

Summary

The efficacy of defendants who refuse pre-trial forensic psychiatric assessment Background and research plan

Background

Some suspects of serious crimes refuse to participate in pre-trial forensic psychiatric assessments. These assessments are conducted by behavioral experts, mostly psychiatrists and psychologists, and are necessary to determine the possible influence of psychiatric disorders at the time of the crime. If psychiatric disorders were present at and related to the (time of the) crime, this may lead to diminished criminal responsibility and instead of or in combination with a prison sentence, mandatory treatment may be imposed. Some defendants, however, refuse to participate in these assessments. In some cases, this may lead to a lack of information on the mental state of the defendant, thereby making it more difficult to impose mandatory treatment. In other cases, information on the defendant is available through other sources and the influence of assessment refusal is less prominent. For defendants who need treatment to reduce their risk of recidivism, refusal of forensic psychiatric pre-trial assessment is an unwanted situation as this may make a judge's imposition of mandatory treatment more difficult. In order to reduce the number of defendants who refuse pre-trial forensic psychiatric assessment, the legislator took several measures. Together these measures are called the 'refusal approach'. The Research and Documentation Centre (WODC) was asked to write a research plan evaluating the refusal approach. In the current report, this research plan is set out.

Methods

The research plan is the result of an analysis of policy documents, including formal promises made to Dutch parliament, and a comparison with previous studies on defendants who refuse pre-trial forensic psychiatric assessment. This analysis led to several research questions and methods. These were then divided into five separate studies that overall, should provide insight into the effectiveness of the refusal approach. The research questions and methods are to be seen as preliminary, these may be altered when deemed necessary.

Results

Goals refusal approach

Three goals of the refusal approach were determined from the policy documents:

- 1 To increase the safety of society on behalf of defendants who refuse pre-trial forensic psychiatric assessment;
- 2 To reduce the number of defendants who refuse pre-trial forensic psychiatric assessment;
- 3 The reduction of the effects of refusing pre-trial forensic psychiatric assessment:

- a To more often impose a tbs-order when this is the best measure to reduce the risk of recidivism. The tbs-order is a judicial measure that entails mandatory hospitalization and treatment in a forensic psychiatric hospital (art. 37a.1 Dutch Criminal Code [DCC]);
- b To impose treatment within a different judicial setting when the imposition of a tbs-order is not possible.

Parts refusal approach

The refusal approach consists of eight parts:

- 1 The Regulation on defendants refusing pre-trial forensic assessment in the Law on forensic care (LFC) and the Advisory Committee on the Disclosure of Information (ACDI);
- 2 Prolongation of the observation period in the Pieter Baan Centre (PBC), a center for forensic psychiatric assessment through, among others, observation;
- 3 Evaluation of the adjusted observation policies for defendants who refuse forensic psychiatric assessment in the PBC;
- 4 Alterations in the disorder criterion;
- 5 Alterations in the risk criterion;
- 6 Improvements in the knowledge and expertise of judges and district attorneys;
- 7 Adjustments in the system of temporary leave;
- 8 Care during and after regular detention.

These parts are described in more detail below. The Regulation on defendants refusing pre-trial forensic assessment in the Law on forensic care (RLFC) involves stipulations on circumstances and conditions under which medical confidentiality may be (partially) breached (art. 37a 6-9 DCC). The ACDI was set up to advise the forensic psychiatric assessors on the presence and usefulness of this information. The RLFC was implemented on the 28 November 2019. A lot of discussion during the parliamentary process involved this possibility to breach medical confidentiality. The other main topics that were discussed were the composition of the ACDI, the role of the penitentiary chambers, privacy aspects and the compatibility with the Law on protection of personal information, the contribution to the solution of the problem of defendants who refuse to participate in pre-trial forensic psychiatric assessment and the possible unwanted side effects of applications to destroy medical files and to avoid psychiatric care. A number of promises to address these possible problems were made to Parliament and for the current research program, research questions were formulated.

The second alteration in legislation is the possibility to prolong the duration of observation at the PBC with a maximum of seven weeks. This alteration was implemented on 1 July 2018 (art. 198 2 Dutch Code of Criminal Procedures [DCCP]).

Third, in April 2017, the PBC opened a special ward within the PBC for refusing defendants and implemented some alterations to their observation process. In a pilot period of one year, the regular observation process was intensified with the goal to increase the amount of information that could be retrieved. After a somewhat positive evaluation of this pilot, showing indeed an increase in some of the information, the changes were implemented in the regular observation process of the PBC. As part of the refusal approach, it will be examined how these changes continued to sort their influence.

Further, two crucial pieces of the legislation necessary for the imposition of a tbs-order were altered, one on disorder(s) and one on danger or risk of recidivism.

With regards to the diagnosis of disorders it was clarified that the judge and not the behavioral experts have to make the final decision on the presence of a disorder. With regards to the risk criterion, the order of the conditions for the imposition of a tbs-order was changed with the criterion of danger taking a more prominent position than before to better reflect that the danger a person may pose to society is an important criterion in the imposition of a tbs-order.

The sixth alteration involves the intention to enhance the knowledge and expertise of judges and district attorneys. This was the result of the conclusion that not all of them were informed on the possibilities to impose the tbs-order when defendants refuse to participate in pre-trial forensic psychiatric assessment.

The improvement of the legal position of tbs-patients was improved in two manners: a tbs-patient no longer loses the right to temporary leave when he possibly has committed a new offence. Also, a tbs-patient in long-term forensic psychiatric care has been given extra possibilities to certain kinds of temporary leave.

The eight and final adjustment that was made, concerns the focal point to guarantee care and treatment for all offenders who may need this. This can also be, besides a forensic psychiatric clinic, a penitentiary institution, a penitentiary hospital or a psychiatric hospital. Furthermore, several legal possibilities exist to ensure such care. For instance, the Measure on behavioral influence and limitation of freedom (MBI; *Gedragsbeïnvloedende en vrijheidsheidsbeperkende maatregel*) within the Law on long-term supervision (LLTS), article 2.3 of the LFC and as conditions imposed in the conditional release of offenders.

Research questions and research methods

In total, 24 research questions were formulated to evaluate the eight parts of the refusal approach. These were divided into five research projects, with the following main topics:

- 1 recidivism rates
 - a recidivism rates for defendants who refuse pre-trial assessment will be compared to those who do not refuse this assessment;
- 2 prevalence rates and punishments
 - a the number of defendants who refuse pre-trial assessment;
 - b the punishment and measures imposed to refusing defendants;
 - c the prolongation of the special approach for refusing defendants in the PBC;
- 3 the evaluation of the RLFC and ACIDI;
- 4 study of legal alterations
 - a the impact of possible side effects, such as applications to destroy medical files and people who may avoid psychiatric care;
 - b the clarification of the disorder and risk criteria;
 - c the effects of the adjustment of the legal position of tbs-patients;
- 5 final report
 - a synthesis of all research projects.

Several qualitative as well as quantitative research methods will be used. Data will be collected from the PBC, case law will be examined to determine the likely punishments and measures imposed on refusing defendants and to determine the use of the RLFC, there will be an analysis of all the legal changes, files for the ACIDI will be examined, interviews will be held with all relevant parties such as the Netherlands Institute for forensic psychiatry and psychology (NIFP), district attorney

(OM), lawyers, judges and treatment staff and panel data among large subgroups of relevant populations will be used.

Conclusion

The final evaluation of the refusal approach is expected to be published three years after the last legislative changes, in 2023. In the meantime, some reports of the separate research projects will be published.