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Partial evaluation of four measures to deal with people who refuse to cooperate in behavioural investigations

Summary

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Background and objective of the study

Increasing safety by reducing repeat offenders is a key objective of the current Dutch government's public safety and security policy. To the extent that a mental disorder contributes to criminal behaviour, treatment can help to reduce repeat offenders when returning to society. A hospital order (*tbs-maatregel*) may be imposed for serious offences, such as a prison sentence of four years or more or various specifically named offences. When imposing a hospital order, it is necessary to determine whether there is a mental disorder or a condition that increases the risk of criminal behaviour. This involves a behavioural examination, the results of which are recorded in a behavioural expert's report (pro Justitia-rapportage). This provides the courts with information about a suspect's possible mental disorder (Article 37a of the Penal Code [*Wetboek van Strafrecht*, *SR*]), the concurrence of the disorder and the offence, the possible knock-on effect of a disorder on the most recent offence, the associated risk of a repeat offence, advice on legal accountability and advice on possible sanctions.

It is common for suspects to refuse to cooperation in behavioural examinations, especially clinical behavioural investigations at the Pieter Baan Centre (*Pieter Baan Centrum, PBC*). The Pieter Baan Centre (PBC) investigates those suspected of serious crimes who may be subject to a hospital order. To combat the refusal to cooperate in behavioural investigations, the Ministry of Justice and Security (*Ministerie van Justitie en Veiligheid, JenV*) has developed an 'approach to people refusing to cooperate in behavioural investigations', with the aim of[1]:

- making society safer with regard to suspects who refuse to cooperate;
- reducing the number of those refusing to cooperate;
- reducing the impact of refusing to cooperate.

Various aspects of the 'approach to people refusing to cooperate in behavioural investigations' are examined in a number of partial studies. This report focuses on one of the partial studies into legislative amendments and the desirable and undesirable side effects thereof.[2] In this regard, four measures of the approach to people refusing to cooperate in behavioural investigations have been partially evaluated:

1. the Regulation on Refusing Observandi (*Regeling Weigerende Observandi*), hereinafter referred to as the Regulation;
2. the refinement of the term 'disorder';
3. the clarification of the risk criterion;
4. the modification of the legal status of people subject to a hospital order.

In the context of this evaluation, the four measures were investigated in terms of implementation, execution, side effects and bottlenecks. In addition, the contribution of the four measures to the objectives of the approach to people refusing to cooperate in behavioural investigations was evaluated, and possible modifications of the four measures that could increase the effectiveness were identified. This study does not include an evaluation of the effects of the four measures.

Structure and methods of investigation

To answer the research questions, we conducted a document study, interviews with various partners in the justice system and administered surveys. A document study was conducted to prepare for the interviews and surveys, as well as for use in analysing and answering the research questions. We studied documents, including policy documents, regarding the preparation and development of an approach to people refusing to cooperate in behavioural investigations and the implementation of the four measures

[1] Nagtegaal, M.H. (2021). *De effectiviteit van de aanpak weigerende verdachten in het Pro Justitia onderzoek [The effectiveness of the approach to non-cooperating suspects in the behavioural expert's study]*. Achtergrond en contouren van een onderzoeksprogramma [Background and outlines of a research programme]. The Hague: WODC. Cahier 2021-16.

[2] The present study does not cover all legislative amendments arising from the approach to people refusing to cooperate in behavioural investigations: the legislative amendment granting the Peter Baan Centre (PBC) an observation period is included in another partial investigation.

by the partners in the justice system. In addition, rulings from the four regional medical disciplinary tribunals were reviewed to ascertain whether there are any rulings on requests regarding the removal or destruction of healthcare records that may be related to the approach to people refusing to cooperate in behavioural investigations. No such rulings were found.

The four measures affect the modus operandi of the various partners in the justice system dealing with people refusing to cooperate in the context of behavioural investigations. To gain insight into the implementation, execution and effectiveness of the four measures, we conducted interviews with the following partners in the justice system:

- the Netherlands Institute of Forensic Psychiatry and Psychology (*Nederlands Instituut voor Forensische Psychiatrie en Psychologie, NIFP*):
  - five behavioural experts;
  - one practitioner at the Pieter Baan Centre (PBC);
- the Public Prosecution Service (*Openbaar Ministerie,* OM):
  - seven public prosecutors from five judicial districts[3];
  - one advocate general (AG) from the procurator general's office at the Court of Appeal (*Ressortsparket*);
  - two policy officers;
- the Judiciary (*Rechterlijke Macht, RM*):
  - one policy officer from the Council for the Judiciary (*Raad voor de rechtspraak*);
  - the president of the Parole Appeals Division (*penitentiaire kamer*);
  - five judges from five judicial districts[4];
- the legal profession:
  - five hospital order/criminal lawyers;
- mental healthcare institutions:
  - sixteen staff from fifteen different mental healthcare institutions from nine provinces[5];
- the Ministry of Justice and Security (JenV):
  - one policy officer;
- the Advisory Committee on Data Provision of Refusing Observandi (*Adviescommissie Gegevensverstrekking Weigerende Observandi, AGWO*);
  - Advisory Committee on Data Provision of Refusing Observandi (AGWO) submitted a joint written response to our questions.

In addition to the interviews, we administered two different surveys: one among the legal profession on the impact of the approach on suspects who refuse to cooperate and possible side effects of the measures (30 questionnaires were completed).

The second survey was administered among Dutch citizens. This survey was administered to two target groups, a panel consisting of the general Dutch population (517 questionnaires were completed) and a panel consisting of citizens who use or have used mental healthcare services (827 questionnaires were completed). The survey asked questions about the general conditions under which citizens expect to avoid necessary or desirable mental healthcare, with a subsequent focus on conditions related to the use of data in criminal proceedings. A similar approach is used concerning questions on the destruction of medical data. By asking citizens to empathize with situations in which the Regulation could be applied, the results provide insight into how citizens think they would act in a (dual) hypothetical situation where they would need healthcare at the same time as being suspected of a serious crime. The survey therefore does not provide insight into how citizens would actually act in such a situation. Consequently, the survey findings should be interpreted with caution.

[3] Amsterdam, East Netherlands, North Holland, Northern Netherlands and East Brabant
[4] Amsterdam, The Hague, Gelderland, Northern Netherlands, Zeeland-West Brabant.
[5] North Holland, South Holland, North Brabant, Gelderland, Friesland, Flevoland, Limburg, Zeeland and Utrecht.

Findings on the implementation, execution in practice and effectiveness

Regulation on Refusing Observandi

Implementation

- Almost all respondents are familiar with the Regulation. Approximately half of the respondents from mental healthcare institutions are aware of the Regulation. The same applies to the lawyers who completed the survey.
- In most cases, the Regulation was brought to the attention of the respondents via their own organization. Information about the Regulation was disseminated via internal news reports, presentations, meetings or via colleagues.
- The respondents differ in their view of the level of support for the measure. They point out that the Regulation can be an additional option for obtaining information for the behavioural investigation. However, various respondents representing partners in the justice system also view the Regulation as an onerous measure that undermines the privacy of suspects and the professional secrecy of practitioners. According to them, in each case it will be necessary to weigh up whether the Regulation can add value and, if so, what value. They consider that the safeguards included in the Regulation contribute to this. Some respondents, especially those in the legal profession, also emphasized the right to refuse: defendants do not have to cooperate in their own sentencing.

Execution

- The Regulation has been applied once since coming into effect in 2019. As a consequence, the partners in the justice system have limited experience of the application in practice. The findings on the execution and the side effects are therefore mainly based on initial experiences and expectations of partners in the justice system.
- One precondition for the execution of the Regulation is familiarity with the measure and the steps to be taken by all partners in the justice system. Respondents from the Public Prosecution Service (OM) and the Netherlands Institute of Forensic Psychiatry and Psychology (NIFP) pointed out that they do not expect that everyone is aware of the existence of the Regulation and/or the steps to take when applying the Regulation. According to these respondents, more attention should be paid periodically to the existence of the Regulation and how the procedure is structured. This would also potentially increase the application.
- The respondents highlighted four bottlenecks in the application of the Regulation:
  - Anticipated duration of the procedure: the application of the Regulation requires a number of steps to be completed (see also H3.1). The turnaround time of all steps is expected to be longer than desirable for the progress of a case. Moreover, by the time the Regulation is applied, it has already been preceded by a number of other actions, which means a case has been ongoing for some time. The respondents consider the number of steps and the turnaround time to be an actual or potential bottleneck for the application of the Regulation.
  - Obtaining practitioner data by the Public Prosecution Service (OM): in order to request data under the Regulation, it is necessary to know which practitioner or practitioners that data should be requested from. This means that the relevant public prosecutor must provide contact details of the practitioner (a doctor, behavioural specialist or legal entity) to the Advisory Committee on Data Provision of Refusing Observandi (AGWO). In many cases, however, it is very difficult if not impossible to find out who the specific practitioner of a suspect is. The Public Prosecution Service (OM) points out that this hampers the application of the Regulation: without specific data on the appropriate practitioners, no request for medical data can be made. As a result, the application of the Regulation falters. This has occurred in a few cases. The Public Prosecution Service (OM) and Advisory Committee on Data Provision of Refusing Observandi (AGWO) argue that it is not currently possible to issue multiple requests to different practitioners, without knowing which of them is the actual practitioner.
  - The decision period of 30 days: when the Regulation is applied, the Advisory Committee on Data Provision of Refusing Observandi (AGWO) is required to provide advice within 30 days describing the presence and usefulness of the suspect's medical data. The Advisory Committee on Data Provision of Refusing Observandi (AGWO) expects that meeting this deadline could be especially difficult if medical records have to be requested separately from several practitioners.

- Possible reluctance to apply the Regulation: the expected duration of the procedure, the moment in the process when the Regulation can be applied, the estimated added value and the strict criteria for application are factors that, according to respondents, lead to a possible reluctance to apply the Regulation. The anticipated delay in a case, combined with the small number of cases in which the Regulation can be applied, limit its application.

- A citizen survey was used to investigate the extent to which the destruction of medical records and healthcare avoidance might occur as side effects of the Regulation. Because citizens were asked to empathize with the dual hypothetical situation of needing healthcare and being suspected of a serious crime, the survey results provide insight into how citizens expect they would act in such a situation. The findings provide no insight into the actual actions of citizens and should therefore be interpreted with caution.
- In the citizen survey, after explaining the Regulation, several scenarios were presented that assessed how likely citizens consider it to be that they will have their medical records destroyed or avoid healthcare due to the existence of the Regulation. The results regarding medical record destruction show that almost a quarter (23%) of the Dutch population expect to have their medical data or a part of their medical data deleted by their General Practitioner, if they imagine a very exceptional situation where their medical records could be accessed during a criminal trial. This also applies to almost a quarter (24%) of respondents with regard to the destruction of the records by other mental health institutions. The extent to which partners in the justice system expect that record destruction could occur/increase as a result of the Regulation was also studied . Almost all respondents considered it unlikely that the destruction of records would increase. At present, the partners in the justice system believe that citizens are unfamiliar with the measure. Moreover, the Regulation can be used in cases that are mostly hypothetical in nature for the average citizen: respondents expect that few citizens will dwell on the possibility that their medical data could one day be requested in criminal proceedings under strict conditions. The respondents think this may be slightly more plausible for citizens with a distrustful attitude, whether related to a mental illness or not. That said, it does require strategic, forward-looking thinking and rational reasoning. The lawyers interviewed, however, do not rule out that the destruction of medical records could become part of advice given to clients if the Regulation is applied successfully more often. This could undermine the effectiveness of the Regulation.
- A similar picture applies with regard to the other possible side effect, healthcare avoidance, as it does to the destruction of medical records. The survey shows that, after an explanation of the Regulation, sixteen percent of the Dutch population expects to avoid healthcare from their General Practitioner if they are asked to imagine the situation in which their medical data could be accessed during a criminal trial in exceptional circumstances. With regard to avoiding other mental healthcare, this applies to almost a fifth of the Dutch population (19%). These percentages do not exceed those found in a previous study on healthcare avoidance among the Dutch population.[6] That survey found that, in the preceding year, fifteen percent had avoided healthcare with their General Practitioner and about a quarter did not follow up a referral to a medical specialist.[7] Respondents from the justice system did not consider it likely that the Regulation will lead to an increase in healthcare avoidance. The same reasoning that applies for medical record destruction also applies here: the circumstances during which the Regulation can be applied is very remote for many people. This effect is more plausible for distrustful citizens with disorders; although respondents do not expect an increase for this group in practice either.

Effectiveness

- The majority of respondents do not expect the Regulation to reduce the number of people refusing to cooperate in behavioural investigations. They argue that the reasons for refusing to cooperate in behavioural investigations are often driven by distrust towards the court and the authorities, combined with a potential or actual disorder. Whether or not their medical data can be requested without their consent will not motivate these refusers to cooperate in a behavioural investigation. A

[6] Van Esch, T.E.M, Brabers, A.E.M., Van Dijk, C., Groenewegen, P.P. & De Jong, J.D. (2015). *Inzicht in zorgmijden [Understanding healthcare avoidance]. Aard, omvang, redenen en achtergrondkenmerken [Nature, extent, reasons and background characteristics]*. Utrecht: Nivel.
[7] Idem.

small proportion of respondents expect that if the Regulation is applied more frequently, suspects might cooperate more often as a precautionary measure so that no outdated medical data is requested.

- The Regulation will also not affect the effect of refusing, according to most respondents. In this regard, respondents mainly state that, even in cases of refusal, in most cases enough connecting factors can already be found from other sources to reach a verdict on the existence or non-existence of a disorder. In that case, the added value is low. According to them, the Regulation has no impact on 'stubborn' refusers; it will not change their mind. In addition, some respondents expect that medical records may not be available for another segment of the target group because they have not been in treatment before. For this segment of the target group, the Regulation will not result in additional, new medical information. This means that the target group to which the Regulation could both apply and have an effect on is therefore small. However, the effect of refusing will diminish for the target group to whom the Regulation is applied and actually results in additional information. The respondents expect these to be suspects with no judicial history who have received mental healthcare.

Refining the concept of disorder and clarification of the risk criterion

Implementation

- The refining of the concept of disorder and the clarification of the risk criterion are not known to all respondents. Respondents from the Netherlands Institute of Forensic Psychiatry and Psychology (NIFP) were unaware of these measures, as were some of the lawyers. The majority of respondents from the Judiciary (RM) and the Public Prosecution Service (OM) were familiar with these measures.
- The amendments concerning the disorder concept and risk criterion were brought to the attention of the organizations in a similar way as the Regulation. Information about the amendments was disseminated by various means, including by newsletters and via substantive meetings. However, respondents from the Netherlands Institute of Forensic Psychiatry and Psychology (NIFP), the legal profession and the Public Prosecution Service (OM) did state that less attention has been paid to these amendments, compared to the Regulation.
- The majority of respondents support the textual amendments. They explained that clarifying legislative texts is a good thing and can help make them easier to understand. However, for some respondents, the purpose of the amendments with regard to the refusal issue is not sufficiently clear. They argue that more attention could have been paid to explaining the background and reason for the amendments. Consequently, opinions differ on the level of support for the measures in light of the approach to people refusing to cooperate in behavioural investigations.

Execution

- Almost all judges and public prosecutors point out that the determination of a disorder in the context of a hospital order is a legal decision. Sufficient connecting factors are needed to make this decision. One of these connecting factors could be an established medical diagnosis in the behavioural expert's report. However, it is not necessary for a disorder to have been determined by behavioural experts. Respondents pointed out that directional advice and information from other documents, such as an old behavioural expert's report, could also be used for this purpose. In doing so, the majority of respondents from the Judiciary (RM) and the Public Prosecution Service (OM) stated that this course of action and interpretation was also sufficiently clear to the majority of judges and public prosecutors prior to the textual amendment of the legislative text, partly because it was established in case law. However, respondents also pointed out that this applies to a lesser extent for some of the judges and public prosecutors: mainly to magistrates who have little or no experience with hospital order cases. They may be more cautious in the legal determination of a disorder without a medical diagnosis. All respondents agreed that amending the legislative text will not change this. According to the respondents, the decisive factor for this is mainly experience in applying the legislative text and hospital order cases.
- With regard to the role of the risk criterion, respondents from the Judiciary (RM) and the Public Prosecution Service (OM) explained that it is clear to almost all judges and public prosecutors that being a 'danger to society' is one of the criteria for being subject to a hospital order. Respondents stated that every time a person was made subject to a hospital order, both criteria are assessed, i.e. the ex-

istence of a disorder and the risk of recurrence. According to the respondents, prior to the amendments in the law there was no ambiguity about the necessity of both criteria and all judges and public prosecutors act accordingly.
- The respondents do not mention any precondition for the execution of these measures. In doing so, they explain that these two textual amendments do not directly affect the course of action or execution in practice. For this reason, they cannot name any required preconditions.
- No side effects and bottlenecks are expected with regard to refining the concept of disorder and clarification of the risk criterion. Respondents from the Judiciary (RM) and the Public Prosecution Service (OM) explained that these amendments are only textual and do not result in any change in legal practice. For this reason, they say the textual amendments will not lead to side effects or bottlenecks.

Effectiveness
- As a result of the textual amendment regarding the determination of a disorder, some judges and public prosecutors may now find the text easier to understand. In doing so, the amendment could lead to greater clarity and uniformity in the determination of a disorder by the courts. Respondents from the Judiciary (RM) and the Public Prosecution Service (OM) did, however, point out that this may only be the case for a small, less experienced group. According to judges, experience in applying and interpreting the legislative text in practice is especially important. In doing so, it is important to regularly train judges and public prosecutors in the use of the legislative text, so that the interpretation and options are continually assessed. The amendment therefore results in the legislative text being easier to understand, but has no effect on its actual application.
- With regard to the risk criterion, respondents do not expect any change in legal practice. They point out that the role and interpretation of that criterion were already sufficiently clear prior to the amendment. According to them, the textual amendment will therefore not cause any change in practical implementation.
- Both measures, according to respondents, will not affect the number of refusers or the effect of refusing.

Modification of the legal status of persons subject to a hospital order

Implementation
- All respondents from the legal profession are familiar with the adjustments affecting the legal status of people subject to hospital orders. They are mostly informed of this via newsletters and meetings of professional associations.
- Lawyers mainly speak out about the reversal of the measure that barred people subject to a hospital order from going on leave for a year if they had been absent without authorization or were suspected of an offence for which pre-trial detention had been authorized, called the 'Teeven year'. They are in favour of this measure and, by contributing to the possibility of more customization in the granting of leave, consider it conducive to the legal status of people subject to hospital orders. At the same time, the adjustments are considered insufficient to positively affect the image of detention under a hospital order. The level of support for the measure is thus present, but the measure is not expected to contribute sufficiently to reducing the issue of refusers.
- Improving the legal status of people subject to hospital orders could contribute to suspects having a more positive attitude towards the hospital order measure and thus possibly to a different attitude towards refusing to cooperate in behavioural investigations. The most important precondition for this is that it must be known that these adjustments have been made, including among people subject to hospital orders.

Execution
- Both the survey conducted among the legal profession and the interviews with lawyers show that advice given by lawyers to their clients regarding the hospital order measure has remained unchanged to date as a result of the adjustments to the legal status of people subject to hospital orders. The main reason given for this is that, at the time of the criminal trial, leave options are still far in the future. As a result, changes in leave options are generally not part of advising clients on the hospital order measure that may be imposed.

- The advice that lawyers give their clients on the hospital order measure depends on multiple factors, including the current state of the hospital order system and factors such as treatment duration and progress and exit options. While the adjustments to the legal status of people subject to hospital orders made within the approach to refusers are a step in the right direction, they are insufficiently far-reaching to bring about a positive change in the advice regarding the hospital order measure.

Effectiveness

- Most lawyers do not expect the adjustment of legal status to contribute to addressing the refusal issue. The main reason for this is that leave options are too far in the future at the time of sentencing and will therefore have little impact on the consideration of whether or not to cooperate with behavioural investigations. In addition, the adjustments are too small to positively change the perception of the hospital order measure and convince a suspect to cooperate.
- Lawyers consider that the current adjustments to the legal status of people subject to hospital orders are insufficient to reduce the number of refusers. They propose more sweeping adjustments to the hospital order system that would help improve progress options of hospital order institutions and set a maximum duration for the hospital order measure.
- The legal profession also does not expect the measures surrounding the adjustment of the legal status of hospital orders to contribute to reducing the effect of refusal.
- Furthermore, lawyers point out that some of the suspects, prompted by their disorder, will always continue to refuse to cooperate in behavioural investigations. The adjustments to the legal status of people subject to hospital orders will not change this.

Conclusion

The approach to refusers focuses on a specific problem with multiple causes. Therefore, the approach consists of several measures targeting different aspects of the refusal issue. The imposition of a hospital order is hampered to a greater or lesser extent by the refusal issue. The issue of refusers can be partially overcome if alternative sources of information are available for behavioural investigations. If, for example, behavioural observation during a stay at the Pieter Baan Centre (PBC) is possible or previously drafted behavioural expert's reports are available, this will allow a behavioural report to still be drafted for the court for some of the refusers.

Regulation on Refusing Observandi

At the time of this study, only very limited experience has been gained from retrieving medical data from older records since the Regulation came into force about three years ago. This may be partly due to a number of bottlenecks in the application of the Regulation, the most important of which are the impact on procedural time and the search for specific practitioners. The limited application raises the question of the extent to which there is a need in practice for the Regulation and what the added value is compared to other ways of collecting information in the behavioural investigation. The study shows that this added value is not currently widely recognized within the organizations in the justice system. According to parties in the criminal justice system, the target group for which the Regulation does add value is very small. These are people who refuse to cooperate in behavioural investigations, for whom no alternative sources of information are available and who have made use of certain healthcare in the past.

At the same time, there is a risk of side effects from the Regulation. No clear signs emerged from this research that the Regulation currently leads to an increase in healthcare avoidance or to the destruction of medical records. Surveys among citizens show that healthcare avoidance and the destruction of medical records could potentially occur as a side effect if it becomes widely known that medical data could be used in a criminal trial in which a hospital order measure can be imposed. However, it is uncertain whether these expectations of citizens will be translated into actual behaviour, partly because citizens were asked questions about a highly hypothetical situation, i.e. if you needed healthcare and were suspected of an offence for which a hospital order measure could be imposed. Whether the side effects of healthcare avoidance and the destruction of medical records could actually occur is thus uncertain, as is the occurrence of the intended effects of the Regulation.

Disorder concept, risk criterion and legal status

The overall picture of the other measures of the approach to refusers that have been evaluated in this study is that there is a level of support for these measures, but they are found to have limited effectiveness in practice. This applies to the refining of the concept of 'disorder', clarifying the risk criterion and improving the legal position of a person subject to a hospital order. The first two measures, according to those involved in the justice system, endorse the already existing practice and thus bring about little or no change in criminal justice practice. The latter measure, improving the legal status of persons subject to hospital orders by reversing the suspension of leave, is seen by lawyers as desirable but insufficiently effective in addressing the refusal issue. During a criminal trial, leave options are still a possible future option. In addition, the measure does not outweigh inadequate progression during the handling of hospital orders and the uncertain and potentially long duration of the hospital order measure. To be effective in this regard, more far-reaching measures in the hospital order regime are required.

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