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Amendments to the Code of Criminal Procedure in connection with a regulation with regard to hearing protected witnesses and some other subjects (protected witnesses)

No. 3

EXPLANATORY MEMORANDUM

1. General

Matters in which the interest of openness in criminal proceedings is difficult to unite with other interests are not uncommon. Recently, this once more came to light in affairs in which an official report of the General Intelligence and Security Service (AIVD) led to criminal investigations. Questions were raised surrounding the practicability of official reports as starting information and as a source of proof. The objective of this legislative proposal is to expand this practicability by subjecting the information included in the official AIVD report to further investigation by means of hearing witnesses. To this end, a number of amendments are proposed to regulations relating to hearing witnesses. This legislative proposal furthermore contains an amendment to the law of evidence.

Each of the proposed amendments contributes to increasing the possibility that information which has been supplied by the intelligence and security services can be used in criminal proceedings. However, at the same time it must be concluded that the nature of such information as well as the legal task of these services imply that the practicability of this information in criminal proceedings, also in the event of adoption and entry into force of the legislative proposal, will not be unlimited. In accordance with the Intelligence and Security Services Act 2002, the interest of state security prevails over the interest of prosecution. That interest, and with that the related interest in preventing serious attacks, must not be jeopardised by disclosing information in criminal proceedings, irrespective of the cost.

This legislative proposal is not an isolated proposal. It must be viewed in line with a series of other legislative amendments that have been proposed within the framework of combating terrorism, a number of which have already been turned into law and have come into effect. Much of what has been initiated in this field originates in international legislation. This applies to legislation which has meanwhile come into effect and which implements the UN treaty on the subject of combating terrorist bomb attacks and the international treaty to fight terrorist funding, but also to the legislative proposal on terrorist crimes which implements the EU framework decree on combating terrorism.

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Other proposals of a legislative nature do not arise from international legislation. For example, the legislative proposal on terrorist crimes also contains amendments concerning the Penal Code which arise directly from the government memorandum «Terrorism and the protection of society» (Parliamentary Papers II 2002/03, 27 925, no. 94). This memorandum announced further measures in the fields of policy and legislation to frustrate and deal with terrorist activities. In order to implement the memorandum, the proposal to penalise acts of conspiring to commit a number of serious terrorist crimes as separate, exceptional crimes, and to bring recruiting on behalf of the Jihad within the scope of criminal statutes, has been added to the legislative proposal on terrorist activities. Furthermore, legislative amendments have been prepared to expand the possibilities for civil law to ban terrorist organisations. The memorandum on «Terrorism and protection of society» also pays attention to the practicability of AIVD information in criminal proceedings. The same applies to the government letter of 31 March 2004 (Parliamentary Papers II 2003/04, 27 925, no.123) which also discusses the intention to improve the information exchange between the services responsible for combating terrorism. The legislative proposal in question is therefore part of a total package of civil/criminal law measures to combat terrorism. The urgency thereof has been emphasised in the aforementioned letter following the Madrid bombings. This urgency is furthermore reason for having deviated from the usual procedure to hear the advisory bodies (the Board of Prosecutors General, the Netherlands Bar Association, the Netherlands Association for the Judiciary and the Council for the Judiciary) on the proposed regulation with regard to this legislative proposal; during the debate on the aforementioned letter of 31 March 2004 and at the urgent request of the various parliamentary parties in the Lower House, the government has promised to do all that is necessary to ensure that the legislative proposal is turned into law and comes into effect as soon as possible.

First, the main features of this legislative proposal shall be discussed below. Subsequently, in order to create a proper understanding of the objective and purport of this legislative proposal, some aspects of the process of information transfer by intelligence and security services for investigation and prosecution, and the application of the relevant information for those objectives, shall be discussed. The main amendments shall be explained in greater detail in the sections thereafter. The explanatory memorandum concludes with an article-by-article summary section, as usual. It is furthermore noted that where in the text below reference is made to AIVD information, this also refers to information from the Military Intelligence and Security Service (MIVD). This prevents frequent repeat of an extensive description, which increases the readability of this memorandum.

2. The broad outlines of the legislative proposal

An AIVD official report is a written document which, in principle, can be used as legal proof in court. However, the courts shall only conclude that the charges have been proved, if proof of a punishable offence has been provided lawfully and conclusively. In respect of the persuasiveness of the evidence, it is particularly important that the reliability of the data contained therein can be tested.

In respect of evidence such as the official reports here referred to, this requires a procedure which on the one hand provides guarantees for the protection of data on the methods used and the persons involved therein and which on the other hand provides sufficient possibilities to verify the factual reliability of the data relevant to prosecution.

In light of the above, the basic principle of the legislative proposal is an expansion of the possibilities to take into account the interest of state security when hearing witnesses. An isolated hearing of the witness by the examining magistrate is proposed. The defence in criminal proceedings does of course retain the right to hear the witness. In order to provide this, the defence shall have the opportunity to submit questions which can be asked through the intermediary of the examining magistrate in a way which has been geared to the circumstances of the hearing, now that due to state security attending the examination of the witness by the defence is possible in highly exceptional cases only. The statement of a protected witness heard in this way shall be included in a report to be drawn up by the examining magistrate, after having ascertained that the text laid down in the report does not damage state security. Because ultimately only the AIVD can fully assess whether disclosure of certain information laid down in the record of the witness examination would damage state security, the report drawn up by the examining magistrate shall only be admitted to the proceedings subject to approval of the witness. This, therefore, involves an exceptional deviation from the basic principle which stipulates that it is the examining magistrate who shall determine which data shall be part of the procedural documents.
For the sake of completeness it needs to be stated here that the interest of state security refers to situations which concern or have in the past concerned activities within the framework of the performance of duties of the intelligence and security services, as described in article 6 of the Intelligence and Security Services Act. The scope of the concept «state security», referred to in article 6 of the Intelligence and Securities Act 2002, is particularly determined by the further description of the activities of the services. The details thereof are included in the annual reports of the services, stating concrete fields of activity and main aspects of the past and current year. In more concrete terms this includes combating international terrorism, certain serious disruptions of public order with the objective of causing political instability and activities carried out in our country which are aimed at overthrowing foreign regimes.

The legislative proposal concludes with an amendment to the laws concerning evidence during prosecution. This amendment ensures that henceforth, official reports of the intelligence and security services shall be deemed as fully acceptable documents by the law under all circumstances. The situation that these written documents can only be validated as evidence in conjunction with the contents of other evidence is excluded.

In connection with information held by the intelligence and security services, the aforementioned amendments can be of interest in various ways. In first instance, they enable officials active for the intelligence and security services to better explain the contents of their official reports. Furthermore, opening up these facilities enables an isolated examination of persons active within the services who are close to the information source. Finally, the courts no longer impose restrictions insofar as the attribution of evidential value to the AIVD official report is concerned.

All this does not imply that in the future a suspect can be sentenced on the basis of an official report alone. The interest of state security often means that the contents and verifiability of the official report shall be of such a nature that sentencing, based mainly on the official report as only evidence, is not possible.

From the above it becomes clear that the examining magistrate shall play an important role in the application of the proposed regulation. The necessary knowledge and experience shall be required from him insofar as the application and valuation of information from the AIVD is concerned. Consultation with the Council for the Judiciary is still to take place in respect of the necessity of specialisation and additional training to increase knowledge in the field of activity of the intelligence and security services.

3. Information from security services for prosecution purposes

AIVD officials do not have the authority to investigate criminal offences (article 9, paragraph one, of the Intelligence and Security Services Act 2002). Neither do police officials working for these services have the authority to investigate criminal offences whilst carrying out intelligence work. These regulations prevent an undesired merger of the functions «investigation» and «information gathering» and the corresponding powers, as well as the monitoring of the execution thereof (compare Parliamentary Papers II 1997/98, 25 877, no. 3, p. 16).
During the debate in the Lower House on the legislative proposal on terrorist crimes, it was pointed out that other countries *do* work with a concept in which «investigation» and «intelligence gathering» merge (Proceedings II 2003/04 p. 2336). For example, officials of the French security services Direction de la Surveillance du Territoire (DST) posses, in addition to their intelligence status, investigative powers and in certain cases are occupied with the criminal investigation into terrorist crimes. It must be stated first and foremost that due to historical reasons DST is part of the national police in France. This explains the investigative powers. The combination of tasks generates a situation in which it is hard to find a balance between, on the one hand, the information route and the required protection of sources to that end, and on the other hand the investigative duties which must lead to a - for the courts and defence - verifiable gathering of evidence for prosecution. In the Netherlands, a clear choice has been made to have the different tasks carried out separately from each other, with a view to the creation of the best possible conditions for the execution of both tasks. The implementation of the procedure involving submission of the official report to the Public Prosecutor for Combating Terrorism serves to link the intelligence domain to the investigation divisions. Furthermore, in order to ensure that information gathered by the intelligence services during the execution of their intelligence duties can contribute to evidence in a wider context, this legislative proposal includes a regulation which enables verification of information with a view to its use in criminal proceedings. Such a regulation is absent in France. The investigative powers and the possibility to record findings in a report cannot prevent the situation that in France the courts and the defence in criminal proceedings at some point may wish to further verify the contents of the evidence. As such, officials of the aforementioned DST service may find themselves faced with the same dilemmas for which the legislative proposal in question offers a regulation.

The core objective of the intelligence and security services when gathering intelligence is to be able to timely alert those bodies, with powers to take measures, in regard to potential threats against the interests stated in the job description of the intelligence and security services. Such gathering of intelligence takes place regardless of whether this concerns a criminal offence or the suspicion thereof. Once the services are aware of criminal offences or suspicions in relation to such offences, the investigative authorities are informed accordingly, state security permitting. The division between investigative activities and the gathering of information by the AIVD does not affect the possibility of information being used in criminal proceedings. Within this context a comparison can be made with the use, during criminal proceedings, of data that was obtained at an earlier stage by means of administrative powers. The application of powers for a purpose other than in criminal proceedings does not, in principle, represent an impediment for the use, in a criminal court case, of information gained within that other framework. A factor which *does* have influence is the extent to which verification of the information stated in the official AIVD report can take place.

The Public Prosecution Office obtains information by means of a so-called official report. Article 38, paragraph one, of the Intelligence and Security Services Act 2002 stipulates that if during the processing of data by or on behalf of a service it appears that this data may also be of interest to the investigation and prosecution of criminal offences, the relevant minister or, on his behalf, the head of the service can communicate this to the appropriate member of the Public Prosecution Office. In urgent cases it is possible to first relay the information verbally, subsequently followed by an official report. Partly with a view to the consequences which may be attached by the Public Prosecution Office to the communication disclosed, viz., the decision to commence an investigation and proceedings, it has been laid down by law that, following a request to that end by the Public Prosecutor for Combating Terrorism, all data on which the communication is based and which is needed to assess the correctness and completeness thereof, is made available for inspection.

In order to gather information, the AIVD uses, among other things, persons who move in or near the environment for which there is a special interest. This involves «agents» and «informants» who are managed by a so-called «operator». Within that context an «agent» is understood to be a natural person who, acting on the instruction and under the responsibility of the AIVD, is assigned to gather information which is of interest to the performance of duties of this service. The operator records information about the source and the contacts maintained with it in an operation report. The contents of communications by the source are recorded in information reports. In addition, the intelligence and security services gather information by deploying special powers as laid down in the Intelligence and Security Act 2002. Also, within set limits, the AIVD frequently cooperates and exchanges information with foreign intelligence and security services. The official report may ultimately be founded on the data collected by the AIVD. However, it is self-evident that an official report can be drawn up on the basis of various intelligence sources. The persons active within the intelligence and security services and who have processed the data on the basis of which the official report has been prepared, can, in principle, be heard as witnesses in criminal proceedings. In those instances, the obligations to observe secrecy as referred to articles 85 and 86 of the Intelligence and Security services 2002 are relevant.

The stipulations of these provisions are based on the previously stated principle that it is the intelligence and security services - and ultimately the responsible ministers - who determine to what extent the relevant officials of these services may make statements in criminal proceedings. Furthermore, reference is made to article 15 of the aforementioned Act, in accordance with which the heads of the services must ensure, firstly, that the secrecy of the data which qualifies in that respect and of the sources this data originates from is maintained, and secondly, that the safety of the persons, with whose cooperation this data is gathered, is guaranteed. This also means that human sources shall only act as witnesses in highly exceptional cases, viz., state security permitting. The legislative proposal in question does not make any changes in that respect.

The use of Information from intelligence and security services for prosecution purposes, occurs both at the start of a criminal investigation as well as when furnishing proof during criminal proceedings. When these services, whilst processing data, come across information which can be of interest to the investigation and prosecution of offences, the Public Prosecution Office shall be informed accordingly. The national Public Prosecutor for Combating Terrorism receives an official report from the services, the contents of which are subsequently processed in a report prepared by the National Police Services Agency (see Parliamentary Papers II 1997/98, 25 877, no. 3, p. 58). This way the information gathered by the intelligence and security services is forwarded to the police, following which a criminal investigation can be started. The question whether the contents of the information processed by the intelligence and security services can generate facts and circumstances within the meaning of article 27 of the Code of Criminal Procedure (a reasonable suspicion of guilt) was recently brought up in a number of criminal proceedings. The rulings in these proceedings confirm that information, gathered by the AIVD, **can** produce grounds for such suspicion, as defined in the Code of Criminal Procedure.

Key elements in this legislative proposal are the conditions under which information and material, originating from the AIVD and processed in an official report to serve as evidence, can be used in criminal proceedings. This particularly concerns the issue that background information, which confirms the reliability of the information submitted, may often not be disclosed. After all, the work of the services would be impossible if their officials were continually obliged to fully explain their operational activities during public court hearings.
Nevertheless, it is desirable that the argumentation in criminal proceedings should be able to be based on material obtained by the AIVD as well. The proposals, which form an additional procedural framework for the verification of the factual correctness and reliability of the information stated in the official report, shall be worked out in the following sections. The intended meaning of the proposed regulation in practice is two-tiered. The protected circumstances, as provided in the regulation, increase the possibility for further investigation into the contents and background of the official report. This results in the possibility, on the one hand, to discuss the background of «concrete information» (tapping reports, written documents) and, on the other hand, to provide the opportunity for the addition or further specification of the data submitted. Within this context reference is made to the ruling of the Court of Appeal in The Hague of 21 June 2004 (case no. 2 2200071403). In accordance with this ruling the Court of Appeal is of the opinion that in view of the highly confidential character of the intelligence work, verification of the lawfulness of the process of gathering information can only take place to a very limited extent.

Reason for such verification only exists when there are concrete indications that the information has been obtained whilst (seriously) violating the fundamental rights of the accused. This ruling is of course important to applying the regulation in question, in that sense that from this it can be concluded that in only a few cases shall there be reason for the lawfulness of the information gathering to be reviewed.

4. Preventing the disclosure of certain data *(article 187d)*

Witnesses are important sources of evidence in criminal procedures. A person who has been summoned as a witness must appear in court and is subsequently obliged to make a statement in respect of «facts and circumstances which he has seen or experienced» (article 342 of the Code of Criminal Procedure). There are exceptions to this main rule. For example, in accordance with article 293 of the Code of Criminal Procedure the judge may allow witnesses not to answer questions which are not relevant to the case or which may cause the witness damage; the examining magistrate has the authority not to include answers to questions in the record of the witness examination (compare articles 187 ff. as well as the threatened witness regulation). Furthermore, there is the possibility to protect certain personal details of the witness in connection with nuisance or impediment in regard to the profession of the witness (limited anonymity).

On the basis of articles 187 and 187d of the Code of Criminal Procedure, in respect of answering questions, the witness may be spared from answering one or more questions by the judge during a public hearing. Currently the law explicitly recognises certain circumstances where it is not in the best interest of the witness or of the proceedings, to fully disclose certain data; this applies in cases where the witness would otherwise be severely inconvenienced or seriously impeded in the execution of his duties or profession, and in cases whereby an important interest of the investigation would be damaged.

It is proposed that an expansion of these provisions be provided, with a view to the hearing of witnesses in cases where the interest of state security must be protected. Within this context, the intention is to augment article 187d, paragraph one, of the Code of Criminal Procedure, so that the interest of state security is included in the specifically stated interests regarding the prevention of the disclosure of data. As a result, the examining magistrate shall be able, within the framework of his investigation into the manner in which certain information is obtained (for example, an investigation into the documents on which an official report is based), to hear witnesses and report about this in such a way that certain data is not recorded in the process.

The examining magistrate's accountability for implementing this option shall be set out in the record of the witness examination, should the examining magistrate decide to make use of this possibility. The examining magistrate shall verify the need to implement this option against the background of the interest of state security, in a similar way to his verification of this choice in reference to the background of the other interests worth protecting that are referred to in article 187d, paragraph one, of the Code Criminal Procedure. ECHR case law states that the court is obliged to study the question of whether applying the provision is necessary. It must be made plausible that less restrictive measures do not suffice (compare, e.g. the ruling of ECHR of 23 April 1997 (Van Mechelen) appl. no. 21 363/93). Within the framework of the investigation, article 187d, paragraph three, of the Code of Criminal Procedure offers the possibility to, for instance, take measures in order to keep secret the methods used. Subsequently this data, which is not to be disclosed, shall not be included in the procedural documents and is not open to inspection by the Public Prosecution Office, the suspect, the counsel and the judge hearing the case. The examining magistrate shall be obliged to state in his report whenever he decides that, in the interest of state security, an answer to a question with respect to procedures applied shall not be disclosed to the parties to the proceedings.

The proposed regulation enables the judge hearing the case, if so required in the interest of state security, to refer the investigation into, for example, the reliability of the data in the official AIVD report, to the examining magistrate. This may be required when the defence raises questions relating to the reliability of the information in the official report and which are relevant to the assessment of the case. After all, answering such questions during public hearings will often not be compatible with the interest of state security. AIVD witnesses who have been summoned shall not be very communicative under these circumstances. Applying the provision in question may ensure that answering questions surrounding the data in the official report may lead to a more satisfactory result. It offers the possibility that, in any case, the examining magistrate himself will be able to be cognizant of all the facts. For example, in the event that the official report is (partly) based on information from a telephone tap, the examining magistrate can, by applying this regulation, take note of the necessary signed permission for such telecommunications tapping, as agreed upon by the responsible ministers. However, this does not alter the case that the judge hearing the case, even after such application of the provision, remains free in his assessment in respect of the findings of the examining magistrate.

It must be noted that the proposed amendment can imply a restriction of the defence rights, now that hearings conducted by the examining magistrate without the presence of and without direct confrontation with the defence is made possible, whilst the examining magistrate is furthermore granted the authority not to disclose certain answers to the parties to the proceedings. The principle laid down in article 6 of ECHR regarding a fair trial does not prevent this restriction of the defence rights. The proposed procedure contains the necessary guarantees aiming to counterbalance these restrictions. The hearing of the witness is conducted by an impartial and independent judicial body (compare the ruling of ECHR of 20 November 1989 (Kostovski) appl. no. 11454/85 and the ruling of ECHR of 27 September 1990 (Windisch) appl. no. 12489/86). Furthermore, the parties to the proceedings are given the opportunity to co-decide what questions shall be posed by the examining magistrate (compare articles 185, paragraph three, and 186, paragraph three, of the Code of Criminal Procedure: see also Kostovski with regard to questions submitted by the defence). Finally, it is the judge hearing the case who ultimately determines whether sufficient information is available for a proper assessment of the case.
As previously stated, the proposal is being made to explicatively stipulate in the law that the interest of state security can present a sufficiently serious reason to limit the defence rights. In addition to the threat to persons and the interest of the investigation, the European Court mentions the interest of state security as an interest which can justify a restriction of the defence rights, provided that this restriction is sufficiently counterbalanced (compare the ruling of ECHR of 24 June 2003 (Dowsett) appl. no. 39482/98 and the ruling of ECHR of 26 March 1996 (Doorson) appl. no. 20524/92). The manner in which the handicaps experienced by the defence as a result of this restriction are counterbalanced by the procedure in question has been discussed above.

The proposed amendments to the regulation in respect of the limited disclosure of data therefore intends to increase the investigation possibilities; all this against the background of the information provided by the intelligence and security services for prosecution purposes without the interests of state security being compromised.

Information not initially stated in the procedural documents can therefore be disclosed to the examining magistrate, after which he can assess whether the omission of such information is necessary with a view to the interest of state security. This prevents, in principle, useful information not being used for evidence, due to the inability to investigate the reliability sufficiently.

5. The protected witness *(articles 226g-226m)*

The other statutory regulation allowing restrictions with regard to hearing witnesses concerns the previously stated threatened witness regulation. In line with the purport of that regulation it is proposed to introduce a separate procedure to hear the protected witness. The procedure can be used when the interest of state security requires that hearing the witness, with regard to the nature of the questions being examined, is conducted in such a way that the extraordinary responsibility of the witness for state security can be taken into account. This at the same time means that the witness is in the best position to decide whether or not the report prepared after the hearing can, with a view to that interest, be added to the criminal file. It concerns a provision which, with a view to this special authority of the witness as well as the possible infringement of the rights of the defence, must be subject to more stringent requirements compared to a hearing in which the disclosure of certain data is prevented. Applying the proposed regulation can imply that the protected witness, as is the case involving a threatened witness, no longer needs to appear at the trial. Contrary to the case in accordance with article 187d of the Code of the Criminal Procedure, protection on the basis of this procedure is more or less final. Applying the proposed regulation regarding the protected witness must therefore be preceded by a thorough verification of the subsidiarity principle. The case must be proven without using protected witnesses, if possible. In the event that less restrictive measures suffice, applying this regulation shall not be necessary.

The examining magistrate must therefore investigate whether there is a situation in which state security requires the identity of the witness to be protected. The public prosecutor, the suspect and his/her counsel, and the witness shall be given the opportunity to be heard in that respect. The proposed article 226g, paragraph three, of the Code of Criminal Procedure obliges the examining magistrate to motivate his decision. The interest of state security will often mean that the reasons underlying his decision to assign the status of protected witness to someone cannot be stated specifically.

If the witness is granted the status of protected witness, he/she shall be heard after having been sworn in. This can be done in such a way that the identity of the witness remains undisclosed. There is reason to do so if - upon disclosure of his/her identity - the witness himself and/or state security are put at risk. However, the application of this regulation is not restricted to that situation. Also in cases where officials of, for instance, the AIVD, who are well known by name, come to give a full explanation, there may be reason to apply this special regulation.

In the event of an anonymous protected witness, the examining magistrate *must* inform himself of the full identity of the witness (article 226h, paragraph one, of the Code of Criminal Procedure). Subsequently, the examining magistrate must organise the hearing and the report thereof in such a way that the identity of this witness remains undisclosed and that the interests of state security are not damaged.

If the examining magistrate - against the background of the interests worth protecting described in article 226j, paragraph one, of the Code of Criminal Procedure - does not include parts of a statement in the report, he shall mention that, in view of these interests, the statement has not been fully disclosed (see further the explanation per article ref article 226j of the Code of Criminal Procedure).

With regard to the actual hearing of the protected witness, the examining magistrate must first investigate whether it is not possible to arrange for the defence to be present when the witness is heard, for example by means of a disguise or the use of a screen. If this is not possible, and with a view to the nature of this hearing this shall usually be the case for parts of the hearing, it may be decided, on the grounds of article 226j, paragraph one, of the Code of Criminal Procedure, that the suspect or his counsel and/or both may not be present during the hearing. In the latter case, the public prosecutor is not authorised to be present at the hearing either. Article 226j, paragraph three, of the Code of Criminal Procedure, stipulates that when the defence is excluded from the hearing, they shall in any case be given the opportunity to ask the witness questions, either by means of telecommunications or by submitting the questions in writing. In the event that the examining magistrate on the grounds of article 226j, paragraph one, of the Code of Criminal Procedure decides to deny the parties to the proceedings access, the hearing shall take place in various steps. In first instance the examining magistrate hears the witness. In view of that, the public prosecutor, the suspect and his counsel can already submit questions. Following this hearing a report is drawn up, which, in connection with a potential threat to state security, is submitted to the witness for inspection. Subsequently this report, subject to approval from the witness, is disclosed to the parties to the proceedings so that, in the light of such report, they can then formulate their questions. Depending on the circumstances of the case in concrete terms, the examining magistrate shall then decide whether these questions can be submitted to the protected witness by means of telecommunications or in writing. When subsequently the examining magistrate, in order to protect the interests referred to in article 226j, paragraph one, of the Code of Criminal Procedure, prevents an answer being disclosed to the public prosecutor, the suspect and his counsel when questions are being asked, he must make note of that in the record of the witness examination. The note shall entail that the examining magistrate indicates that the question has been answered by the witness. During the hearing, the examining magistrate shall investigate the reliability of the statement made by the protected witness and render account in that respect in the report (article 226k of the code of Criminal Procedure). This regulation aims at a wider obligation than investigating the reliability of the persona of the protected witness alone. Even when the examining magistrate does not doubt the reliability and truthfulness of the witness, yet nevertheless has at his disposal some objective indications regarding inaccuracies in the statement, he is deemed to render account in that respect. In a sense, the examining magistrate can therefore, in this respect, also take the position of the parties to the proceedings, the more so since he is able to take note of all information.

After the hearing, the examining magistrate shall draw up the report. His duty of due care, pursuant to the proposed article 226j, paragraph two, of the Code of Criminal Procedure has already been discussed above. Since it cannot be ruled out that, from the record so adopted, data can be inferred which in connection with state security cannot be disclosed, the proposed article 226m of the Code of Criminal Procedure stipulates that the report can only be added to the procedural documents subject to full approval from the witness.

In the event that this approval, in connection with the state security, is not obtained, the examining magistrate ensures that the record of the witness examination is destroyed. He shall report this action. Subsequently, it can be assessed at the trial which conclusions can be drawn from this course of action.

As noted in paragraph 4 with regard to the regulation of article 187d of the Code of the Criminal Procedure, the application of this procedure involves restrictions of the defence rights. Because the procedure in question partly results in the situation where anonymous statements made by protected witnesses can be used as evidence, it is important to state that, in that case, ECHR stipulates the precondition that the defence must have the opportunity to dispute the credibility and reliability of the anonymous witness. The European Court, in this respect, prefers a direct confrontation at a public hearing. Nonetheless, ECHR too recognises that the right to question a suspect can be limited insofar as this limitation is necessary with a view to protecting certain legitimate interests. These legitimate interests include the protection of personal freedom and privacy of the witness, the interest of the investigation (compare the ruling of ECHR of 15 June 1992 (Lüdi) appl. no. 12433/86) and the interest of state security (compare the ruling of ECHR of 24 June 2003 (Dowsett) appl. no. 39482/98) and the ruling of ECHR of 26 March 1996 (Doorson) appl. no. 20524/92). As is considered in Edwards and Lewis: «The entitlement to disclosure of relevant evidence is not, however, an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or to keep secret the crime investigation methods of the police, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. Nonetheless, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Furthermore, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by limitation of its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities» (the ruling of ECHR 22 July 2003 (Edwards and Lewis) appl. nos. 39647/98 and 40461/98, § 53). These counterbalancing guarantees are in the first place provided by handing over the hearing of the protected witness to the independent courts. This has already been discussed in paragraph 4 of this explanatory memorandum. The following may be added within the framework of this regulation: from the Edwards and Lewis case of 22 July 2003 it can be concluded that the European Court is of the opinion that if certain information is withheld from the defence, e.g. to protect the interest of state security, the deciding body may not take note of that information either. Therefore, the option to hand over the hearing of the protected witness to the examining magistrate instead of (one of) the judges hearing the case, follows the line of reasoning of ECHR. In Edwards and Lewis the line of defence that was taken, was that the suspects were provoked by undercover agents. The information which could provide additional clarification in this respect was kept secret from the defence, as the «public interest» would oppose this. The judge, who *had* taken note of the information, disallowed the defence. Since this involved «an issue of fact decided by» this judge, the court of appeal ruled, partly for this reason, that as a result of the procedure applied, «the requirements to provide adversarial proceedings and equality of arms» had been insufficiently taken into account.

Other guarantees to ensure that the rights of the defence are sufficiently respected are: the requirement that the examining magistrate must be able to inform himself of the full identity of the witness, the requirement that the witness be sworn in, the obligation to conduct an investigation pursuant to the proposed article 226k of the Code of the Criminal Procedure and of course also the fact that the defence must have an «adequate and proper opportunity to challenge and question a witness against him, directly or on his behalf» (Kostovski). Furthermore, reference can be made to the proposed amendment to article 344a of the Code of the Criminal Procedure, from which it follows that the anonymous statement of the witness can only serve as evidence if he has been heard in accordance with articles 226g to 226m and that the charge, insofar as proven, concerns a crime as described in article 67, paragraph one, of the Code of the Criminal Procedure which in view of its nature, the organised context in which it has been committed or the relation to other crimes committed by the accused, constitutes a serious breach of the legal order. However, even though the aforementioned procedural guarantees do produce counterbalances in connection with the restriction of the defence rights, under European legislation a conviction in criminal proceedings may nevertheless not be solely, or even not to a decisive extent, based on an anonymous witness statement (Kostovski, Doorson). This regulation, stipulated in Dutch legislation under article 344a, paragraph one, of the Code of Criminal Procedure does of course also apply with regard to statements by protected witnesses. Finally, the fact that the judge must be obliged to provide motivated reasons, [in respect of evidence] must be applied as a guarantee for the defence, in accordance with article 390 of the Code of the Criminal Procedure. Recent criminal court decisions by the European Court (the ruling of ECHR of 27 January 2004 (Lorsé) appl. no. 44484/98 and the ruling of ECHR of 27 January 2004 (Verhoek) appl. no. 54445/00) again demonstrated that an important element in the assessment of whether or not a trial is deemed to be a fair trial within the meaning of article 6 of ECHR, is determined by the extent to which the judge has motivated the use and reliability of the evidence.

Adhering to the procedure regarding the protected witness does not provide the guarantee that the requirements of article 6 of the ECHR have been sufficiently met under all circumstances. Each criminal trial that proceeds in accordance with the proposed regulation, must, in addition, be verified for correct procedure (by the judge) against the background of the stated provision of the treaty. This of course does not obstruct the implementation of this regulation, now that sufficient possibilities for the judge remain, possibly as a result of court decisions by ECHR, to set further requirements in addition thereto. Furthermore, the only relevant factor for ECHR remains whether «the trial as a whole» meets the requirements of article 6 of ECHR.

The objective of this legislative proposal is to create better and clearer conditions under which the information and material gathered by the intelligence and security services can be used for prosecution purposes, so that these services, when balancing the interests they are faced with, can be provided on more frequent occasions. The procedure for hearing protected witnesses can contribute to this. Equal to the addition to the regulation in respect of preventing the disclosure of certain data as explained in paragraph 4, this provision intends to ensure that evidence from intelligence and security services can be further substantiated and verified regarding its reliability by means of statements of witnesses. Furthermore, the testing of the lawfulness thereof is also possible. In this respect it needs to be noted that from the aforementioned ruling of the Court of Appeal in The Hague of 21 June 2004 (case no. 220071403), it can be concluded that there can only be very limited reasons to verify the lawfuness of the (methods of) gathering of intelligence information, viz., when there are concrete indications that the information has been obtained whilst (seriously) violating the rights of the accused.

The principle of legitimate expectations, as applicable to extradition law and legal assistance in criminal proceedings by virtue of a treaty, means - in the opinion of the Court - that the judicial authorities may in any case *assume* lawful gathering of the information provided by the AIVD. Should it emerge that the AIVD has acted incorrectly or unlawfully, it will be the seriousness of the relevant negligence that shall determine whether and if so which consequences - in terms of the proceedings - must be attached to this. Since AIVD officials do not work under the supervision and responsibility of the Public Prosecution Office, a sanction in terms of the criminal proceedings aimed against the Public Prosecution Office and/or a declaration of inadmissibility are rather unlikely. This may be different in exceptional cases when, for example, the Public Prosecution Office was aware of the unlawfulness. In the event that unlawfulness is involved during the gathering of AIVD information, which in view of the seriousness of the violation qualifies for a reaction in terms of criminal proceedings, the exclusion of information as evidence would therefore be more obvious.

Finally, it is noted that the threatened witness regulation contains further specific provisions with regard to calling threatened witnesses (Article 264, paragraph two, of the Code of Criminal Procedure) as well as a legal sanction for refusing to call witnesses other than threatened witnesses (Article 349, paragraph three, of the Code of Criminal Procedure). Since a procedure is proposed with regard to protected witnesses, which - in an equal sense and under practically the same conditions - must generate evidence, the scope of these provisions is expanded so that they also apply to calling anonymous protected witnesses. A deviation in the regulation with regard to hearing protected witnesses, compared to the threatened witness regulation, can be seen in the fact that no provision has been incorporated to appeal against the decision of the examining magistrate with regard to granting the status of protected witness. This relates to the marginal character of the consideration framework: whether or not granting the status of protected witness often merely depends on reasonably objective assessment criteria (AIVD employment contract, position etc.; also compare the explanation to Article 226g). Engaging a remedy based on the above would hardly be useful. In the exceptional case that the status of protected witness is not granted, while there is reason to do so, a decision in court by virtue of Article 316 of the Code of Criminal Procedure can furthermore result in a hearing on the bases of Articles 226g-226m.

6. Law of evidence *(Article 344)*

Section J of the legislative proposal concerns an amendment to Article 344, paragraph one, of the Code of Criminal Procedure. It is proposed to amend Article 344, paragraph one, at 3°, of the Code of Criminal Procedure. Documentation prepared by public bodies or officials concerning subjects which are part of the service under their management, henceforth form - as it is proposed - written documents which can contribute to evidence, also in cases where these documents are not designed to serve as evidence of any fact or circumstance. In this way it is ensured that official reports from the intelligence and security services are not categorised under «other documents», which can only serve as evidence in relation to the contents of other Articles of evidence.
As a result, official reports, in principle, from now on are fully acceptable documents. The law does not restrict the judge in terms of the evidential value he attaches to it.

No special provision of grounds can be indicated on the basis of which documents, drawn up by public bodies or officials, concerning subjects which are part of the service under their management, could not generate satisfactory Articles of evidence, also when they have not been designed to serve as evidence of any fact or any circumstance.
The meaning of the proposed amendment lies in the removal of the de-privileged position of official reports as «other documents». The proposed amendment is also in line with what the examiners of the Code of Criminal Procedure project 2001 are proposing. They propose to change from a system in which non-statutorily regulated evidence is not admissible, to a free evidence system (the examination in court, ed. M.S. Groenhuijsen and G. Knigge, p. 438). In that system, evidence can be furnished by means of any Article; the only condition for the use of an inform ation source as an Article of evidence is that the source provides reliable factual knowledge in terms of contents. The result of this point of view is that the examiners believe that the regulation of Article 344, paragraph one, at 5°, of the Code of Criminal Procedure in respect of using «all other documents» cannot be continued. The amendment of Article 344, paragraph one, of the Code of Criminal Procedure does for that matter not entail opting for an entirely different evidence system. There are good reasons to continue a number of elements in the current legal evidence system, such as the rule that an accused person cannot be convicted solely on the basis of his own statements given in evidence (Article 341, paragraph four, of the Code of Criminal Procedure) as well as the rule that conviction cannot be based on the statement of a single witness. These rules are effectively anchored in the current law of evidence. However, together with the examiners of the Code of Criminal Procedure project 2001 it can be established that all generic restrictions of the applicability of reliable information as evidence in a modern law of criminal procedure require sufficient argumentation. Such provision of grounds is absent with regard to the restriction concerning the documents referred to in Article 344, paragraph one, at 3°, of the Code of Criminal Procedure. Documentation prepared by public bodies or officials concerning subjects which are part of the service under their management generate satisfactory Articles of evidence, also when these documents are not designed to serve as evidence of any fact or circumstance. This applies to official AIVD reports, but also to documents of other governmental bodies. The main question here concerns whether the document contains reliable information in terms of contents; it does not concern the purpose for which it was prepared. The 'purpose' requirement of evidence forms a superfluous restriction; the privileged position of the document referred to in Article 344, paragraph one, at 3°, of the Code of Criminal Procedure already provides a sufficient justification in terms of the quality through those preparing it: the public bodies or officials. Comparable considerations served as a basis for the proposal to include documentation of foreign investigating officers and officials active for international organisations in this category of documents as well.
To be absolutely clear, the proposed amendment does not imply that from now on a suspect can be convicted on the basis of, e.g., a single official AIVD report alone. In many cases, the extent of verifiability of the official report does not permit a conviction that would be based for an important part upon such a report. Article 6 of ECHR, and the right to question, which is incorporated therein, provide an important guarantee for the suspect; this legislative proposal does not affect that in any way. It merely ensures that where Article 6 of ECHR does not prevent a conviction, the statutory regulation of the law of evidence will not form an obstruction during prosecution. Finally, it is relevant to note that ECHR emphasizes that the admissibility (the ruling of ECHR of 12 July 1988 (Schenk) appl. no. 10862184) and valuation (the ruling of ECHR of 6 December 1988 (Barberã, Messegué and Jabardo) appl. no. 10590/83) of evidence are, in principle, matters for the national (judicial) authorities.

7. Explanation per Article

ARTICLE 1

Section A *(Article 136c)*

This amendment to the definition of a threatened witness relates to the proposal to describe, within the meaning of the title of the Code of Criminal Procedure, what a protected witness is understood to mean. Since the judge can give similar orders with regard to threatened and protected witnesses, the inclusion «on the basis of Article 226a» clarifies the procedure whereby the status of threatened witness can be granted.

Section B *(Article 136d)*

As is the case for the regulation in respect of the threatened witness, it is proposed to include a stipulation on definition [of a protected witness] within the meaning of the title with regard to the witness who is being heard in accordance with the special procedure of Articles 226g to 226m of the Code of Criminal Procedure. This prevents frequent repetition of an extensive description. The consideration framework of the examining magistrate on the basis of which he can render the decision to grant the status of «protected witness», is discussed in the explanation of section G.

Section C *(Article 187d, paragraph one)*

This addition to Article 187d, paragraph one, of the Code of Criminal Procedure, has already been extensively explained in paragraph 4 of the general section of this explanatory memorandum. The paragraph shall be expanded to handle cases where a question is asked within the framework of a hearing, but in the interest of state security the answer must be prevented from being disclosed to the parties to the proceedings. The other possibilities, which have already been regulated in Article 187d of the Code of Criminal Procedure regarding the prevention of the disclosure of certain data, concern the cases in which there is ground to believe that the witness shall be subject to nuisance or be impeded in the execution of his duties or profession and/or that disclosure may damage an important interest of the investigation.
In the event that the examining magistrate prevents answers to questions, in respect of a certain issue, from being disclosed to the parties to the proceedings, he is obliged by virtue of paragraph two, Article 187d, of the Code of Criminal Procedure, to motivate why certain answers were not included. Since this very much involves *securing* the fact that certain data will not be disclosed, this motivation cannot be extensive. The statement that the witness, actively employed by the AIVD, has made it sufficiently plausible that the interest of national security shall be damaged upon disclosure of the data in question, shall in general be satisfactory enough for this purpose.

Section D (*Article 190, paragraph five*)

The amendment to this Article with regard to inquiring after the personal details of the witness, partly relates to Article 226h, paragraph three, of the Code of Criminal Procedure, proposed in section G. It is stipulated therein that the examining magistrate, if he is of the opinion that the witness himself or the interest of state security would be at risk upon the disclosure of the identity of the witness, shall hear the protected witness in such a way that his identity remains secret, provided the order as referred to in Article 226h, paragraph one, of the Code of Criminal Procedure, has been issued.

The proposed paragraph five, Article 190, of the Code of Criminal Procedure serves to release the examining magistrate from the obligation to ask the witness for his personal details as described in paragraph one with regard to hearing the protected witness.

Sections E, H and K *(Articles 210, 264, 288 and 349)*

In accordance with the same pattern as the threatened witness regulation, these sections amend Articles 210, 264 and 349 of the Code of Criminal Procedure, in order to grant the public prosecutor the power to refuse summoning a witness when the witness concerned has been given the status of protected witness and when his identity, by virtue of Article 226h, paragraph one, of the Code of Criminal Procedure, has been kept secret or when the public prosecutor has granted the witness anonymity. In the first case, refusal is justified since the regulation system, as described in Articles 226g to 226m of the Code of Criminal Procedure, stipulates that when the examining magistrate has arrived at the opinion that a substantial interest of the witness or of someone else and/or the interest of state security requires that the identity of the witness must be kept secret, the witness concerned need not be subsequently confronted with the risk of disclosure of his identity by having to appear at a public hearing. However, also when the examining magistrate does not deem the necessity of keeping the identity secret plausible and, therefore, does not consider the witness an anonymous, protected witness, the public officer has the possibility to refuse the summons of the witness concerned in the event he has granted the witness anonymity (see Article 210, paragraph two, of the Code of Criminal Procedure). The latter ground for refusal lies in the fact that the preparedness to make a statement in the presence of the examining magistrate would be extremely limited when the public prosecutor would be unable to issue such commitment. However, in respect of this commitment it does need to be noted that the public prosecutor can only act as such when securing the anonymity is necessary in the light of the interests as referred to in Article 187d, paragraph one, of the Code of Criminal Procedure.
The proposed amendments to Articles 264 and 288 of the Code of Criminal Procedure refer to the situation at the trial when the court or the defence submits the request to call as a witness the anonymous, protected witness or the witness who has been granted anonymity by the public prosecutor. Article 264, paragraph two, subparagraph a, of the Code of Criminal Procedure, ensures that the anonymous, protected witness, just as the threatened witness, need not appear in court. Article 288, paragraph two, in conjunction with Article 264, paragraph two, of the Code of Criminal Procedure, regulates the procedure when again at the trial the public prosecutor refuses to summon the witness who has been promised by the prosecutor to be heard anonymously, as a protected witness. In that case, the court shall submit the documents to the examining magistrate in order to hear the witness in accordance with Articles 226g to 226m of the Code of Criminal Procedure. If subsequently the examining magistrate does not arrive at the opinion that the person involved can be deemed an anonymous, protected witness, and the public prosecutor maintains his position that he shall not summon the witness because of the undertaking that the person involved would be heard anonymously, whereas the court is of the opinion that the person involved must be heard as a witness at the trial, then all this shall lead to a declaration of inadmissibility by the public prosecutor in the prosecution initiated by him (compare the proposed amendment to Article 349, paragraph three, of the Code of Criminal Procedure).
From the above it can be concluded that the authority of the public prosecutor to refuse the summons of the witness does not include the situation in which the witness is heard in accordance with Articles 226g to 226m of the Code of Criminal Procedure, without the examining magistrate having ordered to keep secret the identity of the witness on the basis of Article 226h, paragraph one, of the Code of Criminal Procedure and/or a claim having been made to this end following a commitment to the witness.

After all, under these circumstances there is no good reason to limit the right of the defence to a direct confrontation with the witness at the public hearing. As such, the interest of state security often means that the witness shall have to rely upon his obligation to observe secrecy.

Section F *(Article 219b)*

It is proposed to introduce a new Article 219b of the Code of Criminal Procedure, stipulating that those who have been present at the hearing of a protected witness, in their official capacity or by virtue of their profession, must refrain from making any statements in respect of the contents discussed during that hearing. This shall apply to the public prosecutor, the examining magistrate, and the Clerk of the Court, but also to those who on the basis of Article 226i of the Code of Criminal Procedure have been granted special access to be present at the hearing of the witness.
The Article intends to prevent persons who have been involved in these hearings and called as witnesses from disclosing or having to disclose certain information in cases where this would be in opposition to the interest of state security. Without this Article, regulations such as the proposed Article 226m of the Code of Criminal Procedure would have little meaning; witness statements made at the trial could, contrary to the interest of state security, still lead to undesired disclosure of the data at a later date.
In line with the system of the proposed regulation, which assumes that ultimately, only the protected witness can determine if and to what extent disclosure of information may be opposing the interest of state security, it has been decided to introduce an «obligation not to give evidence» rather than a right not to give evidence. The witnesses here referred to are not active for an intelligence or security service and as such are not in the position to make the aforementioned consideration. This line of thought has furthermore been the basis to opt for a wider formulation of the «privilege domain».

Section G *(Article 226g)*

This Article is the starting point of the procedure in respect of the hearing of the protected witness. Paragraph one stipulates that the merits of the necessity to award the status of protected witness - either ex officio, by order of the public prosecutor or at the request of the defence or the witness - can be assessed by the examining magistrate. The situation in which the defence requests the examining magistrate to grant a person the status of protected witness is not easy to perceive, yet it is not entirely impossible. One could imagine, for instance, a situation in court in which the defence is asked, following a request to call a witness, to consider having the hearing conducted in accordance with the procedure of Articles 226g to 226m of the Code of Criminal Procedure. The decree of the examining magistrate concerns either an instruction as referred to in Article 226g, paragraph one, of the Code of Criminal Procedure, or a rejection of the claim or request. With regard to the assessment of whether the interest of state security requires the witness to be deemed a protected witness, it is herewith noted that this assessment cannot be made on the basis of a thorough knowledge of the information. The examining magistrate ascertains whether the person involved is actively working for the AIVD and/or another intelligence service, and examines whether the duties he performs or the nature of the matter and/or the preparedness to disclose matters - partly in connection with Articles 85 and 86 of the Intelligence and Security Services Act 2002 (WIV) - requires the protection of the witness.

Paragraph 2 of the general section of the explanatory memorandum has already given an indication as to the scope of the concept «state security». This demonstrates that the basis for the assessment of whether the interest of state security is being potentially compromised is mainly formed by the conclusion regarding whether the intelligence and security services, within the framework of performing their duties, have carried out activities or (must) carry out activities in the case in question. The criterion «the interest of state security» used in this regulation is thus in line with the concept «state security» of Article 6 of the Intelligence and Security Services Act 2002. This link clarifies the fact that the concept «state security» here used bears a different meaning than similar statutory concepts such as «security of the state» as referred to in Article 100, at 2°, of the Penal Code or «security», referred to in Article 103 of the Constitution. The terms in these provisions relate to situations of war, crisis or an emergency. The concept «any regulation…in the interest of the security of the state» in Article 100, at 2°, of the Penal Code is of a more military nature; this truly involves measures with a view to defending/securing the country in the run-up to or when engaged in war, such as ordering secrecy in respect of movements of the navy and air forces. «Security» within the meaning of Article 103 of the Constitution can, in a certain sense, also be considered as defence/security; it involves situations where the existence of the state itself is at stake or cases in which the situation in a certain circumstance is dire, to the extent that direct intervention to prevent further escalation is desired. Paragraph two of Article 226g of the Code of Criminal Procedure ensures that, prior to the decision of the examining magistrate, the public prosecutor, the defence and the witness are given the opportunity to be heard on the subject of granting the status.
If the examining magistrate rules that paragraph one applies, he must motivate this in a report in accordance with paragraph three. This motivation shall not be able, in most cases, to be of a detailed nature; the examining magistrate can limit himself to making mention of the data on the basis of which he arrived at his opinion, without having to go into details concerning the contents thereof.
Finally, paragraph four stipulates that no remedies are available to counteract a decision of the examining magistrate on the basis of paragraph one. This confirms, beyond doubt, the fact that the public prosecutor does not have the possibility to appeal if a claim has been rejected on the basis of paragraph one. This follows the methodology of Article 187d of the Code of Criminal Procedure, yet the difference in that regulation is that the judge hearing the case can still decide that a witness, who has been subject to Article 187d of the Code of Criminal Procedure, must also appear in court. As set out in the explanations to sections E, H and K above, this is not always the case when the procedure as described in Articles 226g to 226m of the Code of Criminal Procedure is applied. After all, if this concerns an anonymous protected witness, the public prosecutor can prevent evidence being given at the trial.

(Article 226h)

Paragraph one proposes to grant the examining magistrate the power to order the identity of the protected witness to be kept secret. There is reason to do so if - upon disclosure of his identity - the witness himself and/or state security are put at risk. The decision to keep secret the identity of the witness shall often be accompanied with the order pursuant to Article 226g, paragraph one, of the Code of Criminal Procedure.

On that occasion the examining magistrate can be properly informed as to what interests necessitate anonymity. The protected witness, with a view to his special responsibility for state security, shall play a particularly informing and motivating role here.
If the examining magistrate has ordered the identity of the protected witness to be kept secret, he must inform himself of the identity of such witness prior to the hearing. It is likely that this often shall occur simultaneously with the moment when the examining magistrate forms an opinion on a claim pursuant to Article 226g, paragraph one, of the Code of Criminal Procedure. If simultaneous decision-making did not take place, paragraph one in any case obliges identification prior to the hearing. The ECHR too attaches great importance to this knowledge of the identity of the witness (compare, e.g., the ruling of ECHR of 27 September 1990 (Windisch) appl. no. 12489/86).
If the case concerns a protected witness whose identity need not be kept secret, it nonetheless needs to be taken into account that the witness shall display greater willingness to provide information whilst «protected», than would be the case at a public hearing. If the examining magistrate deems the witness anonymous and protected, the witness shall in general not appear at the trial. Hence it is proposed in paragraph two, in conjunction with Article 216 of the Code of Criminal Procedure, to explicitly prescribe that the protected witness always be sworn in prior to the hearing.
Paragraph three of this Article grants the examining magistrate the power to take all measures which can be reasonably required to keep secret the identity of the person involved. The measures may vary from disguising the witness to keeping secret the time and place of the hearing, and shall depend on the way in which the hearing is conducted. It should further be added here that following an order on the basis of Article 226h, paragraph one, of the Code of Criminal Procedure, the identity of the protected witness shall be deemed a secret as defined in Article 272, paragraph one, of the Penal Code. Therefore, all those involved at the hearing are obliged to keep secret any data which could reveal the identity of the protected witness.

(Article 226i)

This Article provides the examining magistrate with the opportunity to allow persons to be present at the hearing of the protected witness. The contents of the provision are practically equal to that of the current Article 187c of the Code of Criminal Procedure, which regulates the attendance of persons at the hearing, by permission of the examining magistrate, in a more general sense. The Article in question aims to protect, in particular, the witness who is confronted with the conflicting situation of, on the one hand, the wish to disclose information in the light of establishing the truth and, on the other hand, his obligation to exercise due care in disclosing information since each piece of information may potentially damage the interest of state security. In connection herewith, for example, the examining magistrate may allow the line manager of the person involved to be present at the hearing.

(Article 226j)

Paragraph one of this Article provides the examining magistrate with the opportunity, when so required by an interest as referred to in Article 226h, paragraph one, of the Code of Criminal Procedure, to rule that the accused or his counsel and/or both may not attend the hearing. The examining magistrate shall decide to that end if he is of the opinion that, with a view to the position of the witness and the nature of the statements to be made, the interest of state security would be insufficiently secured if the parties to the proceeding would attend the hearing.

It is likely that on this ground the examining magistrate shall often decide on a hearing under these circumstances; after all, the examining magistrate has applied Article 226g, paragraph one, of the Code of Criminal Procedure and assumes that the necessary information that is classified as state secrets shall surface during the hearing. That anticipation shall, partly in the interest of establishing the truth, easily justify the decision for a hearing in the absence of the parties to the proceedings. It is, for that matter, also quite conceivable that both the interest of keeping secret the identity of the witness and the interest of state security support the decision of the examining magistrate. Keeping secret the identity of the witness can also directly relate to state security.

The examining magistrate must, in accordance with paragraph two, ensure that the record of the witness examination does not contain data that conflict with the interest of keeping secret the identity of the witness and the interest of state security. The introduction of this paragraph two expresses the previously stated anticipation that the examining magistrate shall usually have to decide to hold a hearing wherein the presence of the suspect, his counsel and the public prosecutor are excluded. In that case the examining magistrate shall prepare a preliminary report of the hearing of the witness. When doing so, he shall take the interests, as referred to in the first paragraph, into account. This obligation to perform to the best of his ability naturally follows on from the protected hearing: what would be the use of a hearing without the attendance of the parties to the proceedings, if ultimately the data to be kept secret can be inspected in the form of a document?
The instruction directed to the examining magistrate in paragraph two is by no means an easy assignment. When preparing the record of the witness examination he must carefully consider what information can be included and what information - either to protect the anonymity of the witness or the interest of state security – must be excluded. If it concerns information which - either exculpatory or incriminatory - can be of interest for the charge to be proved, the examining magistrate shall consider in what form this information, with due consideration for the interest of the state, can be included in the official record of the witness examination.
An illustrative example of the careful and responsible manner in which an examining magistrate deals with the witness' interests worth protecting is the ruling of the Supreme Court of 20 April 1999 (Dutch case law 1999/677). This involved the statement of an anonymous, threatened witness. The Supreme Court ruled that a reasonable explanation of Article 226f, paragraph two, of the Code of Criminal Procedure meant that the examining magistrate could deem himself authorised not to enclose a report if this involved the potential disclosure of the identity of the anonymous witness. The examining magistrate shall have the same powers with regard to the record of the examination of the (anonymous) protected witness, since Article 226f, paragraph two in the proposed Article 226k, paragraph two, of the Code of Criminal Procedure is declared applicable by analogy. If it concerns a record of the witness examination in which the representation of the facts and the interest of state security can ultimately not be united, the inclusion of such record within the procedural documents shall generally not be agreed to, on the basis of Article 226m, paragraph two, of the Code of Criminal Procedure. Also, at a previous stage - following inspection of the contents of the record of the witness examination - the witness can already decide not to approve of further distribution of the report. If, in the interest of state security, approval must - in the opinion of the examining magistrate - be withheld, the examining magistrate must ensure that the official record of the witness examination as well as all other information concerning this examination is destroyed.

By virtue of paragraph three, the examining magistrate - following consent of the witness, must inform the public prosecutor, the accused or his counsel (should such counsel not have attended the hearing) of the contents of the statement made by the protected witness as soon as possible. The record of the witness examination is submitted to the witness prior to this inspection; the witness shall only withhold his approval for distribution if disclosure of this report would damage the interest of state security.

The examining magistrate must of course furthermore offer the public prosecutor, the suspect or his counsel the opportunity, by means of telecommunication or - if in the opinion of the examining magistrate this manner of conducting the hearing would oppose the interest of keeping secret the identity of the witness or the interest of state security - in writing, to submit the questions they wish to ask. In respect of the above, the manner in which the hearing is conducted can be in line with the procedure in which the hearing of the threatened witness is conducted. All this is expressed through paragraph five of Article 226j of the Code of Criminal Procedure, in which Article 226d, paragraph three, of the Code of Criminal Procedure is declared applicable by analogy. It seems appropriate to note that with regard to the hearing of the protected witness it is anticipated that one would be more inclined to decide beforehand to allow questions to be submitted in writing only. Cases concerning the interest of state security shall, for that matter, especially require acting with due care; the examining magistrate shall be aware of this and with a view to the witness' preparedness to communicate he shall not seldom arrive at the opinion that questions may only be submitted in writing. The infringement of the right of the defence and the Public Prosecution Office to question a witness directly must, in general, of course be kept to a minimum. However, in opposition to this basic principle, there is the necessity to protect the interest of state security; that interest may be put at risk by the manner of answering direct questions with the negative result - for the parties to the proceedings as well - that the witness, understandably, shall exercise considerable restraint. The above does not alter the fact that- also with a view to the right to question as referred to in Article 6, paragraph three, under b and d of ECHR - the examining magistrate shall each time have to verify the principles of proportionality and subsidiarity to see if and what measures can be taken to provide a less drastic limitation of the right to question than that of allowing written questions only. The extent to which such measures can be applied does of course depend on the facts and circumstances of the case and the specific interests to be protected which are at stake. Measures such as disguising the witness have already been mentioned previously. Another measure that can be considered is that of questioning by means of telecommunication, during which the witness is repeatedly permitted short pauses in between questions, to enable him to carefully prepare his answers.

(Article 226k)

In accordance with Article 226k of the Code of Criminal Procedure, the examining magistrate must render account in respect of his opinion on the reliability of the statement of a protected witness recorded in the report. An examining magistrate is likely to indicate (by virtue of the meaning incorporated in the phrase “rendering account”) whether his opinion is partly based - negatively or positively - on information which has not been included in the official report, on grounds of the interest of state security. This also concerns the question whether representativeness is involved: do the contents of the record of the witness examination still reflect a proper representation of the statement made by the protected witness. In the proposed formulation of Article 226k of the Code of Criminal Procedure, the emphasis, in terms of the reliability to be investigated, has been put on the statement and not on the reliability of the protected witness as such.

This formulation entails that verifying the reliability of the statement can - in certain circumstances - extend beyond verifying the reliability in the sense of personal veracity of the witness alone. The formulation indicates that an examining magistrate, who does not doubt the veracity of the witness, yet nevertheless may have at hand some objective indications regarding the incorrectness of a statement, must also report this.

(Article 226l)

This Article contains regulations which are already known from the threatened witness regulation. Paragraph one regulates the power of the examining magistrate to take all those measures which are reasonably required to keep secret the identity of the protected witness, if he himself has ordered the anonymity by virtue of Article 226h, paragraph one, of the Code of Criminal Procedure. These measures are carried out by means of request to that effect from the public prosecutor. The examining magistrate's duty of due care to keep secret the identity of the protected witness arises the moment the order or the request as referred to in Article 226h, paragraph one, of the Code of Criminal Procedure is submitted and lasts until all written documents which could yield identity details of the witness are destroyed. With regard to paragraph two, it is furthermore noted that the applicability of Article 226f, paragraphs two and three of the Code of Criminal Procedure, can, for example, be of interest for making documents, such as the summons or calling of the witness, which have not been prepared by the examining magistrate, anonymous prior to making them available for inspection to the parties to the proceedings.

(Article 226m)

It has already been indicated in the general part of this explanatory memorandum that the legislative proposal in question does not imply an amendment to the principle based on the Intelligence and Security Act 2002 that the interest of state security prevails over the interest of prosecution. This principle relates to the basic assumption that ultimately only the intelligence and security services can determine whether the disclosure of the information is in conflict with the interest of state security. Uncontrolled disclosure of such information would increase, to an unacceptable level, the risk that an intelligence organisation would be left unable to function properly. Paragraph one of this Article stipulates, in connection herewith, that the protected witness must agree to the inclusion of the official report of the hearing within the procedural documents. It may be expected that in general such consent shall be given. After all, by virtue of Article 226j, paragraph two, of the Code of Criminal Procedure, the examining magistrate is obliged to take into account the interest of state security. If in the exceptional case approval to include the report is not granted in connection with the interest of state security, the examining magistrate must ensure that the report is destroyed and that he makes an official report of this action accordingly. This follows on from paragraph two, in which Article 226j, paragraph three, first to third sentence has been declared applicable by analogy. This ensures that the fact that the statement by the protected witness is unusable can be discussed by or in the presence of the judges hearing the case.

Section J *(Article 344)*

For an explanation of this Article, reference is made to paragraph 6 of the general part of this explanatory memorandum.

Sections K and M *(Articles 344a and 360)*

The amendments in question intend to establish that the conditions required to be able to include, in the evidence, a statement of a protected witness whose identity has been kept secret, as well as the obligation of the judge to provide reasons for using such statement when furnishing proof, are brought in line with the regulations which in this respect are valid in regard to statements of a threatened witness. Such equalisation is likely, as here too it involves a statement of a witness who remained anonymous. Article 334a of the Code of Criminal Procedure contains general restrictions on using written documents containing statements of anonymous witnesses as evidence. Paragraph one stipulates that declaring a charge proved may not be based solely on statements from anonymous witnesses. A slightly deviating criterion can be concluded from previous decisions of ECHR. The criterion applied by ECHR - and following on from that the administration of justice - entails that a conviction may not «solely or to a decisive extent» be based on statements by anonymous witnesses. It is suggested to bring Article 344a, paragraph one, of the Code of Criminal Procedure in line with this Strasbourg criterion. From paragraph two it arises that a statement of an anonymous witness, who has been heard by the examining magistrate, may only serve as evidence if it concerns a threatened witness and when the charge to be proved concerns a serious crime. This paragraph is currently complemented with a reference to the statement of the anonymous protected witness.
In other instances, statements from anonymous witnesses by virtue of paragraph three may only serve as evidence of the accused having committed the charge, if the conviction is to an important extent supported by alternative evidence, whilst the accused has not indicated the wish to question the anonymous witness. The regulations of Article 344a of the Code of Criminal Procedure must be seen against the background of ECHR case law in respect of anonymous witnesses. They were introduced in 1993 as part of the regulation with regard to threatened witnesses and served to translate ECHR case law on the subject of anonymous witnesses into a statutory regulation. The Court accepts using an anonymous witness statement - during which the right to a direct confrontation with the witness is restricted - as evidence. Yet, the restriction of the rights of the defence continues to be applicable only insofar as this restriction is necessary in the light of protecting other legitimate interests recognised by the Court and assumes compensation through special process guarantees to the advantage of the defence. Such process guarantees are, among other things, included in Articles 226g to 226f of the Code of Criminal Procedure. Article 344a of the Code of Criminal Procedure ensures that they are observed when the anonymous statement is used as evidence.
Based on the proposed extension of the obligation to provide reasons (Article 360 of the Code of Criminal Procedure) the judge shall need to clarify in his ruling that the conditions set out in Article 344a, paragraph two, of the Code of Criminal Procedure have been met. With regard to the requirement of Article 344a, paragraph two, under b, of the Code of Criminal Procedure, one needs to be reminded that the amendments in question regarding the use of anonymous statements as evidence are proposed with a view to the criminal law approach towards terrorist crimes. Such crimes, considering their nature, generate - practically by definition - a serious violation of the legal order.

ARTICLE II

This legislative proposal does not require any special transitory law. The opportunities offered by the legislative proposal to have investigations conducted by the examining magistrate can be applied from the moment they are effective. An exception is made in this Article with regard to the amendment of the description of evidence referred to in Article 344, paragraph one, at 3°, of the Code of Criminal Procedure. It is stipulated that these provisions, from the moment this law enters into force, can be applied in cases where the investigation at the trial has not yet been completed.

ARTICLES III and IV

The legislative proposal in respect of commitments to witnesses in criminal proceedings (26 294) also introduces a number of new sections in title III of the Second Book. These Articles intend to ensure that, when that aforementioned legislative proposal enters into force, the procedure regarding commitments to witnesses who at the same time are suspects, and the procedure regarding the hearing of the protected witnesses, shall succeed each other.

ARTICLE V

It is the intention to have this law implemented this law as soon as possible, following publication in the Bulletin of Acts and Decrees, In respect of its entry into force by Royal Decree it has been decided to ensure that the proposed amendments are given sufficient publicity.

The Minister of Justice,
P. H. Donner