

Privacy International  
London, United Kingdom

An Open Letter to Members of the Eerste Kamer and Tweede Kamer  
concerning Justice Minister Donner's identification proposals.

6th December 2003

Privacy International is writing this Open Letter to Members of both Chambers of the Netherlands Parliament to express our deep concern over Justice Minister Donner's proposed 'Wet op de uitgebreide identificatieplicht'. We believe these requirements will violate the European Convention on Human Rights and the UN Convention on the Rights of the Child.

By way of introduction, Privacy International (PI) [www.privacyinternational.org](http://www.privacyinternational.org) is a human rights group formed in 1990 as a watchdog on surveillance by governments and corporations. Together with members in 40 countries, PI has conducted campaigns and research throughout the world on issues ranging from wiretapping and national security activities, to ID cards, video surveillance, data matching, police information systems, and medical privacy. We work with a wide range of parliamentary and inter-governmental organisations.

We have studied the proposed law, and believe that both the toonplicht requirement (obligation to disclose ID) and the draagplicht requirement (obligation to carry ID) will breach fundamental elements of human rights law. The proposals fail the tests of proportionality, necessity and foreseeability. The proposed law would therefore contravene human rights, and would be an inappropriate application of the exceptions allowed under ECHR to permit state intrusion.

While we acknowledge the recent improvements to the legislation, Privacy International believes that the proposal continues to violate several fundamental protections under the European Convention on Human Rights. The State cannot impose a pre-requirement on citizens to yield their rights unless there is an overwhelming necessity to do so. Nor can a "blanket" imposition be established unless it is in the most unusual circumstances (i.e. imminent threat of terrorist attack).

The European Court of Human Rights has on numerous occasions decided cases involving analogous governmental impositions on surveillance of its citizens, frequently finding such regulation to be in violation of Article 8. Analysis of those cases shows that the identification proposal would interfere with the Article 8 right to privacy. Moreover, an indiscriminate requirement to carry ID is not in accordance with law because it denies citizens a foreseeable basis on which to regulate their conduct. It can be argued that the proposals fundamentally reverse the presumption of innocence crucial in a free society. Finally, such laws are not necessary in a democratic society because the blanket ID requirement is wildly disproportionate to the law enforcement aims that it seeks to advance.

The proposal is also likely to create concern for visitors to the Netherlands. The requirement to carry identification is in direct conflict with conventional advice given to travellers to avoid carrying ID unless absolutely necessary. The existence of a substantial fine and a criminal offence will cause widespread concern and could invoke widespread criminality with a likely increase in street-theft of identity documents.

The legal arguments against the proposal are overwhelming. Article 8 of the European

Convention on Human Rights (ECHR) guarantees every individual the right to respect for his or her private life, subject only to narrow exceptions where government action is imperative. The Donner proposals would interfere with this right by establishing an identity requirement on citizens where no suspicion exists. This interference with the privacy rights of every resident and visitor cannot be justified under the limited exceptions envisaged by Article 8 because it is neither consistent with the rule of law nor necessary in a democratic society.

There have been numerous cases representing a wide variety of circumstances that reflect the requirement for respect for individual autonomy. On the related issue of surveillance, for example, the ECHR protection of the individual is clearly affirmed in such cases as *Klass v. Germany*, *Amann v. Switzerland*, *Rotaru v. Romania*, *Malone v. United Kingdom*, *Kruslin v. France*, *Kopp v. Switzerland* and *Foxley v. United Kingdom*. These decisions highlighted such issues as the "menace of surveillance" and the reversal of the presumption of innocence, and have ruled against arbitrary and indiscriminate impositions of the State.

Privacy International also believes that the requirement for children to carry identification violates the UN Declaration on the Rights of the Child (article 16). This requirement, we believe, is inexplicable, unnecessary and unsafe. Children currently do not hold drivers licenses, nor do they necessarily hold a passport. This law would force them to obtain and carry ID, where traditionally there had been no such requirement.

Over the past thirteen years Privacy International has worked extensively to raise awareness of problems relating to identity schemes in countries such as the United States, Canada, Australia, the United Kingdom and the Philippines. We believe the proposal under consideration in the Netherlands is unnecessary and invites substantial personal, cultural and economic risk.

The government of the United Kingdom this year proposed a national identity card scheme, but because of human rights concerns the government reluctantly ruled out a requirement to carry identification in public. The United Kingdom, like the Netherlands, already provides police with limited authority to establish the identity of suspects in the course of investigations. We would support the Parliament in harmonising these powers with regard to the conduct of specific investigations.

The indiscriminate identity requirement proposed by Minister Donner offends core principles of the rule of law. Moreover, the requirement would be so extensive as to be out of all proportion to the law enforcement objectives served. Such a disproportionate interference in the private lives of individuals cannot be said to be necessary in a democratic society.

With regard to the Data Protection law, Privacy International argues that the blanket identification regime breaches the principle of proportionality, that the practice would flout the specificity principle, and that the existence of an identity requirement takes no account of the consent principle. It should also be remembered that the right to anonymity is inherent in law, and is historically an important protection inextricably linked to the essence of the right to free expression and political participation.

Furthermore, we are concerned that this proposal will create an unacceptable imposition on all residents and visitors to the Netherlands. The proposal will damage relations between authorities and the public, and there is a risk that it will be abused by over-zealous officials. This latter problem was identified by the British High Court in 1953 in a ruling that brought an end to the war-time ID card.

There is, from our research, no evidence that these powers are necessary, or that their use would be in the best interests of society. Privacy International's research into the implications of national identity requirements has established that these initiatives have no effect on the reduction of crime or fraud, but do introduce additional problems of discrimination, criminal false identity and administrative burden.

The proposed law gives extremely wide scope to officials and law enforcement. It refers to the right to demand identification at any point in the performance of responsibilities or functions. The only condition that would apply is that the demand for identification is "within reason". Even taking into account recent amendments to the proposal, this is an unacceptably poor safeguard.

We would like to take this opportunity to signal that if these proposals are to pass into law, Privacy International will reluctantly be obliged to challenge their legality through the courts.

Yours faithfully,

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