

Summary van het rapport *Gevangen in de EBI* H.G. van de Bunt et al. 2013

Background and purpose

To reduce the number of prison escapes the decision was taken at the end of the 1980s to house detainees who pose a flight risk in Extra Secure Units (known as EBAs) in four different prisons. However, this set-up proved to be inadequate. Following several violent breakouts in the early 1990s, the housing of prisoners who pose a flight risk and/or a risk to society was concentrated in a special prison facility within an existing penitentiary institution. This facility, the Temporary Extra Secure Institution (TEBI), was established in 1993 within the Penitentiary Institution Vught (PI Vught). In 1997, the TEBI moved to a new facility and the Extra Secure Institution (EBI), unit 5¹, came into being. The EBI is designed to house both prisoners on remand and convicted prisoners² who (1) pose an extreme flight risk and an unacceptable risk to society because of the danger of recidivism for serious violent offences, or (2) pose an unacceptable risk to society if they escape from detention, but the risk of flight as such is of secondary importance. This involves situations where the escape of the prisoner would lead to serious societal unrest.

Since its inception in 1993, the TEBI has delivered on its promise to secure the specific target population entrusted to its care. Not one prisoner has escaped from the (T)EBI since 1993. The main objective of the EBI has thus been achieved. Neither have there been any escape attempts or hostage situations in the EBI. There have also been relatively few violent incidents involving prison personnel. Questions regarding the effectiveness of the EBI are therefore easy to answer without any in-depth research. Anyone who has visited the EBI knows that breakouts are unlikely to occur in future, providing that the current facilities and the strict regime remain unchanged.

This study poses the question at what price this effectiveness is being achieved. The question is warranted given that the EBI's strict security precautions have given rise to controversy and criticism from the outset. Against this background, the Research and Documentation Centre (WODC) of the Ministry of Security and Justice (MvV&J) commissioned a study to examine the functioning of the EBI and, more specifically, the various 'costs' of the institution's regime. This study addresses the financial costs to the taxpayer, the immaterial costs to prisoners and prison staff (e.g. workload) and, finally, the judicial costs.

Research questions

The central question of the research is:

At what price are the objectives of the EBI being achieved (no hostage-takings; no escapes)?

To answer the central question we formulated the following sub-questions:

1. What is the history of the development of the EBI, what are the specific characteristics of the EBI regime and what are the financial costs of the EBI?
2. What is the legal position of EBI prisoners and what are the judicial 'costs' of the regime?
3. How do members of the prison staff implement the regime in practice and what are the 'costs' involved?
4. How do the prisoners experience their stay in the EBI and what 'costs' do they encounter?

¹ Unit 5 is the official name of the EBI within the Penitentiary Institution Vught (PI Vught).

² The EBI is designed to house both male and female adult prisoners.

Approach and research methods

In order to answer our research questions we used various methods and studied a range of sources. We interviewed 40 persons in 35 interviews: policy makers who were instrumental in setting up the (T)EBI, current and former EBI employees and current and former EBI prisoners. We also studied the daily and monthly reports on current and former EBI prisoners. In addition, we obtained key figures on, among other things, the number of staff employed, the costs of EBI cells, the number of prisoners and the length of their stay, the number of internal sanctions and measures, and the number of complaint cases. To this end, we used the data sources made available by the EBI and PI Vught. To examine the legal position of EBI prisoners we used the customary juristic methods and sources, such as regulations and jurisprudence. In addition to national legislation and case law, we also made use of international norms regarding the position of detainees (in particular Article 3 of the European Convention on Human Rights (ECHR), judgments of the European Court of Human Rights (ECtHR), as well as the work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

We carried out an analysis of escapes from secure facilities in the period 2006-2011 to establish how often prisoners escape from these facilities and how they manage to do so. Based on this analysis we evaluated the plausibility of the idea that successful escapes can be attributed to the lack of one or more security precautions that are in force in the EBI, but not in other facilities. Finally, we used several other research methods and sources, such as attending the meetings of a unit team, the Selection Advisory Committee EBI (SAC-EBI) and the Multi Disciplinary Consultations (MDO); conducting informal conversations with prison staff and detainees; observing the work routines and interactions between prison staff and detainees; and studying the research literature, policy documents and parliamentary documents.

A limitation of this study is that we did not perform a comparative empirical study on the costs of detention in other prisons. By using the methods and sources mentioned above (especially the interviews and daily and monthly reports) we have mainly focused on recording the opinions and perceptions of prisoners and staff members.

The EBI in Vught

The establishment of the TEBI in 1993 was preceded by a period characterized by a concurrence of several crisis situations involving spectacular prison breakouts from Extra Secure Units. In the early 1990s plans were developed to create a separate facility for offenders who pose a serious flight risk. In 1993 such prisoners were concentrated in an extra secure facility with strict house rules and safety precautions. In the following years the new EBI was built on the grounds of PI Vught. It was brought into use in 1997.

The establishment of the EBI with its maximum security level went against the trend in modern penitentiary history described by Franke of encouraging self-control and personal responsibility among detainees, as is the case with 'half-open' prisons. The primary objective of the EBI is to prevent the escape of prisoners who pose an extreme flight risk or whose escape would lead to unacceptable societal unrest. The prisoners are kept in line not by self-control, but by extreme external control. They are left in no doubt that any attempt at escape will be futile. Although a shift can be observed in the enforcement of the strict and limited EBI regime, this regime remains unique in the Netherlands.

Thus far, the EBI has achieved its objectives. There have been no hostage-takings and not one prisoner has escaped, despite the fact that the EBI houses prisoners who pose an extreme flight risk. From the comparison with escapes from other secure prisons it appears that the modus operandi of these escapes would have been unsuccessful in the EBI. The question is, however, at what price this situation is being achieved. It should be obvious that a prisoner's stay in the EBI and the implementation of the regime in practice come at a higher cost than a stay and the implementation of the regime in other (closed) penitentiary institutions. The standard costs of an EBI cell are higher than the costs of a cell in other facilities, which is in part due to the fact that the ratio between staff and prisoners is at least 2 to 1. In addition, there are various extra costs (such as transportation to hospital or the court) which are added to the total costs of PI Vught on top of the costs per cell; EBI prisoners are entitled to remuneration for work (even though no work opportunities are provided); and EBI personnel are awarded a special EBI bonus. The exceptional nature of the EBI is also illustrated by the standard

compensation amounts awarded by the Council for the Administration of Criminal Justice and Protection of Juveniles (RSJ). Damages for wrongful imprisonment in the EBI are higher than those for wrongful imprisonment in other institutions.

The legal position of EBI prisoners

A prisoner's stay in the EBI is governed by a large number of norms, some of which apply to penitentiary institutions in general, while others specifically apply to the EBI. Existing legislation provides for far-reaching powers of the prison director and restrictions on the rights and freedoms of the detainees. The EBI regime is further defined by the way in which these powers are being put to use.

The EBI regime as such cannot be deemed unlawful, given the jurisprudence described in chapter 3. Elements of the regime which were unlawful, such as systematic searches and the absence of any possibility to talk to life partners and close relatives without a glass partition, have since been adjusted. The same goes for elements which were not unlawful as such, but for which provisions could be made to meet prisoners' complaints, such as the possibility to study case files in one's cell. This does not alter the fact that there are still points of contention. The regime is restrictive and it entails far-reaching limitations on various basic rights, such as the right to privacy, family life and physical integrity. For security reasons, the right to work is also not being implemented (ISt, 2011: 99). It remains necessary to look for ways to implement the right to work in a manner that does not detract from the effectiveness of the security measures. The same is true for a limited extension of the possibility to receive visits from life partners and close relatives without a glass partition. The restrictions on contact with the outside world constitute the most difficult aspect of life in the EBI. From a perspective of subsidiarity an assessment should be made of how the situation of the detainees could be alleviated without compromising prison security. Rehabilitation is not given a high priority in the EBI due to the limits imposed by the strict security regime.

The number of detainees in the EBI is relatively low. The selection procedure is surrounded by safeguards and has resulted – also due to the assessments made by the RSJ – in the EBI never being filled to capacity, not even when the rest of the Dutch prison system was facing capacity problems. Even so, within the framework of the selection procedure there are two points of controversy. Firstly, placement in the EBI is often prompted by information provided by the Prisoner Investigation Information Point (GRIP). This information can not be checked by the detainee, his lawyer or the RSJ. Secondly, prisoners find it unsatisfactory that good behaviour is not factored into extension decisions. According to several detainees, these two aspects have reduced the extension procedure to a mere formality. However, recent jurisdiction by the RSJ demonstrates that extension decisions are indeed subjected to critical review.

Working in the EBI

Because of the violent breakouts of the 1980s and early 1990s it was difficult at first to find staff willing to work with the specific target population of the (T)EBI – prisoners who pose a flight risk and are prepared to use violence or take hostages. Today, the majority of personnel seem to enjoy working in the EBI. There are even some staff members who have worked in the (T)EBI since the day it was established.

Characteristics of working in the EBI include the specific nature of the target population and a regime that is different to that of other facilities within the prison system. Safety and control are the key words of the regime and the daily activities are governed by rules and routines. The life of the prisoners as well as the duties of the prison staff are structured according to set patterns. All through the day there are all sorts of monitoring and control activities during which various challenges present themselves, such as staying alert while interacting with detainees. When the daily routine is interrupted by the recalcitrant behaviour of a prisoner, staff members are faced with the challenge of responding in an adequate manner.

While safety and control are central to the regime, the development of humanisation has increasingly become prevalent in the EBI. This trend has taken hold not only in the physical prison environment – architectural choices, furnishings, carpeting, upholstery –, but also in the treatment of detainees by prison staff. Humanisation is often deployed as a means to increase security. This concept is known as

'dynamic security'. Staff members are expected to treat the prisoners humanely and be sensitive to their personal circumstances. All the same, there is mutual suspicion and distrust. The prison staff express their suspicion and distrust of the prisoners in a variety of ways. Conversely, they are treated with suspicion and distrust by the detainees. All this leads to a vicious circle in the communication between staff and detainees: there is no contact because there is distrust, and because there is no contact, there is distrust, despite all the good intentions of dynamic security and humanisation.

As far as the immaterial personal costs are concerned, the question is whether staff in the EBI are more often confronted with violence or other undesirable behaviour, which might – sooner or later – affect their psychological or physical well-being. This does not appear to be the case: working in the EBI is not perceived as being more difficult or demanding than working in other prison regimes. Various other factors, such as the long periods of employment, the low level of sick leave, the expressions of job satisfaction and the relative safety in the workplace, indicate that there are no specific costs attached to working in the EBI. However, the financial operating costs of the EBI have turned out to be considerably higher than those of other facilities, in contrast to costs that are less easy to express in terms of money, such as the safety, health and job satisfaction of the prison staff.

Being detained in the EBI

In 1958 Gresham Sykes published a study of the situation of prisoners in a maximum security prison in New Jersey. He described the different types of pain that prisoners feel as a consequence of their imprisonment: the pain of the loss of freedom and the feeling of having become a social *outlaw* (1958: 65), the lack of important necessities of life, such as sexual relationships and important goods and services, the loss of autonomy and the loss of security.

The '*pains of imprisonment*' described by Sykes are very recognisable and are used by many researchers. The EBI is an outstanding example of a prison that deprives detainees of a great deal of freedom and autonomy. The loss of security certainly applies in the EBI. However, Sykes's five pains of imprisonment do not provide a sufficiently sharp picture of what EBI prisoners feel. It emerged from our interviews that they mainly suffer from the infringement of their intimacy, a cause of pain that was not formulated by Sykes. They suffer from the tension between the lack of privacy to which they are subjected (every little thing they do is registered outside the cell) and the secrecy with which the staff shroud their actions. As a result of the many restrictions imposed on their contacts with the world outside the EBI, the detainees find it difficult to maintain social relations with family members, spouses and friends. They live in an artificial, low-stimulus environment and say that this is having both a physical and psychological impact on them.

Other important causes of pain concern visiting arrangements, more specifically the restrictions that are put into force when prisoners receive visitors without being behind glass, and the body searches. Although the current use of body searches is less controversial than the practice of systematic body searches in the early years of the EBI, being subjected to a body search is still a humiliating experience for prisoners.

The staff may distrust the prisoners, but the prisoners also distrust the prison staff. This distrust mainly concerns the way in which staff handle information. The prisoners have no idea what the staff members know about them and what is being done with this information. It is unclear what type of information is decisive for the SAC-EBI decision. Furthermore, the decision process of the SAC-EBI makes prisoners even more distrustful. For instance, when assessing a prisoner's flight risk, which could lead to him becoming eligible for placement in the EBI or to an extension of his stay in the EBI, information is used which is provided by the Prisoner Investigation Information Point (GRIP). Questions remain as to who supplies the GRIP with information and the reliability of the information which the GRIP uses. The prisoners are unsure about the role that their behaviour (good or bad) in detention plays in extension decisions. They do not know what course they should steer to stay out of the danger zone of an extension. This can result in them keeping their cards close to their chest when dealing with guards to prevent them from finding out about their actual circumstances.

In addition to the distrust between detainees and personnel, there is also mutual distrust between prisoners. Incidents from the past have shown that escalations can have serious consequences. Because

staff members only have limited opportunity to intervene, prisoners can often feel left to the tender mercies of their fellow-prisoners and their own devices. The feeling of insecurity within the EBI is also a major cause of pain for prisoners.

Despite these 'costs' of a stay in the EBI for prisoners, the EBI regime also has several positive side-effects. These concern the strict checks for contraband and the regular rhythm imposed by the regime. It is practically impossible for EBI detainees to obtain access to drugs and alcohol. Together with the strict regime that is conducive to a regular daily pattern, this can make a positive contribution to detainees' general state of health. This corresponds to one of the findings by Kerkhof et al. (2003: 48) who states that prisoners in de EBI have a better rhythm of rest and activity and a healthier sleep pattern than detainees in a unit that houses detainees who are considered fit to have limited contact with society. The management data of PI Vught show that the average EBI prisoner is relatively healthy in comparison to other detainees. It would seem that EBI prisoners make relatively little use of medical and psychological care. To put this into perspective, it should be noted that the aforementioned distrust towards care providers and the supervisory measures that accompany a consultation may deter detainees from using the services of care providers. Detainees also have more time and peace and quiet available to spend on a hobby or on preparing themselves for their hearing.

The EBI in balance? Conclusions and recommendations

In de past twenty years, the EBI has proven its right to exist compared to other closed facilities. There have been no hostage situations or breakouts in the EBI, while prisoners in other institutions have made attempts to escape, some of which have been successful. The question is whether or not it is 'overkill': are prisoners being subjected to certain restrictions unnecessarily or is too much importance being attached to security interests, i.e. the prevention of breakouts, when this is being accomplished at the expense of other interests? When has the ceiling been reached with regard to taking measures to prevent breakouts? At the end of the day, the answer to such questions is based on normative/political considerations, for which this study can only contribute the building blocks. There are two matters over which we, as empirical researchers, would like to pronounce a judgement. The first concerns internal insecurity within the EBI. The second concerns a re-evaluation of the EBI's policy theory. Both matters have prompted us to make policy recommendations.

Internal security

Two violent incidents between detainees took place in the open-air yard, one of which had a deadly outcome. Members of the prison staff did not enter the open-air yard until after the damage had been done. They stayed out of the open-air yard because of a policy that is set out in their working instructions. With regard to emergencies that have not been specifically described, it states that:

'(1) Your personal safety and that of the staff come first; (2) In such a situation, policy states that no persons (prisoners and/or members of staff) must be added to the emergency (due to the risk of hostage-taking).'

The question is whether or not adherence to the EBI's working instructions can lead to violations of the ECHR. One must remember that the working instructions are not aimed at prisoners but at members of staff. Furthermore, they contain prescriptions of a general nature and act as a guideline from which it is possible to deviate. However, this does not detract from the fact that in an actual case, the ECtHR could conduct a substantive examination into the question of whether or not there has been a violation of art. 2 (right to life) or art. 3 ECHR (the prohibition on torture, inhuman and degrading treatment). Following the judgement of the appeal committee, the lawyer of the prisoner who was attacked in 2011 announced that she was going to submit the case to the court in Strasbourg on behalf of her client. She will have known that she is supported in this by a ruling of the European Court.³ This states that if a violent incident occurs in which a prisoner inflicts injury upon a fellow-inmate, the authorities will have to prove that they have done everything possible to guarantee the inmate's safety. The question is whether this positive obligation under the treaty was fulfilled in both incidents in the

³ See among others ECtHR 10 February 2011, EHRC 2011, iss. 81, with note by Boone.

open-air yard.⁴ The cases in question involved violence between prisoners whereby the risk of a hostage situation, although this can never be excluded, could certainly be assessed as being very low. There was also a surplus of staff members available who could have entered the open-air yard. In situations such as these, we find that the internal security of the persons whom the government has in its custody must weigh heavily and the instructions and building-related factors should also provide the opportunity for staff to take immediate action. The working instructions flow from an understandable but extreme determination to prevent staff from being taken hostage. We find that in the exceptional circumstance that a detainee is placed in a life-threatening situation by a fellow-inmate the staff must try to end this situation, if necessary by intervening themselves. It goes without saying that the selection of prisoners who are allowed outside in the exercise yard at the same time is extremely important from the point of view of internal security. In 2011, warnings that a violent incident in the open-air yard was about to happen were evidently disregarded.

On the basis of this, we recommend that procedures should be changed so that detainees in life-threatening situations should be protected by a surplus number of staff. There is already a positive treaty obligation to do so on the grounds of art. 2 ECHR.

Cutting dead wood out of the regime

Over the years, the board of directors of the EBI has relaxed a number of aspects of the regime, sometimes forced by an order of the court, sometimes at their own initiative, and sometimes from the perspective of 'dynamic security'. An important relaxation of the regime that was mentioned is the reduction of the number of body searches. In the past, body searches were also carried out at times when it was inconceivable that the prisoner had any opportunity to carry objects on his person. Such a practice undermines the rationality and therefore the legitimacy of the regime. The current practice of body searches rarely leads to complaints, while it is not likely that safety has been jeopardised to any relevant extent. In that respect, the changes in the practice of body searches could form a blueprint for dealing with other sharp edges of the regime, such as visits behind a glass partition from life partners and close relatives. The idea that 'every nappy may contain semtex' might have been useful in the early days of the EBI in order to introduce the radically different approach of the EBI to preventing breakouts, but nowadays it can hardly be applied as a measure for a rational security policy. Considering the security precautions surrounding the visit, the fact that it is only possible for detainees to shake hands with their life partner or children appears to be unnecessarily restrictive. In the light of the principles of proportionality and subsidiarity, a less pervasive restriction should be sought. The opportunity of an embrace would mean a considerable improvement of the circumstances under which visits take place, while it is not plausible that this would be accompanied by any irresponsible risks.

The irrational measures mentioned above are given the semblance of rationality by the policy theory on which they are based. This policy theory is the complete reversal of the penitentiary wisdom of the 1970s that prisoners should be allowed the illusion that escape is possible. The reversal of this wisdom justifies all restrictive measures. After all, even irrational precautions (such as a body search after receiving a visit from behind a glass partition) become rational in the light of this policy theory, because they contribute to stripping away any such illusions. In short, this policy theory does not place a ceiling on the regime but opens the door to a range of excessive security precautions.

Our recommendation is to 'cut away the dead wood' from the regime by removing rules and practices that are not rational and therefore incomprehensible to the detainees. The policy theory of the EBI is in need of re-evaluation.

⁴ See also Sackers' note under BC 21 February 2012, Sanctions 2013, No 16.