



## Advisory report on the 'Amendment of the Repatriation and Detention of Foreign Nationals Act', Council for the Administration of Criminal Justice and Protection of Juveniles (RSJ)

### Summary

The Advisory Division of the Council for the Administration of Criminal Justice and Protection of Juveniles (hereinafter referred to as 'the Council') has issued advice on the Draft Bill for the Amendment of the Repatriation and Detention of Foreign Nationals Act (Wijziging van de Wet terugkeer en vreemdelingenbewaring, Wtvb) (hereinafter referred to as 'the Amendment'). This Amendment includes a proposed modification of the Bill on the Repatriation and Detention of Foreign Nationals Act (hereinafter referred to as 'the Wtvb Bill') submitted in 2015, which is currently being debated in the Senate. The Council merely has comments and recommendations regarding the legal possibility of a lockdown in a foreign nationals detention facility.

### Rationale

The restricted regime under the Custodial Institutions (Framework) Act (Penitentiare beginselenwet, Pbw) currently applies to foreign nationals detention facilities. Under special circumstances, this regime offers the possibility of incarcerating detained foreign nationals for as long as necessary.

The Wtvb Bill introduces a specific legal framework for foreign nationals detention that relates more to administrative law and less to penitentiary law. This under the assumption that this administrative-law framework is more in line with the purpose of foreign nationals detention and is based on the principle of minimum restrictions.

A new regime is included in the Wtvb Bill, which sets a maximum limit for the number of hours per 24-hour period for which detainees can be incarcerated and guarantees a minimum number of hours of daytime activities per week. In case of imposing a lockdown, a legal bottleneck may arise at this point. In a lockdown situation, all or (large) groups of detainees held in the facility are temporarily locked in their cells. Such a lockdown may be in conflict with the new legal regime in the Wtvb Bill. Therefore, the proposed Amendment grants the director of the facility the legal authority to temporarily deviate from the legal minimum limit (for daytime activities) and maximum limit (lock-in hours).

### Legal provision for lockdowns

#### *Authority of the director*

The legal authority of the director to impose a lockdown is outlined in Section 5(1) of the Wtvb Bill. If deemed absolutely necessary for maintaining order and safety within the facility, the director may deviate from the legal minimum number of hours of daytime activities for a maximum period of four weeks. However, the right to leave the cell for one hour of airing per day must be respected. Therefore, according to this proposal, the maximum duration of a lockdown can be four weeks. This concerns a legal provision for

exceptional situations of a serious nature, where the safety of both detainees and personnel is at stake.

#### *Legal safeguards*

The Amendment states that, when a lockdown is imposed, the director must immediately notify the detainees in writing of this decision in a language that is as comprehensible as possible to everyone. The decision has to be reasoned, dated and signed. It also states that the director must immediately inform the supervisory board of this decision.

In addition, the Amendment stipulates that the lockdown constitutes a measure against which a complaint may be filed under Section 72(1)(b) of the Wtvb Bill. Subsequently, an appeal may be submitted to the Council's special appeals division for the enforcement of foreign nationals detention.

#### **Conclusion and recommendations**

The Council understands the need for including the authority to impose a lockdown as a last-resort order measure in the Wtvb. Practice shows that it is important to have this authority for reasons of safety. However, given the far-reaching nature of the measure and its impact on detainees, the Council considers it essential that sufficient legal safeguards be included in the Act. The Council considers the currently proposed safeguards insufficient. In view of the subsidiarity principle, the duration of the measure and the possibility of differentiation, the Council makes the following recommendations:

1. The Act should include a provision requiring the director to provide reasons for why less drastic measures will not suffice. This will increase the level of acceptance among the detainees. Moreover, this will also facilitate the performance of an interim review by the supervisory board and a review if a complaint and appeal are lodged.
2. The maximum period of a possible lockdown should be set at two weeks. If necessary, the director may extend the lockdown by a maximum of two weeks. This means that the detainees have some 'influence' in preventing the imposition of a second lockdown period of two weeks. In such cases, the supervisory board should perform an interim review. This creates an extra safeguard.
3. The explanatory memorandum should state that the measure must primarily be targeted at the persons responsible for disrupting the order and safety.

*This recommendation can be consulted on the website of the Council for the Administration of Criminal Justice and Youth Protection.*

