

## Summary

### **Evaluation of the Criminal Investigation of Terrorist Crimes Act**

The Act on the extension of the powers of the scope for investigation of terrorist crimes (further referred to in this summary as The Criminal Investigation of Terrorist Crimes Act) came into effect on 1 February 2007. The purpose of this act is to enable investigations of terrorist crimes at an early/earlier stage and to have them continue for a longer period of time. A number of legislative amendments were implemented in order to extend the possibilities of investigation of terrorist crimes. In short, it concerns the following extended powers:

- an extension of the possibilities to use special investigative powers, such as systematic observation and use of a telephone tap;
- an extension of the possibilities to collect information during an exploratory investigation;
- an extension of the possibilities to search persons in security risk areas without them being suspected of a specific criminal offence;
- enabling remand in custody in case of a suspicion of a terrorist crime without a grave presumption;
- a possibility to postpone a full inspection of procedural documents.

The (then) Minister of Justice deemed such considerable and far-reaching extensions necessary due to the major interests that are at stake in case of terrorist crimes and the very serious consequences these crimes may have. At the same time, he realised that the new statutory powers needed to be exercised with due care. That is why he decided to have the application of the act monitored and to have the effects of the act evaluated after a five-year period. The application of the act was monitored each year between 2007 and 2011 by the Research and Documentation Centre [Wetenschappelijk Onderzoek- en Documentatiecentrum, WODC]. The act is evaluated in this concluding report. The purpose of this evaluation is to assess whether the Criminal Investigation of Terrorist Crimes Act contributes to an effective investigation of terrorist crimes. The structure of the evaluation is based on the following questions raised:

- 1 What are the assumptions underlying the Criminal Investigation of Terrorist Crimes Act?
- 2 How is the Criminal Investigation of Terrorist Crimes Act applied in practice and what are the consequences thereof for investigations?

The empirical material collected by the WODC during the four consecutive monitoring rounds serves as a basis for this evaluation. During these rounds, information was collected about the manner in which the act was introduced, the manner in which the act was applied, about the consequences thereof for investigations and about the experiences gained in this respect. During each monitoring round, information was also collected about criminal investigations of terrorist crimes in which the new legislation was not applied. A more detailed description of the data collection can be found in these four underlying monitor reports.

## **General assumptions**

The Criminal Investigation of Terrorist Crimes Act is based on the following general assumptions:

- the extended investigative powers under the new act result in the police and the Public Prosecution Service being able to use investigative means at an earlier stage if there are any 'indications' of a terrorist crime;
- the use of investigative means at an earlier stage and the possibility to have criminal investigations last longer means that it is possible to collect criminal evidence concerning a (supposed) imminent terrorist attack, resulting in a timely detection of suspects, the prevention of terrorist crimes and a successful prosecution of the suspects.

The extension in the act covers five areas. The continuation of this summary will discuss underlying assumptions and the application of the act for each separate area. However, a general overview of the application of the new act is given first.

## **Criminal investigations into terrorism and application of the act from 2007 to 2011**

Between 2007 and 2011, a total of 106 terrorism-related criminal investigations were conducted in the Netherlands. Fifty-five investigations were conducted at the national public prosecutor's office and fifty-one investigations in the regions at the district court public prosecutor's offices. The investigations concerned both major long-term criminal investigations and minor short-term investigations during which special investigative powers were used or were not used at times. The short-term investigations were usually conducted in the regions; the major long-term investigations were usually conducted at the national public prosecutor's office.

The new statutory powers were exercised during 18 of the 106 terrorism-related criminal investigations. During 15 criminal investigations, special investigative powers were exercised on the basis of indications of a terrorist offence; during 4 criminal investigations, suspects were remanded in custody without a grave presumption. Two elements from the new act were applied during one criminal investigation, namely the use of special investigative powers based on indications and - at a later stage - remand in custody without a grave presumption.

The four investigations during which suspects were remanded in custody without a grave presumption were conducted under the authority of the national public prosecutor's office. Seven of the 15 criminal investigations that were initiated based on indications were conducted in the region under the supervision of a district court public prosecutor's office. The other 8 investigations initiated on the basis of indications were conducted under the authority of the national public prosecutor's office by the national investigation service. The application of the act is detailed per section below.

## **Criminal investigation into terrorist crimes based on indications**

Between 2007 and 2011, the possibility to exercise special investigative powers based on the 'indications' criterion was taken advantage of during fifteen criminal investigations.

One of the fifteen investigations initiated on the basis of indications resulted in a prosecution on the ground of suspicions of preparations for a terrorist crime. This case still has to be brought before the court; the suspect was a fugitive at the time this document was written. One investigation was temporarily cancelled because the

suspect stayed abroad for a long period of time. The other thirteen investigations were cancelled sooner or later due to a lack of sufficient criminal evidence against the persons the investigations focused on. So in practice, the application of the 'indications' criterion has, in most cases, not resulted in a successful detection and better prosecution of criminal behaviour, one of the key assumptions at the time the new act was introduced. Almost all investigations were cancelled after some time due to a lack of information about the specific planning of a terrorist attack.

Another assumption accompanying the new act was that the standard requirement of suspicion results in investigative services being unable to exercise any special investigative powers in case of any indications of a terrorist crime, due to the lack of a sufficiently substantiated suspicion. However, the assessment of criminal investigations during the four monitoring rounds shows that, at the start of an investigation, the difference between indications and a suspicion is small, especially in case of a major and immediate threat. In these situations, it appears that special investigative means can already be used if a suspicion is substantiated to a limited extent. The assumption accompanying the new act, namely that investigative services used to be unable to take action and use special investigative means at an early stage, appears to be incorrect. Also in case of relatively 'soft' information, investigative services already form a suspicion if the situation is assessed as threatening and immediate. Following on from this, the research shows that, in investigation procedures, there is a strong margin in the assessment of the hardship of initial intelligence. Practice shows that investigations initiated based on indications can be compared well with investigations initiated based on a suspicion. The elasticity of the various initial criteria is also evidenced by the fact that some investigations based on indications were already converted into an investigation based on a suspicion after one day, because the police wanted to arrest certain persons. This was not done on the basis of additional information obtained, but on the basis of an assessment of the threat. In order to remove the threat, it was decided to initiate an investigation based on a suspicion and to remand certain persons in custody without a grave presumption.

In situations that are not assessed as immediately threatening, the application of the 'indications' criterion does result in the exclusion or limitation of risks through the use of special investigative means.

Once a criminal investigation is pending, falling back on the indications criterion appears to be a reassuring option for investigative services, in order to continue with an investigation in spite of the fact that there is no information that could support a suspicion. The difference between the 'indications' and 'suspicion' criteria seems to play a role in these situations, and an investigation can still continue based on 'softer' information. In one case, this switch from 'suspicion' to 'indications' again resulted in a suspicion and then in the prosecution of the relevant suspect. However, the question is whether this switching between 'suspicion' and 'indications' fits in with the purpose of the act, and whether the act was designed to enable an investigation at all times if it concerns a criminal investigation into terrorist crimes, even if a suspicion that is formed initially cannot be substantiated after an investigation.

### **Exploratory investigation**

No exploratory investigations into terrorist crimes were conducted between 2007 and 2011. The new statutory powers are intended to be exercised in situations in which there is not yet any specific information available on a possible involvement of persons in plotting or committing terrorist crimes. Over the past few years, this

situation has not or hardly occurred and, in practice, some specific information about any involvement usually already appears to be available, as a result of which it is possible to initiate a regular criminal investigation, based on indications or based on a suspicion. It is also possible to use special investigative means pursuant to title V if some information is available about an organisation within which crimes are plotted or committed, without any specific names of persons. So far, practice has shown that data can be demanded in situations in which there is already some evidence for an investigation. For this reason, the additional powers under the new act pertaining to exploratory investigations do not seem to result in additional information about a possible involvement of persons in terrorist crimes, an assumption on which this aspect of the new act is based.

### **Searching in safety risk areas**

Since the introduction of the act, the possibility of searching in safety risk areas has been used to a limited extent. No temporary safety risk areas were formed between 2007 and 2011. However, various permanent safety risk areas were designated upon the introduction of the act. No new permanent areas have been added since, nor has a permanent safety risk area been cancelled. In one permanent safety risk area, the powers to search persons, objects and vehicles, namely in the outlying area of Schiphol, are exercised on a regular basis. The powers are not or hardly exercised in the other areas.

In the Schiphol outlying area, the extended searching powers are exercised in order to exclude possible risks associated with 'deviant behaviour' and immediately remove the area-based threats that have been identified. This use has, so far, not or hardly resulted in information that can be used during a criminal investigation into terrorist crimes. In retrospect, it appears that the information obtained can mostly be linked to forms of organised crime. This is an indication of an unintended consequence of the act, namely that, in practice, the use of the extended searching powers in the Schiphol outlying area mostly contributes to the investigation of organised crime. Following on from this, other safety risk areas point out the difficulty to make an on-site distinction in practice between terrorism-related threats and threats related to other forms of crime or other 'deviant behaviour'. The danger of 'net-widening' is mentioned in other safety risk areas as (part of) the reason for not applying the act.

In practice, investigating officers in other safety risk areas generally also respond to signs of area-based threats by conducting on-site investigations. In doing so, they apply other, existing legislation such as the Compulsory Identification Act [Wet op de identificatieplicht] and Article 3 of the Police Act [Politiewet]. The legislature's assumption for this part of the act was that already existing powers do not enable the police to conduct adequate and immediate investigations in case of any signs of area-based terrorist threats. This assumption is inconsistent with the manner in which already existing powers are exercised in practice.

Another assumption for this part of the act was that the police would be able to conduct immediate on-site investigations in case of any signs of area-based threats, independent from local authorities. This does not appear to have this effect in practice. The legislature left the specific implementation of the act to the local triumvirate and set the condition that further coordination at a local level is required. As a result, the element of 'independence' is no longer there and the manner in which the new searching powers are exercised has, in fact, become strongly dependent on the views of local authorities in this respect. In case of any response to area-based

threats, routines and powers are exercised in practice which have been developed together with local authorities.

### **Remand in custody without a grave presumption**

During the period between 2007 and 2011, the possibility to remand suspects in custody without a grave presumption was used during four criminal investigations. In all cases, this power was exercised in order to remove a possible immediate threat and to further investigate the initial signs. Three of the four investigations were initiated based on a suspicion and one investigation was initiated based on indications. None of the cases resulted in a grave presumption, causing the suspects to be released again and the investigations to be cancelled (after some time). During one investigation, the suspect was handed over to the Foreign Police after having been remanded in custody and was subsequently deported.

The legislature's assumption was that the 'grave presumption' criterion was said to result in suspects of terrorist crimes being released too soon, as a result of which there would not be enough time to investigate. The 'grave presumption' criterion was also said to create the risk that people who constitute an unacceptable threat to society still had to be released. The exercise of this power indeed shows that abandoning the 'grave presumption' criterion results in investigative services being offered more time to investigate what is going on and whether there are a grave presumption. The exercise of this power also results in the (temporary) management and reduction of possible risks associated with a release of suspects. So far, however, the extra time given to the police and judicial authorities to investigate has not resulted in a grave presumptions and an extension of the remand in custody. In a number of cases, the investigation was still continued after the suspects had been released. In all cases, however, these investigations were cancelled after some time due to a lack of evidence.

### **Keeping procedural documents secret**

Between 2007 and 2011, the possibility to postpone a full inspection of procedural documents was not used. During the research period, there was never a criminal case in which procedural documents had to be kept secret for a longer period of time. There was no investigation which had not yet been completed after three months and in which it was desirable to keep certain parts of the file secret for a longer period of time. In other words, the circumstances under which this aspect of the act could be applied did not occur during the research period.

### **In conclusion**

We cannot conclude from the application of the Criminal Investigation of Terrorist Crimes Act that the extended powers have so far contributed to a more efficient investigation of terrorist crimes. If a criminal investigation initiated based on indications shows that these signs are confirmed and continue to exist, an early start does not result in a successful investigation and a collection of criminal evidence. After some time, long-term criminal investigations have to be cancelled, partly due to capacity problems and due to (changed) priorities within the investigation. In that case, the investigations appear to be facing the same problems as long-term criminal investigations initiated on the basis of a suspicion. So this evaluation does not show that an early start offers any advantages for the progress of the investigation.

However, the application of the act has enabled a quick reduction or exclusion of risks that are possibly associated with indications of a terrorist crime. For small short-term investigations, which serve to quickly assess risks and remove threats, the widened legislation seems to meet the assumptions. In these cases, conducting a small short-term investigation is enabled by the extension of the statutory powers. In practice, these cases always concerned a false alarm or another form of crime without any direct threat. However, alternative action strategies for investigating such indications also appear to exist in practice: in case of an immediate threatening situation, usually a suspicion is formed right away in order to make arrests and immediately remove the threat, and, in case of a less immediate threat, regular powers are often exercised at local level under Article 3 of the Police Act, such as paying house visits and talking to people, in order to assess the situation and the threat.

More generally, this research shows that assumptions on the limitations of existing legislation in various contexts appear to be incorrect. In practice, in case of indications of a terrorist crime, the police and judicial authorities usually appear to apply already existing legislation, powers and methods they are already familiar with. This is shown by the use of special investigative powers and also by on-site investigations in safety risk areas. In practice, the difference between indications and a suspicion appears to be small, and existing legislation appears to provide more possibilities than assumed by the legislature upon the introduction of the act.