

SUMMARY

In search of a new balance

Third evaluation of the 'Beginselenwet verpleging ter beschikking gestelden'

This report presents the third evaluation of the *Beginselenwet verpleging ter beschikking gestelden* (Bvt), the act under Dutch criminal law providing regulations (and rights) for the detention of forensic mental health patients in high security services called 'tbs-facilities'. It was enacted in 1997 and requires (in art. 85) a periodical evaluation concerning the effectivity of this act in practice. The first evaluation was carried out in 2001 (Leuw & Mertens) and the second was published in 2009 (Van der Hoeven et al). The legal evaluation requirement seems to be derived from a policy statement from 1991:

'In consultation with the field and on the basis of an analysis of risen problems and rethinking of underlying assumptions, it should periodically be reviewed whether the dimensions of the tbs (safety, treatment and legal protection) have become unbalanced, which possible bottlenecks should be uncorked and how a sustainable new balance can be struck.'

The following two research questions were based on this underlying directive:

1. Do the provisions in the Bvt and its current practice serve the goal of a balance between the dimensions of safety, treatment and legal protection?
2. Is the Bvt itself sustainable in light of the future landscape of forensic mental health in the Netherlands?

The second question is related to current draft legislation, which is to transform the landscape of forensic mental health into a broad terrain covering several legal frameworks. Because of this on-going legislative process this evaluation of the Bvt is limited in scope. It will not focus on organizational aspects which are subject of the legislative changes, rather on the legal position of the detainee. The research is focused on bottlenecks as they are experienced in the field. These bottlenecks are identified through the previous evaluations (including a thematic evaluation of legislation on coerced health care; Leegemate et al, 2014), interviews with all relevant parties in the field and an analysis of case law – including a quantitative analysis of the case law of the complaint commissions of the individual tbs-facilities (2012-2015) and the central appeal commission (2008-2015) as can be found in the supplements to the report.

The downside of focusing on bottlenecks is that most of what is going well may be overlooked. In reverse, the limited number of bottlenecks that were found in comparison to all the provisions in the Bvt (and accessory regulations) reveals that for the greater part no problems are encountered. The legislation and subsequent case law function as a guideline for professionals in practice. Experienced bottlenecks are usually not a reflection of fundamental flaws in the regulations, rather a reflection of a changed context. On the basis of a changed context it is concluded in this report that in relation to the balance of the three dimensions, mainly the legal protection considering the treatment needs strengthening. A few recommendations are specifically intended to balance this situation.

The sustainability of the Bvt is largely determined by its compatibility with other legal frameworks on the broad terrain of forensic mental health. The more compatible, the more the intended flexible movement of patients between facilities regulated by different legal frameworks can be achieved.

The outline of the report and this summary is based on the bottlenecks that were identified. In the report it is extensively explained whether the provision at hand a. is adequately regulated, b. strikes an optimal balance between the dimensions of safety, treatment and legal protection in the present situation, and c. ensures sustainability with regards to the intended dynamic landscape of forensic mental health. In this summary it must suffice to mention the identified 21 bottlenecks and the subsequent recommendations aimed at rethinking basic principles or proposing specific changes in legislation and/or policy concerning the issue at hand.

Most bottlenecks are actually subject to debate between certain parties in the field, often because they are in the midst of the tension that exists between the dimensions of safety, treatment and legal protection. Therefore, a few bottlenecks and the solutions presented should be considered in coherence.

Functioning of legal remedies and the effectiveness of the legal position

Recommendation 1. Mediation: a lack of uniformity and quality

The procedure for mediation by the (monthly) designated member of the supervisory commission should be more elaborately explicated in regulations. Inspiration could be drawn from comparable acts for detention in penitentiary facilities also for minors. Particularly the primacy of mediation and regulating 'pre-mediation' should be considered. Guaranteeing the quality of the mediating members of the supervisory commission should be achieved through quality standards, codes of conduct and professional training – especially of specific mediating competencies.

Recommendation 2. Complaint and appeal: rising numbers (due to over-complaining individuals)

Involve the 'Knowledge centre for supervisory commissions' and the 'Council for the administration of criminal justice and protection of juveniles' (RSJ) in formulating specific policy approaches to over-complaining detainees in con-

sultation with all parties at stake (facilities, lawyers, supervisory commissions, central appeal commission, and possibly in the future the patients confidant (PVP)). Exchanging best practices would be a good first step.

Recommendation 3. Effectiveness of the legal position: preliminary relief proceedings

Consider creating preliminary relief proceedings in order to have the necessity of further restriction of liberty through measures like separation and isolation speedily tested by an independent party (comparable to proceedings in other legal frameworks within forensic mental health).

Recommendation 4. Effectiveness of the legal position: preliminary relief proceedings, part two

Analogous to proposed changes in acts for detainees in (youth) penitentiary facilities, a possibility for a speedily appeal to the central appeal commission should be created in the Bvt against a decision by the minister considering a request for an occasional humanitarian leave (for example to go to the funeral of a family member)

Recommendation 5. Effectiveness of the legal position: time period between complaint and decision

Stricter regulation of, and compliance to, the time period between complaint/appeal and the subsequent decision is recommended. For example a time period for the decision of the central appeal commission should be stipulated, and time periods could officially start on filing the complaint/appeal instead of on reception, and especially after a mediation attempt has failed.

Recommendation 6. Effectiveness of the legal position: legal council/aid

Representation by legal counsel in complaint and appeal procedures should be warranted for a broader range of subjects, through altering the regulations for legal aid. It is recommended that the option of a 'triangle-conversation' to try and come out of a treatment-impasse with patient, clinic and lawyer – a new modality which is appreciated by all parties – is anchored in regulation or policy to ensure legal aid in the future.

Recommendation 7. Effectiveness of the legal position: information

Consider legislating in the Bvt standard case law of the central appeal commission (RSJ) on the subject of wider admissibility of complaints than the law provides for. In particular when that admissibility can not be traced back to the text or system of the Bvt and specific 'rights' or claims are allocated. At the least infringements on 'rights' such as the complete in exertion of a duty of care by the clinic, the structural denial of leave on the basis of circumstances not related to the individual (such as shortage of personnel), and any restriction of movement within the clinic that is warranted in the internal regulations of the facility or the treatment plan.

A further explanation of relevant case law should be part of a new edition of the 'Handbook legal position of tbs-detainees'. Now that a lot of regulations

have changes an updated edition is necessary, which could immediately be written in a more accessible language than which is used in the regulations itself.

Recommendation 8. Effectiveness of the legal position: financial compensation

It is recommended that the possibilities for greater financial compensation – particularly in regard to treatment delay (see recommendation 9) – are increased in accordance with the developments in other legislation and civil case law. In a new regulation on financial management possible downsides of large compensations should be addressed.

Recommendation 9. Inadmissibility of complaints concerning duties of care

A few specific duties of care concerning the treatment, such as those in provisions 16.1 and 17.1 Bvt, should be formulated as rights in order to ensure admissibility of complaints about those situations.

Also the following aspects should be open for complaints:

- Medical interventions (outside of the forensic psychiatric treatment plan) by a facility doctor; analogous to the legal position of detainees in (youth) penitentiaries.
- Unnecessary delay in the treatment.
- Revoking an unaccompanied leave by the director of the facility.

Recommendation 10. Inadmissibility of complaints concerning duties of care: appeal against revoking the authorization for leave

Consider creating the possibility for appealing any ending of an authorization for leave, through demanding a ministerial decision both in case of revocation and expiration.

Accountability through supervision, registration and documentation

Recommendation 11. General supervision through the supervisory commission: lack of uniformity

Further regulation of the ways in which the tasks of the supervisory commission should be performed is recommended.

Recommendation 12. Adopted resolution to introduce patient confidants in tbs-facilities

If particularly recommendations 1, 6 and 9 are adopted, it should be considered not to carry out the adopted resolution. When the patient confidant is nevertheless introduced in tbs-facilities, he should function alongside (and not instead of) the designated monthly member of the supervisory commission because of their different tasks.

Recommendation 13. Many registration obligations.

It is recommended to commission further and more specific research into the registration obligations demanded by regulations, in order to assess and decrease the possible undesired effects on the primary process of treatment.

Recommendation 14. Legally required 'notes': a source of tension

The Dutch Code of Criminal Procedure demands that notes on the physical and mental condition of the tbs-detainee are added to the clinic's advice to the court regarding the prolongation of the tbs-order. The legal position concerning those 'notes' should be strengthened in accordance with that of the treatment plan. At least the right to a free copy and the right to make (written) comments and have them added to the notes should be provided for.

Recommendation 15. Treatment plan: restriction of rights and liberties

Caution should be exercised when restricting rights and liberties through the treatment plan only. Restriction through conditions for leave should aim at the least intrusive available means to ensure safety, in order to try and ensure consent of the individual.

Recommendation 16. Patient dossier: legal position

All documentation concerning the individual execution of the tbs-order should in principle be part of the patient dossier. The enumeration could be expanded, but it is probably better to suffice formulating this principle. Restrictions on access to certain documents should be realized through article 20 Bvt, possibly also through adding the interest of the victim as grounds for restriction.

Infringing on rights: control, measures and coerced treatment

Recommendation 17. Financial management: neither adequate nor compatible

Further regulation of financial management, pay and labour is recommended, at the least on the level of a ministerial regulation. On behalf of legal equality the margins of appreciation concerning treatment autonomy for the facilities should be small on this particular subject. For allowing cash in the facility the legal position of detainees in penitentiaries could act as a model.

Recommendation 18. Possession and use of modern means of communication: update needed

Modern means of communication are such a self-evident part of modern life that it should no longer be ignored in legislation. Using the regulations on restriction of movement in the facility seems to be a better model for that than the regulations on the right to contact with the outside world, because of the larger possibilities for restriction potentially necessary for safety. The specific legal protection should be regulated accordingly.

Rules for investigating a smartphone should be created, in particular concerning the data stored therein.

Recommendation 19. Controlling the controllers

Harmonize the authority to control as much as possible in the broad landscape of forensic mental health, for example through a general regulation on controlling ones body (materials) as proposed before by the joint legal experts of the facilities. Modern 'quicksans' of alcohol- or substance abuse should be incorporated. Attention should be drawn also to controlling the controllers, for example by the patient him- and adequate legal protection.

Recommendation 20. Measures and disciplinary penalties

Erase the provisions on disciplinary penalties in the Bvt.

Recommendation 21. Coerced treatment

With regards to the so called 'Type A-coerced-treatment' a few recommendations are to be made. For example changing the a-typical role of the supervisory commission in order into its more traditional role as complaint commission. A complaint possibility against the expressed intention to start Type A treatment could answer the desire for an independent decision at forehand. The omission that the patient him- or herself does not need to have the intent expressed to him should be mended. International conventions seem to demand assessment of incompetence in case of risk to self harm. For clarity and certainty this should be part of the procedure for all types of coerced care.