parts:

1) a directive on equal treatment in employment and traffic in goods and services, irrespective of race or ethnic origin;
2) a directive establishing a general framework for equal treatment in employment and occupation, regardless of religious or other conviction, sexual preference, age or disability;
3) a Community action programme to combat discrimination.

175. The European directive on equal treatment irrespective of race or ethnic origin was adopted by the Council in June 2000 and published in the Official Journal of the EC on 19

July 2000 (OJ L 180). The framework directive was adopted in November 2000 and published in the Official Journal of the EC on 2 December 2000 (OJ L 303).

176. The provisions of the anti-discrimination framework directive correspond to the provisions of the race directive, ensuring legal certainty regarding the content and scope of the concepts in both. The framework directive contains more non-discrimination grounds than the race directive (e.g. new ones regarding age and disability) but is narrower in scope (covering only discrimination in the context of work). The race directive provides for implementation by 19 July 2003, while the framework directive must be implemented by 2 December 2003. An exception to this latter deadline is made for the provisions on age and disability, which must in any case have been implemented, where special circumstances apply, no later than 2 December 2006.

Evaluation of the Equal Treatment Act

177. Most of the legislation needed to implement the two directives will be incorporated in the Equal Treatment Act. The relevant government ministries are currently working on the government position on the evaluation of the Act, which entered into force in 1994, stipulating that practice under the Act was to be evaluated in five years. The aim is to enact the legislation to implement the European equal treatment directive and amendments arising from the evaluation of the Equal Treatment Act in a single piece of legislation.

The Twelfth Protocol to the ECHR

178. In November 2000, the government of the Netherlands signed the Twelfth Protocol to the ECHR, which contains a general prohibition of discrimination. Unlike the principle of equality embodied in article 1 of the Dutch Constitution and article 26 of the ICCPR, article 14 of the Twelfth Protocol can only be invoked with regard to distinctions made in respect of rights or freedoms listed in the ECHR.

179. Article 1, paragraph 1 of the Protocol states that the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Paragraph 2 adds that no one shall be discriminated against by any public authority on any of these grounds. The aim of this paragraph is to guard against discrimination in activities of public authorities which do not directly involve a statutory right, such as police action or grant-awarding policy.

4.12.4 New legislation

180. On 10 March 1997, the "Barber Directive" (96/97/EC of the Council of the European Union) entered into force, amending Directive 86/378/EEC of the Council of the European Communities of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes. The aim of the Barber Directive is to achieve equal treatment for men and women in schemes that provide more than the statutory minimum requirements.

181. To implement this Directive, Dutch legislation on equal treatment was amended in March 1998. A new chapter on pension provision was added to the Equal Opportunities Act (Wet gelijke behandeling mannen en vrouwen, WGB). Section 12b of this chapter prohibits discrimination between men and women in three areas: the categories of persons eligible for pension provision, the details of such provision, and the implementation of pension schemes.

182. Article 7: 646 of the Civil Code has also been amended. This article prohibits employers from discriminating between men and women with regard to entering into employment contracts, training, terms of employment, promotion, and the termination of employment contracts. Payments and entitlements under pension schemes are now also regarded as "terms of employment".

183. The implementation of the Barber Directive has no immediate practical implications for employees, because the decisions of the European Court of Justice based on Article 119 of the EC Treaty have direct effect.

184. On 3 October 2000 the Equal Opportunities Act was amended such that, in accordance with European rules, the limitation period on claims for equal pay is now five rather than two years (Bulletin of Acts and Decrees 2000, 391).

185. To implement Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, a Bill amending Dutch legislation on equal treatment has been submitted to parliament. Through implementation of the EC Directive, the rules on the burden of proof in cases of sex discrimination will change. When persons who consider themselves wronged because the principle of equal treatment was not applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it will be up to the respondent to prove that there has been no breach of the equal treatment principle. The Bill amending Dutch legislation on equal treatment entered into force 1 January 2001.

4.13 Article 27: Minorities

186. The Minorities Policy (Consultation) Act entered into force in 1997, providing for the government to consult representatives of minority organisations on policy plans relating to the integration of ethnic minorities and relevant developments in minorities policy. The organisations taking part in these consultations receive grants enabling them in turn to consult the grassroots.

187. The basic principle underlying Dutch integration policy is reciprocal acceptance of the population groups – in all their diversity – found in Dutch society. The aim of minorities policy is to allow ethnic minorities to participate fully in society, focusing on proportional participation in education, employment, housing, the care sector, social security, cultural activities, politics and public administration. The many members of ethnic minorities who are naturalised Dutch citizens have the same legal status as other Dutch nationals. The legal status of foreign nationals is as similar as possible to that of Dutch nationals. However, having more or less equal rights is not the same as having equal opportunities. Dutch policy aims to create equal opportunities and to encourage people to seize such opportunities and so to overcome disadvantages. Research results show that the second generation does better than the first, although disadvantages still exist.

188. In 1996, the Newcomers Integration Act entered into force, with the aim of providing resources for people settling in the Netherlands to learn Dutch and to become familiar with Dutch society and customs. This would enable them to take courses, to find jobs and in general to take part in the life of society. The statutory obligation to take an integration course will also apply to imams who spend a period in the Netherlands, as it is important for the leaders of significant religious groups to be familiar with Dutch language and culture. And religious leaders can play an important role in the integration process.

189. Members of ethnic minorities always retain ties with their country or region of origin. Some of them wish to return there at some point. The Repatriation Act, which provides government funds for people wishing to return to their homeland, entered into force in 1999.

190. The Netherlands has not yet ratified the Framework Convention for the Protection of National Minorities. The Dutch Government's desire to extend the protection afforded by this Convention not only to the Frisians but also to the target groups of its integration policy provoked a wide-ranging debate in Parliament. The Lower House has since approved ratification, and the matter will shortly be debated in the Upper House. Among the rights

enshrined in this Convention are the rights of minorities to preserve their own culture, language and history.