

# Legal protection of persons subject to domestic exclusion orders

An exploratory study

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ADRES

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## Summary

The main question addressed in this study is as follows: *Does the law provide sufficient legal protection for persons subject to domestic exclusion orders and should a mandatory judicial review be introduced for the extension of a domestic exclusion order?* This question was prompted by the debate in the Dutch Upper House about the bill concerning the Domestic Exclusion Act.<sup>1</sup> The background to this bill is that extension of an exclusion order takes almost twice as long as the period for which an exclusion order is issued in the first instance.

The Ministry of Justice's Research and Documentation Centre commissioned this study in order to take a first step towards answering this question. The study does not aim to provide a definitive answer as to whether or not a mandatory judicial review should be introduced, but concentrates on the pros and cons of such a review.

The study used a combination of empirical data based on interviews and case file analysis, and a review of literature and case law. The section concerned with legal doctrine consists of a study of the fundamental rights of an excluded person on the basis of the ECHR and a large proportion of the national case law on exclusion orders. Interviews were also held with five academics, and the Dutch legislation was briefly compared with that of Austria and Germany. The practical section contains interviews with 25 excluded persons, analysis of twenty case files, and interviews with four lawyers, six mayors, four care practitioners and four judges.

When a measure as drastic as an exclusion order is taken, several fundamental rights are involved, namely those set out in Articles 5, 6, 8 and 13 of the ECHR. The last three Articles are of particular importance. Articles 6 and 13 of the ECHR are essentially about access to the court and the availability of a true and effective legal remedy. The main question in relation to Article 6 ECHR is whether the exclusion order can be regarded as a punitive sanction. If it can, then stronger safeguards of legal protection apply. The highest Dutch administrative court, the Administrative Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*), is of the opinion that this is not the case. Article 13 ECHR guarantees that if rights safeguarded by the ECHR are violated an effective legal remedy will be available. In principle an appeal can be made to the district court against an exclusion order, but the question is whether an exclusion order constitutes an

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<sup>1</sup> Kamerstukken [Parliamentary Documents] I, 2008/09, 30 657, no. I, p. 1.

unjustified violation of a right protected by the ECHR. Article 8 ECHR is important in this context, since an exclusion order violates the right granted by that Article to respect for an individual's private life and home. Article 8(2) ECHR states that in certain circumstances a violation is justified. To date it has not been established in the Netherlands that an exclusion order has constituted an unjustified violation of Article 8 ECHR.

The majority (68) of the 83 judgments examined (of which seven were cases involving appeals to a higher court) were appeals against an exclusion order (in some cases combined with an appeal against an extension). In eight cases the appeal was only against the extension. Analysis of the case law provided some interesting findings regarding certain issues, such as interest in bringing proceedings, the purpose of a domestic exclusion order and the operation of welfare services. In practically all appeal cases the court assumes that an excluded person has an interest in bringing proceedings, even if he or she has not taken up the option of applying for a provisional remedy. The case law also confirms the object of an exclusion order as formulated by the legislator, namely to avert danger by taking measures and initiating welfare services. The third important conclusion is that the welfare services must in fact have commenced and that these services are in fact reducing the danger. Although the administrative court only tests the reasonableness of the mayor's decision to impose an exclusion order, it fully reviews the existence at the present time of any danger of physical or mental violence. If this threat is not present, then in principle there is no reason to issue or extend an exclusion order.

Our study of the case files and the interviews with mayors and welfare workers revealed the great importance of exercising due care in the proceedings which lead to an exclusion order. Particular care must be taken with regard to compiling case files and conducting interviews with both the excluded person and those remaining at home (the protected persons). Excluded persons in particular indicate that when an interview is conducted by telephone – which is often the case – they cannot present their side of the story adequately. However, in the case law examined this was not put forward as an argument. The case law and interviews with judges show that great importance is in fact attached to due care. Often welfare services and legal protection were mentioned in connection with each other, particularly in interviews with mayors and welfare workers, who observe a certain tension between the two. On the one hand judicialization of these problems would not enhance the possibility of effective welfare services; but on the other, a strong focus on welfare services may lead to neglect of the relevant rights of the parties involved.

The tension between welfare services and legal protection was also raised in interviews with academics. It was questioned whether the power to issue an exclusion order should lie with the mayor. Opinions on this were divided, both among academics and among the mayors themselves. An advantage is that it is easier for the mayor to liaise with the welfare services. If the power to issue an exclusion order were assigned to the court, contact with welfare workers would be more complex. The mayor can work on an individual basis. One drawback mentioned is that a mayor is not as well equipped as a court to judge violations of fundamental rights. Moreover, mayors have differing views, which may result in legal inequality between different municipalities.

A great deal of practical information was gained from the interviews with excluded persons. This information is consistent with the findings referred to above regarding due care and fundamental rights. Elements found positive were the peace brought by the exclusion order or the fact that it had broken the vicious circle in which the parties were trapped. These interviews also revealed that giving proper information to excluded persons or the extent to

which they perceive that they have been properly informed is an important factor in their response to an exclusion order, for instance whether or not they appeal. Another reason often mentioned for not going to court was their relationship with the protected persons. Excluded persons say that judicialization of the conflict solves nothing. Another important point raised was due care – in particular, due care in the way the file is put together and the way interviews are conducted. Several excluded persons said that they thought the file was biased – too much from the victim’s point of view. Some excluded persons also said they had been given insufficient opportunity to tell their side of the story before a decision was made to extend an exclusion order. A very large number of the excluded persons interviewed said they perceived the exclusion order as a punishment, not as an administrative measure or a welfare intervention. This is interesting in view of Article 6 ECHR. When the exclusion order can be regarded as a punitive sanction, the stronger safeguards of legal protection apply. However, the mere fact that excluded persons perceive exclusion orders as a punishment is – in view of current case law from the European Court of Human Rights – not an overriding reason to qualify an exclusion order as a punitive sanction.

There are a few striking differences between the Domestic Exclusion Act and other legal protection systems such as the Psychiatric Hospitals (Compulsory Admissions) Act (*Wet Bopz*), non-molestation orders and street bans under private law and criminal law and – internationally – exclusion orders in Austria and Germany. The main difference in comparison with the Psychiatric Hospitals (Compulsory Admissions) Act is that involuntary commitment in accordance with that Act involves deprivation of liberty as opposed to the restriction of liberty involved in an exclusion order. Mayors say that because of this the two Acts cannot be compared. The main difference between domestic exclusion orders and non-molestation orders and street bans under criminal law or civil law is in plausibility. In the case of domestic exclusion orders people are less reluctant to seek help, and apart from that an exclusion order is a strongly preventive measure. In comparison with Austria and Germany, a striking difference is that in the Netherlands an exclusion order is extended by the mayor. In the other two countries an exclusion order can only be extended if the victim applies for extension at the civil court.

The first part of the main question of this study is: *Does the law provide sufficient legal protection for persons subject to domestic exclusion orders?* It became clear that due care plays a very important role in answering this question. In view of the experiences of excluded persons with regard to interviews, practical implementation and the importance attached to due care by judges, due care seems to be an important benchmark of effective legal protection. At the same time, the tension between legal protection and welfare services was highlighted by this study. Legal protection is important, but it may not be allowed to defeat the purpose of an exclusion order – namely, to avert danger by providing welfare interventions.

The second part of the main question addressed by the study is: *Should a mandatory judicial review be introduced for the extension of a domestic exclusion order?* Since the study did not aim to provide a definitive answer to this question, it concentrated on examining the pros and cons of a mandatory judicial review. The drawback of such a review would be the extra burden it would place on welfare services, the excluded persons and the judiciary. Moreover, a judicial review may be incompatible with the prompt action required in a situation of domestic violence. It is also more difficult for a court to make individually tailored decisions about issuing exclusion orders and deploying welfare services. Assigning the power to extend an exclusion order – and to review that decision – to the court also has

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its advantages. One important advantage is that this would remove the barriers experienced by excluded persons with respect to appealing against orders. The study shows that in some cases excluded persons fail to appeal because they have not received sufficient information about their options, or because in view of the situation they have other things on their minds. Some excluded persons also said that they did not want to appeal because the protected persons might count it against them. Another advantage is that this system would provide a procedural guarantee that due care is observed.

It is questionable whether the introduction of a judicial review would in all cases be the best way to provide sufficient protection of the excluded person's legal position. Our cautious conclusion on the basis of this study is that the most important element in connection with that legal position is that due care is taken in compiling the case file and conducting interviews, and also in providing excluded persons with information. A more meticulous regulation of the current decision-making procedure in relation to these points might well be a better way to safeguard excluded persons' legal position than altering the actual legal protection procedure.