

Summary

The Dutch Hospital Orders (Framework) Act (*Bvt*) took effect in 1997. This Act regulates the internal legal position of mentally ill offenders subject to the Dutch special sanction in criminal law: the *tbs* measure. Ten years after its enactment, the Act was evaluated for the second time. Three issues were presented for examination in this study, specifically:

1. *How has the Act been implemented in tbs institutions in the ten years since it became effective?*
2. *To what extent have the objectives envisaged by the Act been achieved?*
3. *What are the obstacles which have arisen, and which points merit special attention? What undesirable side effects has the Act had?*

To address the issues presented and the research questions, the investigation included an analysis of the professional literature, annual reports, legislation and case law by the complaints committees and appeals board of the Council for the Administration of Criminal Justice and Protection of Juveniles (*RSJ*). Through a survey, an initial impression was gained of the degree to which the various aspects of the Hospital Orders (Framework) Act have actually been implemented in institutions. Surveys were given to 605 employees of *tbs* institutions and to 420 persons subject to *tbs* measures, with a response rate of 48.5% and 50.5% respectively. Based on the survey results and a study of the case law, semi-structured questionnaires were formulated, which were used in conducting interviews with key figures from the *tbs* institutions and from the custodial institutions law area. In total, 33 interviews were conducted with 51 key figures from *tbs* institutions, and 18 interviews with 31 key figures from the custodial institutions law area.

Implementation

Without a doubt, the increased attention for the rights of *tbs* patients has permanently affected the relationships within *tbs* hospitals. Both the Hospital Orders (Framework) Act itself and the case law serve as a guideline for the professional conduct of officials involved in enforcing the *tbs* measure. The laws and regulations constitute a reference point, perhaps not just beforehand, but also in justifying the interventions by personnel after-the-fact. There is a problem here, however. To apply the provisions of the Act correctly, employees

of tbs institutions must be sufficiently aware of the content of the law. Although the provisions of the Act are generally complied with, the investigation revealed that the personnel at tbs institutions in general feel that no or not enough training is provided to them regarding the legal position of tbs patients. In addition, a majority of the persons subject to tbs measures believe that the personnel are not really aware or only partially aware of the rights and obligations of tbs offenders. The tbs offenders themselves likewise do not appear to be informed optimally about their legal position under the Hospital Orders (Framework) Act. While a majority do seem to be cognizant of the internal rules, knowledge about the Act is not provided in a well-organized manner within institutions, and the relevant laws and regulations are not easily accessible, either.

Objectives

The development of the Hospital Orders (Framework) Act assumed the need for optimal coordination between the three fundamental dimensions of the tbs measure: to wit, protection (for society), treatment (for tbs offenders, with an eye towards re-socialization) and legal position (of tbs offenders, during the enforcement of the measure). Society is protected in the short term through detention, and in the long term through treatment focusing on reducing the risk of re-offence to such a level that allowing this person to return to society is justifiable. These three components regulating the tbs offender's legal position operate in a dynamic enforcement process as three pillars which keep each other in balance. As such, these components can be viewed as the foundations for responsible enforcement of the tbs measure. Partly as a result of the discussions in society in connection with several serious incidents, the emphasis in recent years with respect to tbs hospital stays has shifted even more to the protection aspect, with attention for treatment being pushed to the background. This process has also been reinforced by the general trend towards a society which hardly deems risks acceptable any more. A great deal of effort is therefore dedicated to minimizing safety risks. The heightened emphasis on protection has sometimes been at the expense of treatment, and the rights of tbs patients have also been compromised. The interviews in the hospital made crystal clear that protection is now considered the priority with, if not the *raison d'être* for, tbs measures. Three obstacles consistently cropped up in the investigation: the capacity problem, the personnel staffing and the increased ministerial control (see Chapter 5). This has made the search for a balance between care, treatment and legal position more difficult in the last several years.

Obstacles and problem areas

A major finding of the study was that 'care' and 'treatment' are terms which, though formally distinct from one another in the law, are strongly interwoven in clinical practice. The survey showed that nearly half of the employees believe that, in institutions, there is no clear distinction between care and treatment. The right to treatment is not provided for as such in the Hospital Orders (Framework) Act; for tbs offenders, this right can be inferred from Article 37c(2), Dutch

Criminal Code (*Wetboek van Strafrecht*), which states that the Minister must ensure that persons subject to the tbs measure receive the required treatment. Very few enforceable rights relating to treatment for tbs offenders can therefore be inferred from the Hospital Orders (Framework) Act. Tbs patients merely have the right to periodic evaluations of the progress of the care and treatment and the right to provide written comments on the evaluation report (Article 18 of the Act), as well as the right to inspect the information recorded in the patient file (Article 20 of the Act). The investigation disclosed that these rights are generally respected. Other important aspects of the treatment are set forth in the Hospital Orders (Framework) Act as a duty of care on the part of the head of the institution, for example, the adoption of a care and treatment plan within three months. Two-thirds of the tbs offenders indicated in the survey that this period was substantially exceeded. Further elaboration of the right to treatment in the penal laws might reduce the vagueness and uncertainty existing at present.

Personnel shortages often result in treatment being postponed for a long time and waiting lists being created. Thus, 40% of the employees disagreed with the statement that the institution had sufficient treatment modalities and facilities to meet the treatment needs of the tbs patient population. One-third of the persons subject to tbs measures said that the treatment did not satisfy their needs or wishes.

The Hospital Orders (Framework) Act distinguishes between, on the one hand, disciplinary punishments (Articles 48 and 49 of the Act) and, on the other hand, order and safety measures based on which, for example, freedom of movement within the institution may be restricted. While two-thirds of the employees surveyed stated that disciplinary measures were applied, it was clear from the interviews (and internal rules) that this occurs seldom or never. It must be concluded that employees do not really seem to understand the distinction between disciplinary punishments and measures. Based on the information from the interviews, the regulation of disciplinary punishments in the law appears to be a dead letter.

Article 4 of the Hospital Orders (Framework) Act does not include the option of admitting patients pursuant to civil-law procedures. Under the Special Admissions to Psychiatric Hospitals Act (*Wet Bopz*), however, they may be admitted to a custodial tbs institution. Although the Hospital Orders (Framework) Act applies to this category, the patients concerned sometimes do not realize this.

The problems mentioned in this evaluation with regard to the management of money by tbs offenders were consistent with the findings from the first evaluation of the Hospital Orders (Framework) Act: The survey showed that almost one-quarter of the employees thought that the institution did not have enough control over how patients spent their financial resources outside the institution. The persons interviewed at a number of institutions regarded this as a problem, because finances are considered an important factor in managing the risk that patients will commit new crimes. Several institutions have resolved this issue by encouraging the tbs patient upon arrival to transfer the 'outside money'

to the 'inside account' which the patient has with the institution. The institution does not have absolute power in this respect, however: A tbs offender cannot be required to do this. The inability to make payments or to pay off debts for the tbs patient without the patient's permission is sometimes viewed as an obstacle. The conclusion to be drawn is that additional provisions in the law concerning the management of money may be necessary. Apparently, the general provisions in the Dutch Civil Code [*Burgerlijk Wetboek*] with respect to administration orders, guardianship and curatorship are inadequate.

Article 26.1, Hospital Orders (Framework) Act, states that, in order to avert danger to a patient's health or safety, the head of an institution may, on the recommendation of a doctor, require the patient to submit to a specific medical treatment. The Hospital Orders (Care) Regulations (*Rvt*) provide further rules regarding this. At present, the Hospital Orders (Framework) Act does not include any basis for forced treatment, but only the possibility of performing a forced medical procedure of short duration, as stated in Article 26 of the Act. Nearly 45%¹ of the employees who completed the survey said that the possibilities for administering forced medication are too limited. Nearly 41% percent did not think so. The interviews showed that a majority favoured expanding the possibilities. It was indicated that the criteria for administering forced medication are too narrow. In the light of the major shortage of personnel in institutions, this desire must, however, be addressed in a careful manner.

Long-stay facilities are intended for tbs offenders for whom, despite lengthy treatment, it has not been possible to reduce the risk of re-offence to an acceptable level, and for whom, given the current state of the science and practice, no realistic prospect of treatment is deemed to exist. Members of the Council for the Administration of Criminal Justice and Protection of Juveniles and advisors indicated in the interviews that, in their opinion, the possibilities for reviewing placements in long-stay facilities are insufficient. There needs to be an opportunity for appeals, with the Court of Appeal in Arnhem, for example. Long-stay facilities are not mentioned in the Hospital Orders (Framework) Act. Many respondents felt that long-stay placement is too drastic a measure to be regulated within a policy framework. Moreover, the question was emphatically raised whether tbs offenders in long-stay facilities ought not to have an entirely different legal position, given that the goal of a long stay – contrary to what is presumed in the Hospital Orders (Framework) Act – is no longer a return to society, but a stay which is as humane as possible. The examination of the case law revealed that appeals against long-stay placement decisions constituted the largest group of placement/transfer appeals in 2005 and 2006; these represented 53% of the placement/transfer appeals in 2005, and 57% in 2006. It is noteworthy that a relatively large number of these appeals were allowed (in whole or in part), specifically, 23% in 2005 and 38% in 2006.

Article 56, Hospital Orders (Framework) Act, states that a tbs patient may file a complaint with the complaints committee of the Supervisory Committee

1 Dispersion: 6 to 64 percent.

[*Commissie van Toezicht*] regarding various decisions taken by the head of the institution. Before doing so, the patient may ask the Supervisory Committee to mediate (Article 55 of the Act). It was apparent both from the analysis of the Supervisory Committee's annual reports and from the interviews that mediation is intensively used at almost all institutions. While the text of Article 55 of the Act seems to place the initiative for this in the tbs offender's hands, complaints are submitted to mediation first in most of the institutions, unless the tbs offender absolutely does not want this. At some institutions, complaints are in fact submitted to mediation in all cases, even if the tbs offender objects to this. Remarkably, a large number of complaints are withdrawn after mediation. This particularly merits attention in the light of the pressure which tbs offenders may experience to agree to mediation.

The survey disclosed that tbs offenders are generally aware of the complaints procedure and, to the extent they take advantage of this, feel that the complaints are taken seriously by the complaints committee. At the same time, it was clear that the complaints committee is not seen as a body which is independent of the institution. The tbs offenders pointed out in the interviews that, in their view, institution employees equate filing complaints with not cooperating in the treatment. A complaint which was often expressed in the interviews was that decisions are not rendered within four weeks (Article 65.1, Hospital Orders (Framework) Act), with it not being exceptional for a decision to take several months.

Finally, unlike the Custodial Institutions Act [*Penitentiaire Beginselenwet*] the Hospital Orders (Framework) Act does not allow for an appeal against medical treatment by a doctor affiliated with the institution. The respondents from the custodial institutions law area particularly lamented this.