Mr Nils Muižnieks
Commissioner for Human Rights
Council of Europe

The Hague, 25 November

Dear Commissioner,

Thank you for your letter of 2 November making some preliminary observations as a follow-up to your official visit to the Netherlands in May 2014. Your questions focus on three areas in which the government of the Netherlands has proposed measures to combat terrorism. We will address each area separately.

Your questions regarding the Temporary Administrative (Counter-Terrorism) Measures Bill (*Tijdelijke wet bestuurlijke maatregelen terrorismebestrijding*) were as follows.

1. **How is or can these provisions be brought in line with the ECHR-standards: ensuring that the measures are accessible and sufficiently precise so that persons concerned must reasonably be able to foresee the consequences of their actions?**

The Dutch government takes the view that the proposed measures are sufficiently clearly formulated and that the criteria for their application meet the requirement of foreseeability, as noted in the Explanatory Memorandum and other documents relating to the Bill's passage through parliament.[1] *The fact that the European Court of Human Rights (ECtHR) grants the member states a certain margin of appreciation where measures to protect national security are concerned is of relevance here. The ECtHR accepts that not every act or behaviour that presents a risk to national security can be predicted or defined in advance. The requirement of necessity is an important safeguard preventing lightly use of the criterion of whether a person 'on the basis of their behaviour can be connected to terrorist activities or the support thereof.' Whenever a decision imposing limitations on a person's freedom of movement is made, a need to protect national security must be demonstrated. Such a measure will only be resorted to in exceptional circumstances. Contrary to the observation in your letter, electronic tagging cannot be used to monitor compliance with all measures restricting freedom of movement, only to ensure compliance with a ban on presence in certain areas.*

[1] See for example Parliamentary Papers, House of Representatives 2015/16, 34359, no.3, p. 12 ff.

2. **How does the government intend to safeguard "fair trial" standards in this context? In particular, how are "fair trial" standards preserved in the face of the use of evidence from the security service that cannot be disclosed to the person concerned? Are there sufficient counterbalances to the difficulties that the use of secret evidence poses for an individual?**

Prior judicial scrutiny

The government regards prior judicial scrutiny of all administrative measures as unnecessary. Under the General Administrative Law Act (Awb), citizens can apply to the administrative courts for legal protection against administrative decisions made by government. The basic principle is that government governs and the courts scrutinise. Protecting national security is pre-eminently a task for government. With regard to the question whether a particular measure is necessary to protect national security the government has a certain margin of appreciation. The fact that a measure is aimed at combating terrorism is in itself insufficient justification for departing from the general system of protection under administrative law by exercising prior judicial scrutiny. There are a number of administrative law provisions ensuring that a court ruling on the permissibility of a measure can quickly be obtained.

Extra safeguards over and above the usual remedy of review by the administrative courts are provided in the context of counterterrorism legislation. For example, if a person's Dutch nationality is revoked on the grounds that he/she has joined a terrorist organisation abroad (Bill amending the Netherlands Nationality Act in connection with the revocation of Dutch nationality in the interests of national security), judicial review of that decision is automatic. Another example is the elimination of the objections stage, so that a court decision on the measures taken can be obtained as quickly as possible (Temporary Administrative (Counter-Terrorism) Measures Bill*).*

Decisions based on AIVD official reports

The government would observe that decisions of government bodies that constitute an interference in the private lives of citizens can be challenged before the administrative courts. This is also the case where decisions are fully or partly based on official reports by the General Intelligence and Security Service (AIVD). Admittedly, in such cases it is not always possible to make public the information from the AIVD on which the decision is based or share it with the person concerned, either partially or fully. This is to avoid jeopardising the activities and operational methods of the intelligence and security services or the safety of

sources. However, this does not mean it is impossible to challenge government measures. The Awb provides for a specific procedure concerning the way in which confidential information can be made available in court proceedings (section 8:29). Parties may refuse to provide confidential information on the grounds of compelling reasons, including national security, or may stipulate that it can only be shared with the court. If the court decides that restricted access to the information is justified (this is thus subject to judicial scrutiny), it must have the consent of the other parties before it gives judgment based fully or partly on the information in question. This provision seeks to strike a balance between the disadvantage suffered by the person concerned (in that they are unable to access confidential information on which certain government measures are based), and the compelling reasons which may prevent such information being disclosed to him or her. In light of the above, the government is of the opinion that the legal protection against certain government measures that the person concerned can obtain from the administrative courts is effectively safeguarded.

3. **Would the government like to reflect on the comment of my predecessor, who considered the implications of a similar proposal in 2008, that a custodial sentence of up to one year in case of non-compliance with reporting duties or area bans was disproportionate?**

Anyone who intentionally acts in contravention of an obligation or prohibition arising from a measure to restrict freedom of movement under the Temporary Administrative (Counter-Terrorism) Measures Bill is liable to a term of imprisonment not exceeding one year or a fine not exceeding €8200. The government does not consider these maximum penalties to be disproportionate, given the interest – i.e. national security – to be protected. The court decides what is an appropriate sentence in the specific circumstances. The government would emphasise that these are maximum penalties under the law – the sentence actually imposed in a specific case may be more favourable to the defendant.

Your questions as regards the **amendment of the Netherlands Nationality Act** (*Rijkswet op het Nederlanderschap*) were as follows.

1. **Can the government clarify how the Bill can be implemented in a way that would not have adverse repercussions on social cohesion and certain religious or ethnic groups whose members are bound to be affected by these measures?**

The government would observe that the distinction between persons with a single nationality and those with multiple nationalities is not new and derives from the Netherlands' treaty obligation to prevent statelessness. At the same time, it is permitted under the European Convention on Nationality to provide for loss of nationality in the event of 'conduct seriously prejudicial to the vital interests of the State Party', as long as the person in question does not become stateless as a result. The Netherlands is making use of this option. The distinction referred to above is inherent to this option under the Convention. The possible implications of the proposed measure will have to be assessed in each individual case on the basis of the criteria for revoking Dutch nationality set out in the Bill.

With regard to the potential repercussions for social cohesion and certain religious or ethnic groups, the government would refer the Commissioner to its response under 'Impact of counterterrorism measures on certain social groups'.

2. **Can the government reflect on in whether the use of such concepts meets the Strasbourg Court's criteria in relation to precision and foreseeability, and whether this sufficiently captures the requirement in the 1997 European Convention on Nationality that a person has engaged in conduct that is seriously prejudicial to vital interests of the State?**

As stated above, article 7, paragraph 1 (d) of the European Convention on Nationality provides a basis under international law for revoking a person's nationality if their conduct is seriously prejudicial to the State's vital interests. It is up to the member states to elaborate on this provision, which does not have direct effect. The proposed measure, under which Dutch nationality may be revoked in the interests of national security, is in the government's opinion a well-considered elaboration of the provision.

The statutory criteria are sufficiently clear, so that the circumstances in which Dutch nationality may be revoked are foreseeable for everyone. The foreseeability of revocation was in fact one of the government's reasons not simply to transpose the criterion contained in article 7, paragraph 1 (d), but to enact its own, more precise definition of the grounds for revocation in national legislation.

3. **Can the government give more information on how the right to an effective remedy, enshrined in article 13 ECHR, can be adequately guaranteed, especially in cases where the person concerned has left the Netherlands and**

will be unable to return to appeal a revocation decision in person, which may present obstacles to a fair hearing.

The government refers the Commissioner to its answer to the question above regarding safeguarding fair trial standards where administrative measures are concerned and the need for prior judicial scrutiny.

4. **Can the government reflect on the problem of the use of secret evidence and the need for sufficient counterbalances in the context of a fair trial?**

For an answer to this question, the government refers the Commissioner to its earlier response in the section on the Temporary Administrative (Counter-Terrorism) Measures Bill- (see question 2.), where it explains that compelling reasons such as national security can justify a refusal to provide confidential information.

The following questions relate to the **Intelligence and Security Services Bill** (*Wet op de inlichtingen- en veiligheidsdiensten*).

1. **Can the government provide more information about how extensive the scope of review the TIB will be, and how it will be ensured that the TIB operates fully independently?**

The Bill containing rules regarding the intelligence and security services introduced on 28 October 2016 (Parliamentary Papers 34588) provides for an independent body consisting of three members, the Use of Powers Review Board (TIB). The TIB will assess the legality of all decisions by the minister (excluding the possibility of mandate) permitting the use of special powers; its review therefore includes a test of necessity, proportionality and subsidiarity. This takes place before the permission granted by the minister is put into effect. If the TIB concludes that the decision to grant permission was unlawful, the permission lapses automatically and the special powers cannot be exercised. In any event, ministerial decisions granting permission for the use of special powers with regard to intercepting communications (targeted and investigation-specific) and accessing automated devices and systems must be submitted to the TIB. In addition, the TIB can require the minister to provide all assistance and information that it deems necessary to carry out its task; the minister is obliged to cooperate and provide information.

The Bill provides the statutory basis guaranteeing the independence of the TIB by regulating its task, powers and the appointment of its members. The House of Representatives plays an important role in appointing the TIB's members. The procedure is identical to that for the Review Committee on the Intelligence and Security Services (CTIVD). When there is a vacancy, the House of Representatives submits at least three names to the government, which must choose from among these nominees. Members of the TIB are appointed by the King for a period of six years; they may be reappointed for another six years. At least two of the three members must have been a member of the judiciary for at least six years. The third member may be an experienced judge but this is not mandatory. He/she may possess expertise in a different field, for example technology. Since the use of various powers involves the application of modern information and communication technologies it is desirable for such expertise to be available within the TIB so that it can take account in its decision-making of the implications of applying such technologies, particularly for the right to privacy. The TIB must publish an annual report of its activities.

2. **How effective is the oversight organized throughout later stages after initiation of surveillance activities?**

Under the current system, oversight during the stages following a decision on the use of special powers lies primarily in the hands of the CTIVD. This independent review committee is charged with overseeing the legality of the implementation of the Intelligence and Security Services Act and the Security Screening Act. The CTIVD has published dozens of reports on this subject which are discussed by the responsible minister with the House of Representatives. Although the CTIVD's findings in reviewing legality are not binding, the vast majority are accepted by the ministers responsible for the various services; the fact that they are not binding does not therefore stand in the way of effective oversight. If a minister does not follow the CTIVD's findings in a specific case, he/she may be called to account by parliament. In addition, it is possible to lodge a complaint with the minister, who in such cases is advised by the CTIVD as an independent complaints body. Complainants who disagree with the minister's views on the issue may apply to the National Ombudsman. Finally, recourse may be had to the courts. In some cases (for example, if access to documents has been refused) the administrative courts are competent; in others (if the complainant believes that the AIVD, and thus the State, has committed a wrongful act), the civil courts.

As well as establishing the TIB (see above), to supplement the current system the Bill presently before parliament further strengthens the position of the CTIVD, particularly with

regard to the handling of complaints. A special unit within the CTIVD will be given an independent power to investigate complaints and to submit a binding opinion to the minister (which may entail halting an investigation, terminating the use of powers or destroying data).

Finally, the Bill provides for a range of extra safeguards with regard to the use of special powers and the processing of personal data. For example, the seniority level at which permission must be obtained is raised for powers expected to entail the greatest interference with a person's right to privacy; in such cases it must be the responsible minister (who cannot mandate a lower-level official) who gives the relevant permission, following which the TIB assesses the legality of that decision. Permission is subject to time limits. The Bill also provides for limits on the period for which data received may be retained, as well as a duty to assess data in terms of relevance and destroy non-relevant data immediately (or at the end of the retention period). In fleshing out the detail of these and other safeguards, account was taken of the requirements arising from ECtHR case law (for example, Weber and Saravia v. Germany*). In the government's opinion, there is thus an effective system of oversight with regard to all stages of the Dutch intelligence and security services' investigation process.*

The following question concerns the **impact of counterterrorism measures on certain social groups**.

1. **Can the government give further information on how it engages or plans to engage in prevention in order to safeguard social cohesion, and how application of the aforementioned legislative measures will be monitored effectively?**

The international community and Dutch society are facing urgent issues regarding security and freedom which demand robust and consistent answers. The defence of our individual liberties is the foundation of Dutch society.

The government is working towards a balanced, comprehensive approach that takes into account the aims of terrorism.[2] *This implies a focus on preventing as well as prosecuting terrorist activities, and efforts to counter social tensions arising from the fear of terrorism.*

[2] Letter of 11 July 2016, Parliamentary Papers, House of Representatives 2015/16, 29 754, no. 391, (Annexe 779604, National Counterterrorism Strategy for 2016–2020, which defines terrorism as 'the perpetration of ideologically inspired acts of violence against people or of acts intended to cause property damage and calculated to result in social disruption, in order to undermine and destabilise society, create a climate of fear among the general public or influence political decision-making').

The government takes the view that reactive measures alone are insufficient to prevent terrorist threats. It believes that preventing the recruitment of people who are attracted by extremist ideas, for instance, is an important intervention in the area of counterterrorism.[3] *A report entitled 'Two worlds, two realities' shows that to an increasing extent young people live in two different worlds that fail to understand each other. This can lead to tensions, particularly when attacks abroad intensify anger about and fear of terrorism on the one hand, and discrimination and exclusion on the other. For these reasons we need preventive measures and programmes to fight the radicalisation of individuals and to reduce tensions between population groups.*[4]

It is understandable that people have concerns about social cohesion in their neighbourhood and whether groups of newcomers will make a sufficiently active contribution to society. The wide range of private initiatives for the reception of refugees, and the integration of asylum seekers who have been granted residence permits are positive signals. People feel a responsibility to help those in need, sometimes as individuals and sometimes as members of organisations such as schools, local communities or student associations. These activities illustrate the resilience of our society and a willingness to make a personal contribution towards supporting newcomers.

Any risk of counterproductive effects or undesirable side effects, such as an increase in social tensions, polarisation, alienation and estrangement would arise primarily if the measures were applied on a large scale. But they will in fact be applied on an incidental and narrowly targeted basis. What is more, the question of whether a specific government measure applied in an individual situation could be counterproductive will be taken into account when the decision is made. If other strategies are deemed more likely to prevent an individual from becoming radicalised (or further radicalised), the authorities will not impose a given measure (e.g.one restricting his/her freedom of movement).

Furthermore, the government believes that in drafting legislation and measures in the field of counterterrorism it must always ask itself if these are absolutely necessary, whether existing legislation is not in fact sufficient and whether the measures envisaged will be effective in combating and/or preventing terrorism. This last consideration implies an assessment of whether the proposed measures will be counter-productive. In the Explanatory Memorandum that accompanies every Bill, the government renders account for the choices it has made. The Advisory Division of the Council of State also assesses all bills and draft orders in

[3] Letter of 11 July 2016, Parliamentary Papers, House of Representatives 2015/16, 29 754, no. 391.
[4] Parliamentary Papers, House of Representatives 2015/16, 34 300-VIII, no. 129.

council in light of the criteria of necessity and effectiveness. The new Temporary Administrative (Counter-Terrorism) Measures BillAct will undergo an evaluation, as prescribed by law. Even in cases where no formal evaluation is provided for, the effectiveness of the measures will be closely monitored.

Finally, the government believes it is important to emphasise that the proposed measures in no way target specific population groups. They are applicable to all forms of terrorism whatever the ideology behind them. On every occasion the measure applied is directed at an individual person or group of persons with the aim of preventing the commission of criminal offences. Collective characteristics such as race or religion play no role in the statutory criteria for application or in the actual implementation of a measure. The targets are persons who on the grounds of their behaviour can be connected to terrorist activities or support for such activities.

We would like to express our appreciation of the Office of the Commissioner for Human Rights of the Council of Europe, and of the manner in which you have contributed to it.

Yours sincerely,

Mr. G.A. van der Steur
Minister of Security and Justice

dr. R.H.A. Plasterk
Minister of the Interior and Kingdom Relations