

Summary

Access to legal aid during police interrogations in the Netherlands: 2017-2019

The early stage of the criminal justice process is of crucial importance for those who have been arrested or detained for a criminal offence. Within the first hours or days of detainment and police custody, the prospects for a fair trial and decisions about guilt or innocence are often determined. A central element within this initial part of the criminal justice process is the interrogation of the suspect by the police. In particular during these interrogations, suspects find themselves in a vulnerable position. This study reports on the state of affairs regarding the implementation of the right to access to legal aid during police interrogations in the early phase of the criminal justice process. This right, which we will refer to as *interrogation aid*, was established in the Netherlands in 2016. We look at the situation one to three years after its introduction and examine the organization and work processes, the implementation in practice, the role played by lawyers during police interrogations and the developments in expenditure on subsidized legal aid.

The right to interrogation aid originates from the Salduz judgment of the European Court of Human Rights. Before this judgment, suspects were entitled to receive interrogation aid after police custody but not in the period between the arrest and police custody (a 6 hours detainment period). As a result of the Salduz-judgment, this gradually changed over the years. First, in 2010, all suspects were given the right to receive consultation from a lawyer *before* interrogation, and underage suspects were given the additional right to receive legal aid *during* interrogation. In 2016, all suspects were given the right to receive legal aid during police interrogations. In 2017, these new regulations were established as formal rights (the Implementation Act).

The current report builds upon research by Klein Haarhuis (2018). She focused on the first year after the implementation of the new right. Klein Haarhuis (2018) described this new right predominantly from the perspective of the police organization. The most serious criminal offenses were included only to a limited extent. The present study again sheds light on the new right, but this time mainly from the perspective of the legal profession and one to three years after the introduction of the right. In addition, a greater number of serious criminal offenses could be included in the analyses allowing for more definite conclusions. We also looked at two changes that were implemented simultaneously with the Implementation Act, i.e. the limited extension of lawyers' powers during interrogation and the extension of the time period between arrest and police custody – the detainment period – for more serious criminal offenses from six to a maximum of nine hours.

The present investigation focuses on interrogation aid for adult suspects and for criminal offenses for which pre-trial detention is possible. In particular for these topics, relevant policy knowledge gaps exist. Interrogation aid includes the assistance during police interrogations and so called 'ivs'-interrogations during which a suspect is informed about placement in pre-trial detention. Consultation from a lawyer preceding the interrogation is not part of our research focus, but because it

is often strongly linked to legal aid during interrogation, we also pay attention to this element of legal aid in the pre-trial phase when necessary.

The following four research questions are central to this report.

- 1 How is the implementation of the Implementation Act progressing in terms of organization and work processes?
- 2 How does the implementation of the right to interrogation aid turn out in practice?
- 3 What role does the lawyer have during the interrogation?
- 4 How have the expenditures on (on-call) fees for consultation and interrogation aid developed?

Methods

Various information sources were used to answer our research questions. First, an online survey was held among all pre-trial ('piket') lawyers registered with the Legal Aid Board. A total of 1,159 lawyers completed our survey. Second, interrogation files were examined at eight of the ten district public prosecutors' offices of the Public Prosecution Service. A total of 375 interrogation reports belonging to suspects from 258 files were investigated. Third, nine local criminal law portfolio holders of the NOvA (the Dutch Bar) were interviewed, as well as eight police officers from three organizational layers (local team, district investigation and regional investigation) covering two police regions. Fourth, the Legal Aid Board provided data from their registers for secondary data analysis. Finally, a desk study was carried out. These information sources together offer a wide range of insights into the organization and implementation practice of the right to interrogation aid from different angles.

Research findings

Organization and work processes

Compared to the introduction of the law in 2016, the introduction of the Implementation Act on 1 March 2017 brought only a few changes in the organization of interrogation aid. We are not aware of any initiatives from the legal profession and from the Legal Aid Board other than the initiatives that were already described by Klein Haarhuis (2018). A number of existing tools used by the police have been adapted. According to the interviewed portfolio holders and police officers, the police are generally successful in facilitating interrogation aid. Overall, the interviewees are also positive about the collaboration between lawyers and police. According to the Bar's portfolio holders, the initial resistance among police officers and previous problems with the police have almost completely disappeared.

Most of the surveyed pre-trial lawyers experience suspects' right to interrogation aid as an added value. Ensuring that the statement of the suspect is recorded correctly in the official report, avoiding pressure on the suspect, being better informed about the police file, building a relationship of trust with the suspect and offering moral support are considered (very) important benefits by over 80% of the lawyers that participated in our survey. Moreover, a majority of lawyers consider more pertinent questions during the interrogation, as well as the possibility of influencing suspects' willingness to explain or remain silent during the interrogation as being of added value. Added value is perceived to be greater for vulnerable than for non-vulnerable

suspects. The limited extension of lawyers' powers during interrogation from 1 March 2017 is considered an improvement by about half of the surveyed lawyers. Questions on possible bottlenecks reveal a subset of lawyers with relatively positive experiences (consecutive planning of consultation and interrogation and limited waiting times) and a group with relatively negative experiences (non-consecutive planning and longer waiting times). When lawyers experience waiting time, the majority feel that they cannot use it usefully. The interviewees were also divided in their views on possible problems. Overall, the balance seems to tip toward positive experiences and only incidental problems. Problems that are mentioned mainly concern scheduling follow-up hearings and having to take lawyers' agendas into account, especially when suspects have a preferred lawyer. In cases concerning more serious offenses, there is often less time pressure because the suspect usually goes into pre-trial custody anyway. This makes it easier to schedule legal aid.

The implementation in practice

The analysis of the official interrogation reports shows that 76% of suspects are interrogated by the police once, 19% twice, 5% three times and less than 1% four times. On average, suspects are interrogated 1.3 times. In most cases, the police managed to complete the interrogation in the pre-trial phase and follow-up questioning was not necessary. Of all suspects, 41% does not engage a lawyer at all, 23% receives only a consultation, and 36% are assisted by a lawyer during their interrogation after receiving a consultation. Interrogation aid without a preceding consultation did not occur in our sample. For 26% of all suspects, the ivs-interrogation takes place without a lawyer; for 10% a lawyer is present, and for 3% the legal aid status is unknown. Of all suspects, 60% are not placed into pre-trial custody.

Suspects usually renounce their right to interrogation aid themselves. Reasons given include: not necessary, not needed, not wanted, or other reasons. If legal aid is used, this is usually provided by an on-call lawyer, but a preferred lawyer is also consulted regularly. Of all suspects who are interrogated only once, 32% make use of their right to interrogation aid. Of all suspects who were interrogated several times, 10% make use of their right to interrogation aid at every interview, 35% do so at any time, and 55% do not receive aid at all.

The total interrogation time, including interruptions and interrogations after the suspect has been taken into pre-trial custody, but excluding the ivs-interrogation, is 75 minutes on average and the median is 55 minutes. For offenses with a penalty of 12 years or more, the average is about 30 minutes more than for offenses with a penalty of 6-12 years, and about 40 minutes more than for offenses with a penalty of 4-6 years. With an average difference of 41 minutes and a median difference of 21 minutes, cases in which suspects received interrogation aid take considerably longer than cases in which no interrogation aid was received.

Role of the lawyer

Pre-trial lawyers frequently make use of the extended powers during interrogation that came along with the introduction of the Implementation Act. Their most common intervention is to make comments and question the suspect or the interrogating officer. Survey results indicate that this occurs 'regularly' or 'often'. In addition, pre-trial lawyers 'sometimes' or 'regularly' ask for clarification of questions and 'sometimes' remind suspects of their right to remain silent. There is very little evidence of interventions in response to violation of the prohibition of pressure.

This also applies to answering a question on behalf of the suspect (for which permission is required from the interrogator). According to the surveyed lawyers and the official interrogations reports, interventions are often allowed by interrogators. Lawyers' presence does not seem to influence whether or not the suspect remains silent during interrogation.

Development of expenditures on pre-trial legal aid

The introduction and expansion of the right to receive consultation and interrogation aid has led to an increase in expenditures within the pre-trial section of the legal aid system. Between 2008 and 2018, total expenditure on legal aid in the pre-trial phase of criminal cases increases by 12.5 million euros (7.6 million euros when adjusted for inflation; adults and minors combined). The introduction of interrogation aid for adult suspects in 2016 results in a significant increase in the number of claims for this form of aid. Between 2015 and 2016, the number of claims for interrogation aid after consultation increases fivefold, and the number of claims for interrogation aid without prior consultation increases by a factor of 6.5. Between 2016 and 2018, the number of claims for consultation and interrogation aid continues to increase, while the number of claims for interrogation aid continues to rise in 2017 and then returns to the 2016 level. The increase in claims for both consultation and interrogation aid comes along with a decrease in the number of claims for just consultation aid, which has more than halved over the 2015-2018 period.

Limitations of the police file investigation

With regard to the findings from the police file investigation, it should be noted that we have not gained insight into interrogations in cases where an appeal has been lodged. It is possible that the proof in these cases is more difficult than in the cases studied, which could be reflected in longer interrogation times and multiple interrogations before subjects are taken into custody. Future research should reveal to what extent the length of interrogations in the phase between arrest and police custody depends on whether an appeal has been lodged. The lack of non-prosecuted suspects in our sample of files may also have influenced the results of our investigation. Suspects who are not prosecuted, often due to a lack of evidence, may have shorter interrogations and may also be less likely to use a lawyer.

Final remarks

All things considered, the present study shows a number of positive developments. First, the organization and work processes of the various parties now seem to be well consolidated. The entry into force of the Implementation Act on 1 March 2017 brings few changes to the formal organization of interrogation aid. From the implementation practice it is clear that the work processes are mostly by the book. Of course there are exceptions, and sometimes deviations are made from the standard processes, but this almost never results in insurmountable problems for the police or the legal profession. There also seems to be a mutual understanding of each other's position and problems in the process, so that any struggles are more easily accepted. In addition, lawyers' presence does not lead to an increase in the proportion of suspects who remain silent. Problems in the organization and work processes that emerge do not seem to be of a structural nature. These problems include the waiting time for lawyers and police officers as well as the sometimes limited telephone accessibility of the police.

During the research, two observations were made that we would like to dwell on. First, we looked at 25 files of suspects whose criminal case began with a summons to the police station. These suspects were eventually prosecuted by the officer for an offense for which pre-trial detention is possible. Compared to arrested suspects, these summoned suspects are much less likely to use legal aid during the first interrogation. This observation calls for more research into the considerations behind summoning as well as the question at what point the police deem it necessary to proceed with arrest in order to protect the rights of the person facing criminal trial. Secondly, it was noted that there is an area of tension between the set two-hour period for the lawyer to come to the location to provide consultation aid and, on the other hand, the desire on the part of the government to have consultation aid and interrogation aid take place as closely as possible to one another. The two-hour deadline sometimes seems to be at odds with the time needed to start an interrogation.

Finally, it should be noted that the present investigation is not an evaluation study but provides a picture of the state of affairs with regard to suspects' right to interrogation aid. In this report, the implementation has been viewed primarily from the perspective of the legal profession. Although the eight police officers interviewed provided valuable insights for our investigation, for a more complete picture of the police perspective we refer to Klein Haarhuis' (2018) earlier report.