Summary

Reason and research questions

When an accused is sentenced, for example to a conditional hospital order, he is at liberty within certain limits to institute appeal to the court of appeal or Supreme Court against the court's decision. The conditional hospital order may not be enforced as long as no ordinary remedy is open against it and, if such a remedy is used, until it has been withdrawn or a decision has been taken on it (Art. 557 (1) Dutch Code of Penal Procedure (*Sv*), hereinafter CPP. This means that the accused will be released and not subject to any form of supervision, unless he has been detained on a certain basis, for example in pre-trial detention. That pre-trial detention must be lifted immediately if the accused has been placed in pre-trial detention and no prison sentence has been imposed or if a prison sentence has been imposed, the duration of which is equal to or shorter than the duration of the time the accused has spent on remand. At that time, there will be a period without (court-ordered) supervision which lasts until the judgment in the fact-finding instance has become final. In such an unsupervised period, a case occurred in 2004 in which the accused committed homicide. This serious case, which has come to be known as 'the Doetinchem Murder Case', was the reason for this study, in which a number of questions concerning the unsupervised period are answered.

The objective of the study is threefold:

- To provide insight into the extent to which unsupervised periods occur between the end of pre-trial detention and enforcement of the conditional hospital order, which arise because there is still a possibility for appeal to the court of appeal or Supreme Court.

- To provide insight into the extent to which crimes are committed during unsupervised periods.

- To provide insight into the existing possibilities to prevent unsupervised periods within the present legal framework, in order to be able to decide whether statutory rules on this issue should be amended.

The research questions read:

1a. How often in the period from 2002 to 2006 did it occur that pre-trial detention ended while the sentence to a conditional hospital order (in the first instance or on appeal) could not yet be enforced because the judgment was not yet final?

1b. In the cases in which the above-mentioned situation occurred: how long was the period between the time pre-trial detention ended until the time the conditional hospital order could be enforced?

1c. In the cases in which the above-mentioned situation occurred: was an offence committed during this period, as far as the judicial authorities know, and what offence or offences were concerned?

2. What possibilities are available to the Public Prosecution Service and the judiciary within the current system of laws and regulations to prevent enforcement of the conditional hospital order from not immediately following pre-trial detention?

3. Can the proposed legislative amendment relating to the conditional hospital order be expected to have an effect on the connection between pre-trial detention and enforcement of the conditional hospital order. If so, in what sense?

In order to answer these questions, information on all cases in which a conditional hospital order was imposed in 2002 to 2006 was analysed. In addition, laws and regulations were subjected to an analysis and fifteen experts from legal practice were consulted.

Number of unsupervised periods and crimes

In 2002 to 2006, a conditional hospital order (whether or not combined with another penalty/other penalties) was imposed in the first instance in 298 cases in total. Nineteen times in the period from 2004 to 2006, a conditional hospital order was imposed only on appeal. This establishes that in the five-year period between 2002 and 2006, the conditional hospital order was imposed in 317 cases.

Of those 317 cases, it was possible to establish in 287 cases whether or not an unsupervised period had occurred. This appears to have been the case in 107, which amounts to 37% of the cases.

There appears to be a schism between short unsupervised periods and prolonged unsupervised periods. Short unsupervised periods last two weeks at most and represent a vast majority of the cases, namely 93% (99 of the 107 cases). Prolonged unsupervised periods rarely occur (8 of the 107 cases) and only if appeal to the court of appeal or Supreme Court was instituted. In the period studied, these proved to vary in length from 105 days (minimum) to two years and 145 days (maximum).

During the 99 short unsupervised periods (of two weeks at most), no crimes were committed except for the Doetinchem homicide. This appears to have been a single incident.

In three of the eight prolonged unsupervised periods, one or more offences were committed. In all three cases, the same type of offence was concerned as that for which the accused had been sentenced to a conditional hospital order. Two cases

involved less serious forms of the offence. In one of the three cases, no prosecution took place.

Analysis of laws and regulations

During the search for possibilities in laws and regulations to prevent unsupervised periods, four schemes were studied: pre-trial detention, sentencing, the execution of sentences and non-punitive orders and the Psychiatric Hospitals (Compulsory Admission) Act (BOPZ). The draft legislative proposal 'Adjustment of the conditional hospital order' was also included in the analysis. Nine options were found which are theoretically capable of preventing (some of the) unsupervised periods. The main aspects of the pros and cons of these options are discussed below.

Within the rules governing pre-trial detention, two possibilities were studied: extension of the time on remand (in accordance with Art. 72 and 75 CPP) and conditional suspension of the pre-trial detention order (on the basis of Art. 80 CPP). Extension of the time on remand to prevent the occurrence of an unsupervised period is possible only if the accused has been sentenced to non-suspended imprisonment, a custodial measure or a non-custodial measure that could entail deprivation of liberty. This sentence and/or measure must also be of a longer duration than the time already spent on remand. Because the maximum custodial sentence to be imposed with the conditional hospital order is three years, at the time of the final judgment, it might appear that the sentence had a shorter duration than that of the time on remand. The pre-trial detention order will then be lifted at the time of the final judgment or shortly afterwards, which means that the convicted person will be released without a final judgment having been delivered on the basis of which execution of the conditional hospital order could start. A solution for this problem is to define the conditional hospital order as a custodial order or as an order that could entail custodial punishment. After all, if the person subject to a conditional hospital order violates the condition(s), the conditional hospital order can be converted into a hospital order with compulsory treatment. In addition, in practice, the conditional hospital order can be in the nature of a custodial punishment, for example if it is enforced in an intramural, clinical setting. The result of this (re)definition would be that detention on remand could continue during the period in which an ordinary remedy can be applied, so that no unsupervised period occurs. In general, it cannot be established on the basis of legal history and the relevant case law whether the conditional hospital order is a custodial order or an order that could entail custodial punishment. Clarity could be created in this situation if the legislature were to make this more explicit.

The other possibility offered by Art. 75 CPP (for cases in which appeal has been instituted) is that the pre-trial detention order is not extended, but that it is demanded and ordered once again. A convicting judgment in the last fact-finding instance can be considered as a (new) serious objection (Art. 75 (2) second sentence CPP) and can be a sufficient ground for (renewed) imprisonment, even in the situation in which the previously given pre-trial detention order has been lifted. This possible solution, however, could be at odds with the starting point that restraint should be exercised in dealing with the coercive measure of pre-trial detention. Moreover, the anticipation

requirement applies in this case (Art. 67a (3) CPP). This means that a court may not order pre-trial detention if it anticipates that upon sentencing, no non-suspended prison sentence or a measure entailing or that could entail deprivation of liberty will be imposed on the accused, or that the duration of such a prison sentence or measure will not exceed the duration of the pre-trial detention.

A second possibility within the pre-trial detention regime is conditional suspension of the pre-trial detention order (Art. 80 CPP). That could entail that the accused will have to place himself under treatment, for example at a mental healthcare institution. In that way, the suspension of pre-trial detention could, as it were, anticipate the ultimate imposition of the conditional hospital order. This solution is seamlessly in line with the current statutory rules and does not require a legislative amendment. An objection remains, however, that basing a (trial) *treatment* on suspended pre-trial detention is problematic in terms of the law, because it already anticipates the final conviction and punishment. Pre-trial detention could perhaps be suspended under the special condition of *supervision* by the probation service or a type of technical supervision. An important limitation of this solution is that it can apply only to accused persons who state that they are willing to cooperate in this type of supervision. Ignoring or violating the condition can then be a reason to place the accused in custody again.

An unsupervised period could occur if the convicted person is released during the period in which appeal is instituted because the pre-trial detention order has been lifted. A solution for this unsupervised period is that the court imposes a longer custodial punishment. An advantage of this solution is that in such cases the pre-trial detention order continues to run until sixty days from the judgment. In this way, the convicted person remains longer on remand. An objection against this solution is that it does not (always) withstand testing against the proportionality principle. The second disadvantage of this solution is, in cases in which appeal has been instituted, that the problem of the unsupervised period is shifted to the future. In that case, the convicted person will (still) be released when the time spent on remand is equal to the duration of the prison sentence imposed (Art. 72 (4) CPP). That can be dealt with by demanding a new (or extended) pre-trial detention order in the second instance, possibly followed by immediate suspension of the order under the special condition of supervision by the probation service or treatment. A requirement for this is, however, that the conditions for imposing pre-trial detention must be met once again. Furthermore, appeal must have been instituted and that is the case in only a small part of the total conditional hospital orders imposed.

A solution that can be found in the execution stage is that Art. 557 (1) CPP is amended in the sense that the probation service can already start executing the conditional hospital order. The amendment of that article could entail, for example that the conditional hospital order can be enforced with immediate effect so that, despite the possibility to appeal, the probation service will have a basis for supervision and there is a guarantee of financing and a specific assignment for the probation service. An objection is that this solution is at odds with the presumption of innocence. For the purpose of the strictest possible selection of persons sentenced to a conditional hospital order for whom supervision can be organised in this way, the amend-

ment of Art. 557 (1) CPP should be linked to a further provision (e.g. a governmental decree) in which this measure remains reserved for those persons for whom behavioural experts or the probation service do not consider an unsupervised period responsible, but for whom the probation service is indeed an adequate way to guarantee public safety.

A final possible solution within the criminal law system is to ask behavioural experts or the Probation and Aftercare Service to indicate in their advice or report on measures whether an unsupervised period is responsible for the accused person in question. If the rapporteur's judgment is that an unsupervised period is irresponsible, the court may decide not to impose a conditional hospital order and impose a (longer) prison sentence or a hospital order with compulsory treatment instead. An objection to the (longer) prison sentence is that it ignores the fact that the choice of a hospital order is made because *treatment* of the accused – possibly after punishment – is considered important. Imposition of a hospital order with compulsory treatment could mean a violation of the proportionality principle because the hospital order with compulsory treatment might be too heavy a sanction in cases in which a conditional hospital order seems in principle to be the most appropriate measure.

A solution outside the framework of criminal law is placement in a mental healthcare institution by way of the Psychiatric Hospitals (Compulsory Admissions) Act (BOPZ). The advantage of such placement is that it can theoretically be executed quickly. This solution, however, is also subject to practical and fundamental objections. The BOPZ appears to provide a solution for a limited number of cases at most. In addition, from a legal point of view, the regimes of the hospital order and BOPZ are separate and it is not clear whether a BOPZ process can be started at the time that a hospital order process cannot yet be started. Furthermore, this solution can succeed only if BOPZ supervision can be provided quickly and if BOPZ institutions are willing to admit persons placed under a hospital order. On the basis of the analysis, both expectations have to be termed negative.

In conclusion, the new legislative proposal relating to conditional hospital orders was examined, which is intended to remove several bottlenecks in practice. This proposal, however, hardly provides any remedy for the unsupervised periods referred to in this study, because it is based on the situation in which there is a final court judgment. The proposed extension of the maximum prison sentence that can be imposed in combination with a conditional hospital order (from three to five years) offers a marginal solution in the sense that with a longer prison sentence, there will be less of a chance that too much time will already have been spent on remand. If the proportionality principle is not violated, there will only be some room to impose somewhat more than three years imprisonment in cases in which to date three years non-suspended imprisonment has been imposed in combination with a conditional hospital order. This could prevent unsupervised periods which occur after three years under the current law because pre-trial detention has to be lifted. In the period studied, however, an unsupervised period appeared to occur rarely only three years from the judgment, which means that this amendment will not play any meaningful role as a solution for the current unsupervised periods.

Reviewing all options, it can be concluded that not one of these automatically constitutes a solution for the unsupervised periods. There are legal as well as (sometimes) organisational objections to all options and/or the problem of a limited scope.

Opinion of the experts

The majority of respondents (nine out of fourteen) consider the unsupervised period as defined in this study as a 'non-issue'. They consider the question of the occurrence of unsupervised periods as determined by a single incident, concluding that unsupervised periods can simply occur when a conditional hospital order is imposed. This measure is supposed to give the accused a certain degree of freedom. The actual problems, which come down to a lack of cooperation among agencies, recalcitrant clinics and long-lasting procedures and processing times, occur only after the judgment has become final, according to the experts.

Of the nine potential (partial) solutions presented to them for the unsupervised periods, the experts considered the option of conditional suspension of pre-trial detention as quickly as possible as the best. The objections to this option are directed mainly against already starting treatment when a final judgment has not yet been delivered. On the one hand, these are legal in nature: there is no legal basis for such a heavy substance to the condition. On the other hand, there is the practical problem that in most cases a conditional hospital order entails treatment in a clinic (ambulatory or intramural) and a treatment place is often not readily available. These objections do not apply or apply to a lesser extent if conditions for suspension do not entail admission/treatment but supervision by the probation service. In addition, the option to interpret Art. 72 (3) CPP in such a way that the conditional hospital order can be viewed as a custodial measure or a measure that could entail deprivation of liberty entailing that pre-trial detention lasts until the judgment is final was assessed positively by eight of the respondents. In that case, however, they would want a ruling by the Supreme Court (Hoge Raad) or a more explicit explanation by the legislature for a definite answer regarding the possibility of this interpretation. A third solution under consideration is the amendment of Art. 557 (1) CPP in order that the conditional hospital order can become enforceable with immediate effect and the probation service can start its supervision quickly. The objection remains, however, that this solution is at odds with the presumption of innocence.

Conclusion

Judging by the prevalence of crimes committed during unsupervised periods, there seems to be no question of a large-scale problem. During the short unsupervised periods (two weeks at most) , which occurred 99 times in the period from 2002 to 2006, only one, although serious, offence was committed, namely the homicide in Doetinchem. In the rarely occurring longer lasting unsupervised periods (8 in the period from 2002 to 2006), crimes appear to occur more often (in 3 of the 8 cases).

On the basis of these findings, the conclusion seems justified that mainly prolonged unsupervised periods should be avoided. Priority need not be given to the prevention

of short unsupervised periods. In order to shorten the prolonged unsupervised periods, in these types of cases hearings in courts of appeal and at the Supreme Court should follow more quickly on the judgment in the first or second instance. For this purpose, appeal in cases in which a conditional hospital order was imposed in the first instance could be heard explicitly with priority, as well as appeal to the Supreme Court following on appeal to the court of appeal.

If it is not possible to create enough guarantees for the timely settlement of appeals to the court of appeal and to the Supreme Court, a solution could be found in the nine options studied.
A practicable solution should satisfy three criteria:

1. it should be a solution for all prolonged unsupervised periods;
2. the solution should conflict as little as possible with the principles of criminal law;
3. the solution should be as simple as possible to implement in a practical and organisational sense.

Only making an exception to Article 557(1) CPP, which would always enable the enforcement of a conditional hospital order to start immediately, withstands this review to a reasonable extent.
Nevertheless, because the serious objection also applies to this solution that a punishment is started while the accused has not yet been convicted, secondly, the experts are of the opinion that the unsupervised period (as referred to here) is an issue of very limited significance and, thirdly, the figures show that a crime is committed less than once a year in an unsupervised period, leaving the situation regarding the imposition and execution of the conditional hospital order as it is now could also be considered.

Finally, there is still a possibility to search for a solution outside the existing laws and regulations. These would then be solutions for which a legislative amendment would be necessary. Searching for such solutions was outside the scope of this study.

In weighing the above-mentioned possibilities, it is important to realise that no single form of supervision other than imprisonment provides (or can provide) a solution for the prevention of the commission of crimes by persons sentenced to a conditional hospital order in free society. Other types of supervision do not provide any guarantee because convicted persons can evade them whenever they want to. It should also be considered that being released, at any rate being able to move about freely in society, is a characteristic appropriate to the conditional hospital order. Whether all persons sentenced to a conditional hospital order are able to deal with it properly and responsibly is a question which has to be dealt time and again with great care by all experts involved in the sentencing process.