

OBSTACLES TO THE
IMPLEMENTATION OF THE
TEMPORARY DOMESTIC EXCLUSION
ORDER ACT

- summary -

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Study, conducted by Regioplan by order of the
Research and Documentation Centre (WODC),
Ministry of Security and Justice.

SUMMARY

Survey objective	<p>Objective of the survey</p> <p>The objective of the survey is to identify unresolved procedural and legal obstacles that reduce the effectiveness of the Temporary Domestic Exclusion Order Act (<i>Wet tijdelijk huisverbod</i>).</p>
Survey of practical application	<p>Structure of the survey</p> <p>An email was sent to all 408 municipalities in the Netherlands informing them about the survey and asking them to identify obstacles. Domestic Violence Advice and Support Centres (<i>Steunpunten Huiselijk Geweld</i>) and all (former) police forces were asked to do the same.</p>
Case law study	<p>A study of the case law was conducted to supplement an existing overview that was compiled in 2010 and sourced from www.rechtspraak.nl. As at 1 January 2013, 228 court judgments in cases relating to or involving domestic exclusion orders had been published on the website. Eleven judgments not published on the website but cited by municipalities were added to the list. The legal obstacles and case histories identified in the survey phase were presented to experts at a special meeting.</p>
Legal obstacles	<p>Legal obstacles</p> <p>The following legal obstacles were identified following an analysis of court judgments and a subsequent meeting of experts convened to discuss the findings of that analysis:</p> <ul style="list-style-type: none">• The municipalities cited a lack of clarity regarding the method of judicial assessment. The courts alternate between applying a test of reasonableness and a full review on the merits. As a consequence, municipalities do not know what to expect in the courtroom.• In some cases, the conditions of Section 67a of the Code of Criminal Procedure (<i>Wetboek van Strafvordering</i>) prevent the provisional detention of individuals who have violated a domestic exclusion order imposed on them, even though in such situations there is often a credible threat. When provisional detention is not a possibility, cases are often dismissed. The Public Prosecution Service's domestic violence directive and internal guidance framework are both based on the principle of 'always prosecute, unless...'. In practice, however, it appears that some public prosecutors are not sufficiently familiar with this guideline. Failure to prosecute violations of domestic exclusion orders can undermine compliance.• There are two obstacles that are related to the immediacy criterion in the Temporary Domestic Exclusion Order Act. On the one hand, municipalities are not always able to impose preventive domestic exclusion orders and at the same time comply with this criterion (which usually requires more substantiation than a case involving a current incident). On the other, sometimes courts (wrongly) assess whether a case involves a current

incident. This makes it difficult to use the domestic exclusion order as a preventive instrument.

- Domestic exclusion orders are sometimes set aside when the victim's whereabouts or place of residence is unknown. The ban on contact becomes invalid along with the domestic exclusion order.

Procedural legal obstacles

Procedural
legal

There are also legal obstacles that have little to do with the legislative framework but do have procedural implications.

- When domestic exclusion orders coincide with criminal proceedings, they are often quashed by the court because restrictions imposed under criminal law overlap (at least in terms of objective) with the restrictions imposed by the domestic exclusion order. However, help services are not provided in criminal proceedings. In addition, the ban on contact is often more securely embedded in domestic exclusion orders than in conditions imposed under criminal law.
- In some cases, domestic exclusion orders are quashed because the individuals involved make contradictory statements about the violence. In domestic exclusion order cases there is almost always more evidence than contradictory statements alone. It is particularly important in cases involving mutual allegations of violence to record these statements carefully in the file and indicate why the evidence adduced is deemed sufficient to warrant a domestic exclusion order.
- Police records may support a decision to impose a domestic exclusion order, but are not necessary, according to the case law. However, municipalities have the impression that decisions to quash domestic exclusion orders are made too quickly when there is no police record.
- Municipalities consider it unreasonable that cost orders are imposed when domestic exclusion orders are quashed on the basis of examination ex nunc. When a mayor imposes a domestic exclusion order on the proper grounds, the situation may have changed by the time the hearing takes place. When a domestic exclusion order is examined ex nunc, the decision regarding the order is based on the new situation, which sometimes leads to the order being quashed and a cost order being issued.
- When no assistant public prosecutor is available, domestic exclusion orders cannot be issued. The experts consulted in the context of this survey recommend that powers to impose domestic exclusion orders be delegated to other parties, because assistant public prosecutors have heavy workloads.

Procedural obstacles

Procedural
obstacles

There are four obstacles to the implementation of the Temporary Domestic Exclusion Order Act that arise from the framework established by the legislator:

- It is not always possible to impose domestic exclusion orders in appropriate situations: child abuse situations and situations in which there is no current police incident (the 'preventive' domestic exclusion order). Due to the use

of the term 'incident' in the Temporary Domestic Exclusion Order Decree, a term taken from the Domestic Violence Risk Assessment Instrument (RiHG), domestic exclusion orders are issued mainly when there is a current police incident. However, usually there is no current police incident in situations involving child abuse and 'preventive' domestic exclusion orders, while the Act was intended to apply to this type of situation as well. The term 'immediately' in the Act is also an issue with respect to 'preventive' domestic exclusion orders.

- Even if a situation formally warrants a domestic exclusion order, because the statutory criteria have been met and the risk assessment indicates that there is a serious threat, a domestic exclusion order may not always be an *appropriate* measure. Honour-based violence and a real risk of suicide are possible contraindications that must be taken into account when a domestic exclusion order is being considered. However, the Temporary Domestic Exclusion Order Act and Decree do not address these issues; they merely set out the formal requirements for a domestic exclusion order. There is no guarantee that these factors will be taken into account when the interests involved are weighed in order to arrive at a decision concerning a domestic exclusion order.
- Decisions to extend domestic exclusion orders and assistance plans are not always completed in time and may be qualitatively inadequate. The statutory ten-day period for domestic exclusion orders makes it virtually impossible for social workers to formulate a qualitatively good plan, particularly in complex situations, even if they are available 24 hours a day. When decisions on extensions and assistance plans are not completed in time or are not of sufficient quality, the quality of the follow-up pathway is jeopardized. In addition, this can lead to domestic exclusion orders being extended while it is unknown whether and to what extent the threat that was observed when the order was imposed still exists.
- It is not always possible to notify the subject of a domestic exclusion order of an extension. This is an issue that pertains to the statutory framework when the reason is that the subject's contact information is unknown. The law requires the subject to provide contact information, but does not impose sanctions for failing to do so.

Other issues

Other
issues

The survey revealed that there are aspects of implementation that reduce the effectiveness of the Act but are not related to the parameters set by the legislator. The main issues are as follows:

- Incomplete files often lead to domestic exclusion orders being quashed by the courts. Thorough documentation of the motivation for and notification of a decision is essential.
- Enforcement measures are not always taken when domestic exclusion orders are violated. This is due in part to the statutory framework. But another reason is the inadequacy of the response by social workers, who refrain from reporting violations for fear of damaging their relationship of trust with their client. In addition, the police sometimes do not respond

because they do not consider every violation important enough to warrant action or because they assume the Public Prosecution Service will decide not to prosecute.

- Subjects of domestic exclusion orders do not always receive timely assistance. In many cases, social workers are unable to contact the subject, either because he/she is in prison and they have no access to the custodial institution or because the subject's whereabouts are unknown.
- The kind of assistance that is needed in the situation is not always available. This is due in part to the way in which assistance in cases involving domestic exclusion orders is organized. There are also waiting lists and sometimes the assistance required is not available.
- The safety of the victim(s) after a domestic exclusion order expires is not always guaranteed. Additional protective measures under criminal law often do not take effect immediately.