SIMPLIFICATION OF SUSPICION CRITERIA
(*VEREENVOUDIGING VERDENKINGSCRITERIA*)

Consequences of the proposed changes of suspicion criteria for the application of investigative powers in criminal investigations

(*De gevolgen van de voorgenomen wijziging van de verdenkingscriteria voor de opsporingspraktijk*)

SUMMARY

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This study was conducted by the department of Criminal Law, in collaboration with the Bonger Institute of Criminology, Faculty of Law, University of Amsterdam, and was commissioned by the Research and Documentation Centre (WODC) of the Netherlands Ministry of Security and Justice.

Full report (in Dutch) available at www.uva.nl/bonger and www.wodc.nl.

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Summary

Introduction

This research was commissioned by the *Wetenschappelijk Onderzoek- en Documentatiecentrum* (in English: Research and Documentation Centre) of the Dutch Ministry of Security and Justice and conducted by the Department of Criminal Law at the University of Amsterdam, in cooperation with the university's Bonger Institute of Criminology. It concerns a study into the consequences of the proposed simplification of the criteria for the application of investigative powers (*verdenkingscriteria*). The results of this study will be used in the modernization process of the Dutch Code of Criminal Procedure. The most important proposals that are part of said modernization were announced in a Memorandum (Contourennota). This includes a proposal to simplify the criteria that exist under the current law for the application of different investigative powers by the police and the prosecution. Over the years, the diversity of those criteria has made the relevant part of the Code of Criminal Procedure increasingly intricate. Further, it is said that some of the current criteria don't serve as a solid foundation in practice. As a consequence thereof, it may not always be clear in respect of which crimes certain investigative powers may be applied. The proposed new application criteria for investigative powers are as follows:

- suspicion of a criminal offence;
- suspicion of a crime for which the maximum term of imprisonment is *one or more* years (hereafter: the one-year criterion);
- suspicion of a crime for which the maximum term of imprisonment is *four or more* years (hereafter: the four-year criterion);
- suspicion of a crime for which the maximum term of imprisonment is *eight or more* years (hereafter: the eight-year criterion).

Under the proposed legislation, the one-year criterion will apply to most of the investigative powers to which either of the following criteria currently apply: 'a crime must have been committed for which the application of remand custody is permitted' and 'suspicion of a crime'. The proposed one-year criterion is more demanding than the existing criterion of 'suspicion of a crime'. With regard to a number of more intrusive investigative powers, the intention is to replace the current criterion that 'a crime must have been committed for which the application of remand custody is permitted' with the four-year criterion. The eight-year criterion will apply only to a few even more intrusive investigative powers.

Additionally, the criteria that apply to the use of (different) means of coercion entailing the deprivation of liberty (i.e., police custody (*inverzekeringstelling),* remand in custody *(bewaring)* and remand detention *(gevangenhouding)*) will be altered under the proposed legislation. Un-

der current law, police custody (*inverzekeringstelling*) may only be ordered when 'a crime for which the application of preventive custody (*voorlopige hechtenis*) is permitted'. Remand in custody (*bewaring*) and remand detention (*gevangenhouding*) are forms of preventive custody.

With regard to the criteria that relate to the application of police custody (*inverzekeringstelling*) and remand in custody (*bewaring*), the *Contourennota* presents two options: either the introduction of a two-year criterion (Option 1) or the introduction of a one-year criterion but with the prescription that the public prosecutor carries out a test related to the necessity and proportionality of the police custody (*inverzekeringstelling*) in cases in which the maximum penalty that can be imposed is less than two years' imprisonment. The *Contourennota* proposed for the four-year criterion to be applied to remand detention (*gevangenhouding*). However, a strictly formulated exception may be introduced to the four-year criterion when there is a suspicion of crimes such as assault (Article 300 of the Dutch Criminal Code), damage to property (Article 350) and threatening (Article 285), in situations of domestic violence.

This study aims to set out the consequences of the proposed changes of the criteria for the application of investigative powers and the said means of coercion that entail [the] deprivation of liberty. The term 'consequences' refers to the anticipated effects of the proposed changes for the efficiency of criminal investigations. Such efficiency is assessed in both quantitative and qualitative terms. The following question was central to this research:

What will be the consequences of the changes that will be made to the criteria that pertain to the application of investigative powers for criminal investigations and means of coercion that entail the deprivation of liberty?

In order to arrive at a complete and correct overview of the consequences of the proposals, this study examines which investigative powers and means of coercion that entail [the] deprivation of liberty can no longer be applied as a result of the proposed changes when investigating one of the crimes selected for the purpose of this study, and whether this will lead to a loss of efficiency in the investigation of those crimes according to the practitioners involved (police officers and public prosecutors).

The following sub questions have been answered in this study:

1. *Which investigative powers can no longer be applied as a result of the simplification of the criteria that pertain to the application of investigative powers?*
2. *How often are such powers currently being applied in respect of the crimes that have been selected for the purpose of this study?*
3. *What will the consequences be for criminal investigations if these investigative powers can no longer be applied in respect of investigating the selected crimes? More specifically:*

   a. *In how many cases would the absence of such powers be problematic from the angle of efficiency?*
   b. *Are there other powers that may lead to similar results?*
4. *What will the consequences be for the efficiency of criminal investigations into the selected crimes when police custody (inverzekeringstelling) and remand in custody (bewaring) can no longer be applied in case one chooses Option 1 and in case one chooses Option 2?*

Chapter 2 sets out the study's starting point, within which framework the research has been conducted, and the methods that have been used in order to answer the research questions. Chapter 3 describes the legal consequences of the proposed changes. By means of a quantitative analysis of data provided by the Ministry of Security and Justice and of case files, Chapter 4 sets out how often the investigative measures and means of coercion that will no longer be permitted under the proposed changes are being applied when investigating the selected crimes. Chapter 5 answers the third sub question. On the basis of the results from interviews conducted with police personnel and public prosecutors as well as the outcomes of an expert meeting bringing together police officers and public prosecutors it examines whether threats will arise to the efficiency of criminal investigations if certain investigative powers and means of coercion will no longer be permitted, which alternatives exist, and whether those alternatives would be practicable. Finally, the central research question is answered in the Conclusion and Final Remarks.

Justification and methods

The legal analysis in Chapter 3 extends to the criminal offences listed in the Dutch Criminal Code (hereafter: DCC) as well as those listed in important other Acts: the Road Traffic Act 1994 (hereafter: WVW 1994), the Opium Act, the Economic Offences Act and the Weapons and Ammunitions Act (hereafter: WWM).

The analysis of data provided by the prosecution, the case file research, the interviews with public prosecutors and police officers, and the expert meeting were limited to a number of selected offences:

- Discrimination offences (Articles 137c-e and g, Par. 2 DCC);
- Electronic break-in (hacking) (Article 138ab, Par. 1 DCC);
- Performing denial of service attacks (Article 138b DCC);
- Unlawful tapping of data traffic (Article 139c DCC);
- To stock hacking tools (Article 139d DCC);
- Corruption of children (Article 248d DCC);
- Grooming (Article 248e DCC);
- Coercion (Article 284 DCC);

- Threatening (Article 285, Par. 1 DCC);
- Stalking (Article 285b DCC);
- Assault (Article 300, Par. 1 DCC);
- Damaging property (Article 350 DCC);
- Wrecking or rendering inaccessible of computer data (Article 350a, Par. 1 DCC);
- Abuse of emergency numbers (Article 142, Par. 2 DCC);
- Abandoning the place of [the] accident (Article 7 Road Traffic Act).

These criminal offences, bar the final two, were selected because remand custody (with the relevant investigative powers) may be applied in relation to them, while they draw a prison sentence of less than four years. We can therefore expect to see the biggest changes in connection with these offences. The final two criminal offences have been included because it has been anticipated in advance that these will be linked to problems because of the maximum penalty of three months' imprisonment that can be imposed for these crimes.

To answer the question of how often these measures are being applied under the current legislation, this study uses registration data provided by the Public Prosecution Service. The Service's *Parket-Generaal* has made available a data file of all cases – from all parts of the Netherlands and dealt with in 2013 – in which a person was suspected of committing one of the selected criminal offences. The year 2013 was chosen because this was the most recent year in which the chance of a case still being open is the smallest. Additionally, a sample of case files from the Amsterdam police unit was analysed.

Which investigative powers and means of coercion entailing the deprivation of liberty will no longer be permitted as a result of the proposed simplification of the criteria their application?

By means of a legal analysis in this study the focus is on which investigative powers and means of coercion entailing the deprivation of liberty will no longer be permitted as a result of the planned changes.

The following investigative powers will no longer be permitted in relation to all of the criminal offences listed in Article 67, Par. 1 under b and c of the Dutch Code of Criminal Procedure (hereafter: DCCP) (remand custody offences for which the maximum penalty is less than four years' imprisonment), because the four-year criterion will apply to them after the planned changes: the standard practices of taking pictures of the face and finger prints for identification purposes; internal examination of the body; shaving, cutting or growing a moustache, beard or head hair; wearing specific clothing or accessories in order to draw out a confrontation; taking palm, foot, toe or ear prints; taping telecommunications; and forced DNA tests. Additionally, large-scale DNA tests will no longer be permitted because they will fall under the eight-year criterion.

The powers relating to systematic observation, systematic information gathering, and ordering the release of user and identification data will no longer be permitted to be used to investigate criminal offences with maximum prison sentences of less than one year, because the one-year criterion will apply to these cases.

With regard to the effects of the changes to the criteria for the application of investigative powers on the application of the means of coercion entailing the deprivation of liberty one needs to differentiate between the effects of a choice for Option 1 (two-year criterion) and Option 2 (one-year criterion with the prescription that the public prosecutor carries out a test related to the necessity and proportionality of the *inverzekeringstelling*). In the case of Option 1, *inverzekeringstelling* and *bewaring* will no longer permitted with regard to the offences listed in Articles 137e Par. 2, 137g Par. 2, 138a Par. 1, 184a, 254a, 272, 344b, 417bis DCC and Article 55 Par. 2 WWM. In the case of Option 2, police custody (*inverzekeringstelling*) and remand in custody (*bewaring*) will no longer permitted with regard to the offences listed in Article 254a Par. 1 DCC and Article 55 Par. 2 WWM.

Implementing the four-year criterion in relation to the application of remand detention (*gevangenhouding*) will mean that this power will not be permitted in connection with any of the criminal offences listed in Article 67 Par. 1 under b and c. The *Contourennota* does mention that an exception to the four-year criteria is being considered for a number of criminal offences that involve domestic violence. However, it must be noted that the researchers assumed that the power to detain a suspect will continue to apply in cases where the suspect does not have a permanent residence in the Netherlands, and in cases where a person is suspected of committing an offence to which a prison sentence applies according to its legal definition.

Results of the simplification of the criteria for the application of investigative powers for the efficiency of investigations: how often are the powers being used?

Analysis of the Public Prosecution Service's data files

The data files from the Public Prosecution Service covering the study's reference year, 2013, produced 47,675 unique cases involving the criminal offences selected for this study with a maximum sentence of one to four years in prison, and 5,003 such cases where the maximum sentence was less than one year. The selected discrimination offences occurred in none of these cases. [Individual] computer-related offences occurred infrequently, so they were grouped together under the header 'cybercrime'. Grooming and corruption of minors were also grouped together as one category for the same reason.

In total, the application of one or more (special) investigative powers was registered in 181 (0.4%) of the selected cases. In 175 cases this included the taping of telecommunications and

in 18 cases this included taping confidential communication. In an absolute sense, cases that involved threatening and assault scored highest. In a relative sense, cybercrime scores highest. Infiltration and forced DNA testing had not been used at all according to the registration data.

In total, remand detention (*gevangenhouding*) was registered in 1,897 cases. In an absolute sense, this means of coercion entailing the deprivation of liberty was used most in cases where there was a suspicion of threats and/or assault; in a relative sense it was used most with suspected cases of grooming/perverting of minors. In 70% of these cases there were also suspicions of more serious criminal offences connected with maximum sentences of at least four years in prison. It is possible that the proposed legal change will not impact this type of case, because remand detention (*gevangenhouding*) will be permitted on the basis of those more serious offences. However, the Public Prosecution Service's registration system does not detail whether imprisonment was indeed ordered on the basis of the more serious offences. In 30% of those cases (570 in 2013), there was no suspicion of more serious offences and imprisonment would certainly not be permitted under the proposed regulation.

Case file analysis

The Public Prosecution Service's registration systems do not contain information on the application of investigative powers that do not require the involvement of a public prosecutor. Furthermore, they do not contain data on the application of Articles 55c, 56 Par. 2 and 61a. In order to obtain this data, the researchers had to rely on a case file analysis. Additionally, the information from the Public Prosecution Service's data files does not show in relation to which specific criminal offence(s) within a case a given investigative power was used. For the sample, a selection was made from the data file containing the cases of selected offences which were dealt with by the Public Prosecution Service in 2013, of cases in which the suspect was subpoenaed, in which the suspect was handed a 'penalty order' (*strafbeschikking*) (fine), or in which the case was settled out of court (*transactie*). For practical purposes, a further selection of cases was made from this group – of all cases that had been supplied by the Amsterdam police unit.

In the end, a sample of 293 case files concerning cases related to offences with maximum sentences of one to four years in prison were available for the analysis. Of cases with a maximum prison sentence of up to one year, 38 case files were studied.

Case files concerning cases relating to offences with a maximum sentence of one to four years in prison

The case file analysis confirms the findings of the registration data analysis, meaning that infiltration and forced DNA testing had not been used in the selected cases. The use of the powers to tape confidential communication and to tape telecommunications had been registered though, and was found in five and nine cases, respectively. 83 of the investigated case files showed that the power to take facial photographs and finger prints as a standard prac-

tice had been made use of (28%). Examinations inside the body and *maatregelen in het belang van het onderzoek* ('measures in the interest of the investigation', as set out in Article 61a DCCP) were not found in the case file analysis. In total, 88 case files (33%) showed that investigative powers had been applied that would no longer be permitted for use with regard to the selected crimes with a maximum sentence of one to four years in prison under the proposed legislation. Of those 88 case files in the analysis, 49 showed that the use of these powers was solely based on one or more of the selected crimes. In 19 case files the application of these powers was in part based on other, more serious crimes, and in 20 case files it was based solely on other, more serious crimes. The most frequently used power was the one detailed in Article 55c Par. 2 DCCP. Concretely, this means that photos and fingerprints could still be taken under the proposed legislation in 39 of the analysed case files containing criminal offences with maximum sentences of one to four years in prison. In 49 case files (17%) these powers would no longer be permitted for use and no photos and fingerprints of the suspect would be stored in the data files.

Remand detention (*gevangenhouding*) occurred in 35 of the analysed case files (in 12 of these 35 cases detention was suspended under certain conditions). This comes down to 12% of the case files concerning criminal offences with a maximum sentence of one to four years in prison (in which cases detention would not be permitted for use under the proposed regulation). However, in most cases (28 out of 35) detention was ordered solely or in part on the basis of other, more serious crimes. In 2% of all analysed case files related to criminal offences with a maximum sentence of one to four years in prison, detention was solely ordered on the basis of criminal offences with regard to which this will no longer be permitted under the proposed legislation.

Case files concerning cases relating to criminal offences with a maximum sentence of less than one year in prison

In the analysed case files, the investigative powers of systematic observation, systematic information gathering and ordering identifying data did not occur in relation to the investigation of selected criminal offences with a maximum sentence of less than a year in prison (abuse of emergency phone numbers and abandoning the scene of the crime). Meanwhile, in two of the analysed case files use was made of the power to order user data. However, in both cases this was done on the basis of other, more serious offences. As a result, in the analysed case files, no indication was found for the use of powers that will no longer be permitted under the proposed legislation.

Estimates

In order to confirm how many of the cases from Amsterdam from 2013 investigative powers and means of coercion entailing the deprivation of liberty had been used that will no longer be permitted under the proposed change in legislation, estimates were made on the basis of the results from the case file analysis. This was done by multiplying the percentages

of case files in which investigative powers or means of coercion entailing the deprivation of liberty had been applied solely on the basis of the selected crimes by the number of cases from which the sample of case files had been drawn. In an estimated 447 Amsterdam cases from 2013 relating to criminal offences with a maximum sentence of one to four years in prison special investigative powers had been used that will no longer be permitted after the proposed change in legislation. These 447 cases mostly pertain to threatening, assault and damage to property. In an estimated 53 cases from Amsterdam detention had been ordered in cases where this will no longer be permitted after the proposed change in legislation.

These estimates only pertain to cases in which the suspect was subpoenaed, in which the Public Prosecution Service had imposed a punishment (*OM-strafbeschikking*), or in which the case was settled out of court (*transactie*). Cases in which a decision not to prosecute had been made, were not included in the study. However, the cases in which the suspect was subpoenaed, in which the Public Prosecution Service had imposed a punishment (*OM-strafbeschikking*), or in which the case was settled out of court (*transactie*) made up the majority of the cases (62%). Additionally, the analysis of the Public Prosecution Service's registration data showed that 97% of the cases in which detention was registered the suspect had been subpoenaed. Furthermore, the estimates only pertain to Amsterdam. The question of the degree to which other police units recognize the picture sketched by the estimates from Amsterdam was put forward during an expert meeting.

Apart from the degree to which the results of the quantitative analysis of registration data and the case file analysis sketch a recognizable picture, the expert meeting also addressed the limitations of the data that were used to do the analyses. The participants stressed the importance of the application of powers for truth finding purposes, even when their application does not ultimately result in a prosecution. These figures were missing from the quantitative findings of the present study. A supplementary analysis points out that, in all of the Netherlands in 2013, 4,922 cases (containing the criminal offences selected for this study for which the maximum prison sentence is one to four years) were conditionally dismissed (*voorwaardelijk geseponeerd*) by the Public Prosecution Service. In none of these cases the use of 'special investigative powers' (*bijzondere opsporingsbevoegdheden*) was registered, and only in one case the use of detention was registered. How many cases from 2013 ended in a police dismissal (*politiesepot*) is unknown. These types of cases are missing from the Public Prosecution Service's registration data, and the researchers were not able to utilize the police's registration data because these files do not answer the question whether a 'special investigative power' (*bijzondere opsporingsbevoegdheid*) was used in an individual case.

Another thing that was brought up during the expert meeting is that cases in which a power that was used to investigate one of the selected offences led to the suspicion of a different, more serious, offence, which a subpoena was finally issued, for do not show up in the findings. Furthermore, it was noted that the instances of the application of powers that led to a

prosecution *abroad* have not found their way into the findings. Additionally, the application of investigative powers in the framework of international legal assistance does not show up in the quantitative findings of the present study. The choice of 2013 as the year to study was also said to have had an impact on the findings. For instance, the Public Prosecution Service hardly dealt with cases of cybercrime, discrimination and grooming in 2013, which means that the application of powers in these types of cases could not have been investigated properly. Given these limitations brought up by practitioners of the analysed (available) data, the estimates resulting from this study need to be seen as minimum estimates for the number of cases in which powers were used that will no longer be permitted after the proposed change in legislation. However, the expert meeting did not conclude that the application of powers in Amsterdam differs significantly from that by other regional police units. Assuming that the minimum estimates for Amsterdam can indeed be extrapolated to nation-wide minimum estimates, the percentage findings from the case file analysis have been multiplied by the number of cases that were settled with a subpoena, *strafbeschikking* (fine) or transaction nation-wide. Based on this information, it is estimated that in the Netherlands in 2013 investigative powers that will no longer be permitted after the proposed change in legislation were used in at least 4,990 cases. This concerns mostly the standard practice of taking fingerprints and photographs of the face, which will fall under the four-year criterion under the proposed legislation. In an estimated 587 cases, detention had been ordered in relation to criminal offences for which it will no longer be permitted after the change in legislation.

Consequences of the simplification of the criteria for the application of investigative powers on the efficiency of the investigation: shortcoming or alternatives?

In order to judge whether the efficiency of criminal investigations will be under threat if certain powers will no longer be permitted in relation to the offences selected for this study, the researchers have not only examined how often, but also in which situations the relevant powers are being applied in the current situation. Additionally, they examined whether there are other powers that can be used to obtain similar results. This was done by each individual (category of) power. Qualitative interviews were conducted with public prosecutors and police personnel, while the quantitative findings were checked for recognisability and validity during an expert meeting in which public prosecutors and police personnel took part. In a general sense, it must be pointed out that an oft-noted difference between a low frequency of the application of a power and the high level of importance granted to that power by practitioners can only be explained by the researchers by noting that the frequency of application is not necessarily relevant for the level of importance attributed to powers in concrete cases.

A number of investigative powers are not being applied in the investigation of the selected criminal offences. These are: Article 56 Par. 2 DCPC (internal examination of the body), Article 61a sub e (shaving, cutting or growing a moustache, beard or head hair), sub f (wearing specific clothing or accessories in order to draw out a confrontation) and sub g DCPC (placement in an observation cell) and Article 151b DCPC (making an order to acquire cell material for the purpose of DNA testing). Taking facial photos and fingerprints in order to confirm a person's identity (Article 55c Par. 2 DCPC) is standard practice in every case nowadays in most regional police units. Generally, it can also be noted that the significance of saving and processing both fingerprints and (mainly) facial photographs is great to the investigative practice in a quantitative sense (it is expected that the significance of fingerprints will only continue to grow in the coming years), while there are no workable alternatives.

Seeing as the power to confirm a person's identity through taking photographs and fingerprints when it is in doubt will continue to exist under the proposed regulation, the answer to the question of whether the loss of the use if the standard (mandatory) power of Article 55c Par. 2 DCPC will be considered as such depends to a great extent on the manner in which 'doubt' will come to be defined in the future. On the basis of remarks made by practitioners, the researchers fear the emergence of a 'creative approach' or a loose interpretation of the power, resulting in the investigative power being used when there is doubt about a person's identity as an alternative to the standard practice in Article 55c Par. 2 DCPC. On this basis, and on the basis that the proposed change in legislation represents a heightened standard when compared to the current situation (which, according to the researchers, cannot be justified on the basis of the (relatively slight) violation that the application creates in their view, compared to the interest of the (future) investigation), the researchers advise the introduction of the one-year criterion rather than the four-year criterion for the power in Article 55c Par. 2 DCPC.

Most '*special investigative powers*' (*bijzondere opsporingsbevoegdheden*) are not normally applied when investigating the criminal offences selected for this study. This especially rings true for more serious powers such as infiltration and the systematic gathering of information. Additionally, the latter power will not disappear for the time being when it comes to the selected crimes. According to respondents and the participants in the expert meeting, there is a growing need for the use of exactly these 'special investigative powers' (*bijzondere opsporingsbevoegdheden*) in the digital domain, while practitioners point out that, according to them, the violation of rights that their use represents is usually of a different order of greatness than in the physical domain. In their opinion, those powers no longer being permitted in relation to the selected crimes will cause more serious alternatives (in the physical domain) to be explored. From this perspective, the digital context would require a *sui generis* approach, i.e. for powers specific to the context.

The researchers do not agree with the argument that the violation of rights that these powers represent in the digital domain is of a different (lesser) order of greatness than the application of those same powers in the physical domain, and would therefore be more easily justified. In fact, the digital domain is where a large part of citizens' public lives take place nowadays. It is precisely this domain that they want to be able to be themselves in a carefree way. It is exactly the relatively limited seriousness of the crimes that have been selected for the present study that, according to the researchers, does not justify the use of such drastic powers as infiltration, taping confidential communication, and taping telecommunications.

Furthermore, the practitioners emphasize that the application of special investigative powers for a less serious offence (the criminal offences selected for this study) is often necessary to track down more serious offences. This so-called 'tip of the iceberg' argument for the retention of specific investigative powers for the relatively less serious offences that the investigation focuses on, would be applicable mostly to sex crimes, discrimination offences, and a lot of 'common' crimes.

The problem with this argument for the granting of powers that cause a certain violation to the rights of citizens in favour of the investigation of relatively less serious offences is its *ad infinitum* character, which is hardly in accordance with the rule of law (in the end, it argues in favour of issuing blank checks to investigative authorities in terms of investigative powers; after all, any curtailment of these powers could lead to certain crimes not being detected): in addition, it goes against the systematics of the Dutch Code of Criminal Procedure, which is based on the principle that the application of investigative powers needs to be linked to suspicion of a criminal offence and that more serious measures are permitted when there is a suspicion of more serious offences. Consequently, such an argument undermines one of the most important principles of criminal procedure. Additionally, the use of the powers to order the release of information (Article 126n-ne), systematic observations (Article 126g), and the systematic gathering of information (Article 126j) will remain permitted when investigating these criminal offences. That these offences are relatively less serious does not justify the application of drastic powers such as infiltration (Article 126h), taping confidential information (Article 126l), and listening in on and taping telecommunications (Article 126m).

Below, the (possible alternatives to) the use of special investigative powers will be discussed further, for each category of selected crimes:

> *'Common' criminal offences (e.g. threatening, coercion, stalking, and assault)*
> Special investigative powers are not used frequently in investigating 'common' criminal offences (*veel voorkomende criminaliteit*). The powers that *are* being used with some regularity will continue to be permitted, such as the powers to order (*vorderingsbevoegdheden*) in 126na and 126nc DCPC will continue to be permitted in relation to these criminal offences.

Article 7 WVW 1994: abandoning the scene of a crime

When investigating the offence of abandoning the scene of a crime, special investigate powers are hardly – if ever – used.

Article 142 Par. 2 DCC: abuse of emergency numbers

When investigation the offence of abusing emergency phone numbers, the power to order (*vorderingsbevoegdheid*) in Article 126na DCPC (the order is made through the CIOT). No longer being permitted to use this power will be a great loss to the investigation. There is no alternative way to obtain the user data.

Article 248d DCC and Article 248e DCC: perverting of minors and grooming

The investigative powers that are used frequently for the detection of these crimes will not disappear. The only exception is the taping of telecommunications (Article 126m DCPC). However, according to an analysis of the Public Prosecution Service's data, this power was only used in two cases related to the selected crimes nationally in 2013. Additionally, in those cases there must have been a link with other offences committed by the same suspect, because neither perverting of minors nor grooming can be considered serious breaches of the law.

Article 138ab DCC, Article 138b DCC and Article 139d DCC: cybercrime

Again, the investigative powers that are used frequently for the detection of these crimes will not disappear. And again, the taping of telecommunications forms an exception. This power was used in five cases nationally in the year chosen for this study (2013). Furthermore, it is again the case that there must have been a link to other offences committed by the suspect, because cybercrime is not usually considered a serious breach of the law.

Overall, it can be said that means of coercion entailing the deprivation of liberty are regularly used during the investigation of the selected crimes. The options to put a suspect in police custody (*inverzekeringstelling*) and custody (*bewaring*) will continue to exist if a choice is made in favour of the one-year criterion (with a mandatory test of proportionality and subsidiarity by the public prosecutor). In case the two-year criterion is implemented, these pre-trial detention options will no longer be permitted in relation to the selected crimes of disseminating discriminatory opinions in a professional, habitual or communal (two or more people) context (Article 137e Par. 2) and habitual or joint racial discrimination when performing the duties of an office or a profession (Article 137g Par. 2). However, these offences did not occur in the Netherlands during the research period.

The option to order detention (*gevangenhouding*) *will* come to disappear for all pre-trial detention offences with a maximum prison sentence of less than four years. The researchers assume that an exception will be made in relation to suspects who do not have a permanent residence in the Netherlands.

Although the application of police custody (*inverzekeringstelling*) and custody (*bewaring*) will remain possible in relation to the pre-trial detention offences in the study, the participants in the interviews and the expert meeting were asked what their preference is in terms of implementing Option 1 (two-year criterion) or Option 2 (one-year criterion, with the a mandatory test of proportionality and subsidiarity performed by the public prosecutor for offences with a maximum prison sentence between one and two years).

Because the proportionality test explicitly mandated under Option 2 as a criterion for the application of police custody already applies to all activities of the public prosecutor, all respondents opined that the choice between Options 1 and 2 comes down solely to a political choice for a one- or two-year criterion. The fact that, under Option 2, the public prosecutor (rather than a deputy public prosecutor (*hulpofficier van justitie*)) orders the police custody in cases where the maximum prison sentence is between one and two years – which the researchers agree adds significant value – was not addressed by the respondents or by the participants of the expert meeting.

Concluding remarks

All in all, the central question to this study – what the consequences of the proposed changes to the suspicion criteria will be for criminal investigations – can be answered by asserting that little will change, especially if the proposal by the researchers to apply a one-year criterion to the power in Article 55c Par. 2 DCC is taken on board. This finding is relevant to the offences that were selected for the present study due to the large societal interest in their investigation, their relative frequency, and the fact that problems had been foreseen if certain powers could no longer be used when investigating them. Special investigative powers that could no longer be used in case the proposed legislative changes are passed, such as infiltration (Article 126h), taping confidential communication (Article 126l) and recording telecommunications (Article 126m), are already hardly ever used. This observation results from the analysis of the Public Prosecution Service's data, from the case file analysis, the interviews with police personnel and public prosecutors who deal with the investigation and prosecution of these offences on a daily basis, and from the expert meeting. The power to conduct mandatory DNA tests and examinations inside the body, and the application of investigative measures (Article 61a DCPC), are not used in investigating the criminal offences selected for this study. Only the practices of taking fingerprints and taking photographs for identification purposes are currently standard practice when it comes to this type of criminal offence. That these obligations will cease to exist for the selected criminal offences after the proposed legislation is passed means that it will no longer be permitted to store these photographs and fingerprints in the databases that serve to prevent, investigate, prosecute and try criminal offences. The loss of this opportunity, which practitioners claim there is a great need for, leads the researchers to propose a re-evaluation of

the introduction of a four-year criterion. The introduction of a one-year criterion seems more suited for these (less intrusive) obligations.

Another problem is detected concerning the investigation of Article 142 Par. 2 DCC (abuse of emergency numbers). Because the possibility to demand user data (Article 126na DCPC) and identifying data (Article 126nc DCPC) will cease to exist, it will become significantly more difficult to detect these crimes. Alternative methods – besides the completely voluntary cooperation of involved citizens – are not available.

When it comes to pre-trial deprivation of liberty, only remand detention (*gevangenhouding*) will disappear for all crimes mentioned in Article 67 Par. 1 under b and c. According to the researchers, the intrusiveness of these means of coercion justifies this change. If other exceptions to the four-year criterion are to be considered, in addition to the proposed exception for cases of domestic violence, changes to the substantive law will need to be considered. Series of crime-specific exceptions to general rules do not lead to the desired simplification of the law.