

**Victa vincit veritas?**

**Evaluation of the Reform of Review in favor of Former  
Suspects Act**

**Summary**

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## Summary

### *Background to the evaluation*

The extraordinary remedy Review in favor of Former Suspects (*herziening ten voordele van een gewezen verdachte*) is provided for in article 457 et seq of the Dutch Code of Criminal Procedure. Because of the Reform of Review in favor of Former Suspects Act (*Wet hervorming herziening ten voordele*), which became effective on 1 October 2012, the provisions of this remedy underwent a number of important amendments. The objective was to ensure that this legislation widened the opportunities to initiate a review in situations in which a review could be substantively indicated, while retaining the extraordinary character of this remedy. In the first place, the essence is to create a new procedure which, in serious cases and prior to a review application, gives former suspects the opportunity to ask the procurator general to initiate further investigations into the existence of new evidence. This would be done in preparation of a review application. A second important section relates to the amendment of the new evidence criterion. Thirdly, the legislation provided for a number of other amendments, the significance of which was less structural. The most important is the compulsory legal representation of former suspects in respect of the submission of a request for a further investigation or a review application.

### **Statutorily prescribed evaluation**

Article IA of the Reform of Review in favor of Former Suspects Act contains a report prescribing the effectiveness and effects of the legislation in practice. This research relates to this evaluation, and is being carried out on the instruction of the Research and Documentation Centre (WODC). For the purpose of this research, the legislation is divided into the three aforementioned themes. The first and second sections relate to the two most important amendments and, as such, relate to the opportunities former suspects have to submit a request for further investigation to be carried out by the procurator general and the widening of the new evidence concept (from 'a single circumstance' to 'a given'). The other amendments will be dealt with in the third section. Consequently, in accordance with the instructions, this research evaluates the sections of the amending act and not (the provisions governing) the remedy of review in favor of former suspects as such.

### *The definition of a problem and the research questions*

The following definition of the problem underlies the research:

*In which respect and to what degree is the Reform of Review in favor of Former Suspects Act effective and what are the possible secondary effects of this legislation?*

This definition of the problem leads to the six following research questions:

1. What are the nature and scope of the use of the new opportunities/elements of the Reform of Review in favor of Former Suspects Act? Which type of cases does it involve?

2. Under the new legislation, what are the numbers and duration of each type of case and phase of:
  - requests for further investigation;
  - requests for advice submitted to ACAS, the Advisory Committee for concluded criminal cases (*de Adviescommissie afgesloten strafzaken*);
  - advice from ACAS;
  - further investigation by the procurator general at the Supreme Court, subdivided into investigations by:
    - the procurator general him/herself;
    - the investigating judge;
    - the investigating team;
  - review applications subdivided into:
    - applications on the grounds of a given that falls under the concept of new evidence;
    - applications in which use was made of the new investigation opportunities;
    - other review applications.
  
3. What are the reasons for deeming inadmissible, rejecting or upholding:
  - requests for further investigation;
  - review applications submitted after a further investigation;
  - review applications submitted after a further investigation has been rejected?
  
4. What are the effects of the legislation, are there any unintended effects and which impediments occur during its implementation (for example regarding the new evidence criterion, the opportunity threshold for initiating a further investigation, periods of time/duration, compulsory legal representation, financial thresholds/claims, magnetic effects or any other)?
  
5. How are the opportunities offered by the legislation and its implementation appreciated by those involved and what are their criteria in this respect?
  
6. When the legislation is implemented, are its objectives being fulfilled in practice? How is the opinion in this respect substantiated?

### ***Structure and method***

To answer the research questions, a study of the literature was carried out as well as empirical research. The empirical research consisted of both a quantitative and a qualitative section. The primary objective of the quantitative analysis was to offer clarity about the nature and scope of the amended opportunities provided by the legislation and a description of how procedures proceed in practice. All the requests for further investigation and all the review applications submitted between the date of effectiveness of the Act in October 2012 and the end of 2017 were analysed. The aim of the qualitative section was to shine light on the intended and unintended effects of the legislation and to consider the extent to which the legislation was appreciated by those involved in the procedure. For the qualitative section,

interviews were held with the representatives of all the organisations involved in reviews and requests for further investigations. A former suspect was also interviewed, as well as two scientists who are conducting research into potential retrials. In total, 25 interviews were held. A list of the respondents has been included in Appendix 3. In order to reflect on the findings of the quantitative analysis and to corroborate the results of the qualitative research, an expert meeting was carried out during the final phase of the research. During this meeting, the preliminary findings were discussed with a group of people who had both practical and scientific experience. This both supplemented and reinforced the findings. In total, seven experts took part in this meeting.

As the evaluation has been prescribed in the Act itself, it goes without saying that the objectives can be found in parliamentary history, starting with the text of the original legislative proposal and the explanatory memorandum to this. Chapter 2 sketches the background to the Reform of Review in favor of Former Suspects Act, the legal character of the amendments implemented and the objectives of the reform. Chapter 3 presents the findings about the new opportunity offered to former suspects to submit a request to the procurator general to initiate a further investigation. In Chapter 4, the findings in respect of the review applications are dealt with, in particular the amendment to the new evidence concept. Both these chapters start by reporting the figures followed by the results of the interviews, and conclude by presenting the findings of the section. Chapter 5 consists of the other amendments. Final conclusions are drawn in Chapter 6.

### *Requests for further investigation by the procurator general; the legal framework*

Chapter 2 sketches the legal framework of the Reform of Review in favor of Former Suspects Act. Under the new provisions, former suspects may turn to the procurator general and request that further investigations are initiated ‘in preparation of a review application’ (article 461, paragraph 1 of the Dutch Code of Criminal Procedure). In general, the legislature intends this new opportunity to mitigate a former suspect’s lack of evidence and to make it possible to have a broader investigation into potential new evidence carried out than was previously possible. This relates to a situation in which reasonable doubt exists about the correctness of the decision in a concluded criminal case, but without further investigation there is insufficient information available to assess whether a review application is indicated or would be possible.

The only thing that can be investigated is whether there is any new evidence (the grounds for a review laid down in article 457, paragraph 1c of the Dutch Code of Criminal Procedure). However, the request to have a further investigation into new evidence cannot be submitted for every conviction, but only for a criminal offence that is, at least, subject to a mandatory prison sentence of twelve years. Cumulatively, it is also a requirement that the criminal offence in question has seriously shocked the legal order.

The former suspect can only initiate this process via a defence counsel. In addition, both formal and substantive requirements are placed on the request. These requirements have been imposed so that the request can be handled efficiently. They also form an admissibility threshold. The procurator general may only reject the request if there are insufficient indications of potential new evidence or if the requested investigation is unnecessary.

On the grounds of article 462, paragraph 1 of the Dutch Code of Criminal Procedure, the procurator general may, officially or at the request of the former suspect, decide in advance to submit a request to 'a committee charged with advising on the desirability of a further investigation'. This committee is ACAS, the Advisory Committee for concluded criminal cases, established by the Advisory Committee for Concluded Criminal Cases Decree. If there is a case in which a prison sentence of six or more years has been imposed, then, pursuant to the second paragraph, it is compulsory for the procurator general to obtain advice from ACAS. This obligation is not applicable if, in his or her opinion, the request is inadmissible or manifestly unfounded or, alternatively, could be upheld.

ACAS has the task 'of advising the procurator general of the desirability of a further investigation' as referred to in article 461, paragraph 1, of the Dutch Code of Criminal Procedure (article 462, paragraph 1 of the Dutch Code of Criminal Procedure, and article 2 of the Advisory Committee for Concluded Criminal Cases Decree and article 2.1 of the Internal Rules of the Advisory Committee for concluded criminal cases). ACAS should deal with the task in an impartial and independent way, whereby it can decide on its way of working itself (as well as its internal rules). ACAS has modest investigative powers in order for it to fulfil its advisory role, and consists of both lawyers and members who are not lawyers.

ACAS cannot simply be viewed as the successor to CEAS, the Committee for the Evaluation of Concluded Criminal Cases (*Commissie Evaluatie Afgesloten Strafzaken*). ACAS serves the procurator general, while CEAS reported to the Board of Procurators General. Moreover, unlike CEAS, ACAS does not have the task of carrying out further investigations itself. A further difference between ACAS and CEAS is that ACAS does not look for serious shortcomings in the investigation, but considers the desirability of a further investigation on the basis of new evidence and advises the procurator general in this respect.

### **Further investigation**

In the first instance, carrying out 'a further investigation' is regulated by article 463 of the Dutch Code of Criminal Procedure. In cases when a request for a further investigation is upheld, this article lays down that the procurator general initiates these further investigations. In this context, the procurator general can designate a specific investigation to the court's investigating judge who has not as yet taken cognisance of the case. In addition, the procurator general may be assisted by an investigation team. He or she can also call on assistance from the Board of Procurators General when instituting the investigation team and carrying out the investigation. After completing the investigation, all the documentation must be added to the court documents; as the applicant, the former suspect will be given a copy of all the documents (article 463, paragraph 6 of the Dutch Code of Criminal Procedure). In principle, it is up to the former suspect to submit a review application to the Supreme Court. However, it is also possible for the procurator general to submit a review application. He or she is accorded this authority on the grounds of article 457, paragraph 1 of the Dutch Code of Criminal Procedure. Under the new provisions use has been made of this authority.

### *New evidence criterion; given versus circumstance; the legal framework*

Under current legislation, new evidence requires that there is a question of a 'given' which was unknown to the judge during the court hearing and which, either on its own or in relation to the previously submitted evidence, seems incompatible with the judgement, to such an extent that serious suspicions arise that, should this given have been known, the investigation into the case would have resulted in the former suspect being acquitted, or discharged from prosecution, or the prosecution being barred or to the application of a lesser penal provision (article 457, paragraph 1c of the Dutch Code of Criminal Procedure). Previously the legislation referred to 'a single circumstance'. However, it is no longer necessary for the new information to be of a factual nature. Consequently, the word 'given' has been chosen as the legal definition, instead of for example 'fact or circumstance'. Under certain circumstances, other givens which are of a factual nature, such as new or revised expert opinions, can provide new evidence.

The new evidence concept still has three essential elements, of which i) 'a given' is the main element (was previously: 'a single circumstance'). However, it still has to be a given which ii) was unknown to the court, and which iii) gives rise to serious suspicions that, had this given been known, it would have resulted in another specifically described final judgement. Therefore, the scope of the new evidence concept is not only outlined by changing the element to a 'given' instead of a 'circumstance', but also by the other elements and cannot be viewed apart from these. Only when a given complies with all these requirements can it be considered new evidence. Sections ii) and iii) of the new evidence were consciously left *unchanged* in the legislative amendments.

In the interpretation of what a given can be, the expert evidence was particularly central to the discussion. On the basis of parliamentary history, four situations can be distinguished in which expert evidence will always provide a given. Firstly, the situation where the relevant question, which is directly related to proven charges, has not as yet been submitted to an expert. Secondly, the situation that a new expert, from another field of expertise or on the grounds of other investigative methods, arrives at new conclusions. Thirdly, the case that, on the grounds of the same facts, a new expert reaches another opinion because the previous expert opinion was based on incorrect factual assumptions or because there are new developments in the relevant field of expertise. Fourthly, the situation that the expert backtracks from his or her original opinion because this opinion was based on an incorrect premise due to the lack of correct initial information.

In a clarification ruling issued on 17 April 2018 (ECLI:NL:HR:2018:605), the Supreme Court set out some principles which it intended to observe in review cases. Hereby an explicit link was made to the legislative history for cases in which an expert opinion can provide new evidence, although the ruling did not specifically refer to the fourth situation. The Supreme Court imposed specific requirements on the expert and on his or her opinion. Any expert opinion/insight which is presented as new and/or revised must be of sufficient quality and weight to lead to a review of the judgement and the review application must provide sufficient clarity, so that the content of this opinion and the novelty of it can be deemed to be of value.



### *Other amendments in the provisions*

Regarding the other legislative amendments, the introduction of compulsory legal representation for the former suspect is by far the most significant. In this context, the defence counsel has acquired a double role. A defence counsel will provide a (better) service to a former suspect who is entitled to appeal for a further investigation or to have a review application handled than when the former suspect is left to use the legal arrangements available on his or her own. At the same time, the belief is that, given compulsory legal representation, the counsel will be able to select cases (early and adequately) and, in so doing, will help ensure that the people and resources of the organisations charged with the review are used efficiently.

The other amendments relate to the description of the documents which must be appended to the request and explain the grounds for the review ('documents' instead of 'a list of evidence'), the extension of the circle of co-perpetrators/third parties in the case of a review with reference to a successful complaint to the ECHR from a joint offender, the settlement by the State of the Netherlands of any compensation and costs previously paid by the former suspect to the disadvantaged party, and information provision to victims and their surviving dependants who require such information.

### *Empirical findings in respect of requests for further investigation*

The empirical findings regarding requests for further investigation are accounted for in chapter 3. Although the respondents view the new opportunities as a positive amendment, a number of them also indicated that, in practice, its effect had not resulted in a sizeable widening of the opportunities to substantiate review applications. The majority of applications were rejected and the number of applications submitted was fairly limited. Consequently, the exceptional character of review legislation has remained intact. At the same time, lawyers believe that former suspects are not being offered sufficient scope to discuss wrongful convictions effectively.

The legislative reform also established ACAS as the procurator general's advisory body. In the past five years or so, with the exception of one, all admissible requests for further investigation have been submitted to ACAS for advice. The Procurator General's Office at the Supreme Court is satisfied with the reports from ACAS. It has never taken a decision that was not (in the main) in agreement with the advice from ACAS. Those interviewed approved of a body being involved in the assessment of requests for further investigation which did not consist only of lawyers and, therefore, viewed the cases from more than simply a legal perspective. Everyone was predominantly positive regarding the composition of ACAS. A few of the respondents (some lawyers and scientists) were less positive about the way ACAS undertook its work. These respondents felt that ACAS was too restrictive when giving advice about a further investigation and tended to act too much in anticipation of a judgement or whether there was any potential new evidence. In the respondents' view, this criterion should not play a role in this phase. However, formally, ACAS has the task 'of advising the procurator general of the desirability of a further investigation as referred to in article 461, paragraph 1, of the Dutch Code of Criminal Procedure.' The majority of ACAS's



members indicated that, despite this formal task, they view each case openly and do not allow themselves to be limited to, for example, what is put before them by the lawyers.

In the statutory provisions, a number of conditions are placed on the submission of requests for further investigation. Consequently, requests can only be submitted in cases where there is a question of a twelve-year fact and a seriously shocked legal system. Almost all the respondents are of the opinion that the opportunity of further investigation should only be available in the more serious cases and, therefore, believe it is good that certain conditions have been laid down. However, some of the respondents would prefer a slightly lower limit than the twelve-year fact. Moreover, there appeared to be a lack of clarity among the respondents as to what a 'seriously shocked legal system' actually means. Currently, only one request has been rejected, because it did not comply with this criterion.

In addition to these statutory limitations, lawyers also detailed a number of other impediments which appear to ensure that not all the cases, for which a request could - and probably should - be submitted, are actually being submitted to the procurator general. Firstly, they stated that they believed that the arguments they needed to present for a further investigation to be carried out had to be so strong that these could only be made if they themselves had an investigation carried out prior to submitting the request. However, in many cases this created financial problems. Furthermore, several lawyers indicated that they would not take on any legal aid review cases, because the remuneration paid for these cases in no way covered the hours they had to work on the cases.

The process of submitting a request for a further investigation and the eventual carrying out of the further investigation take a long time. In complex and extensive cases both these two stages can take several years. The majority of respondents understood that the process would take a long time. However, one person found that (in certain cases) it was hard to understand. In particular, the Baybasin case was mentioned several times in this context.

Only limited extra financial resources have been made available for the implementation of this legislation. The workload in the procurator general's office has increased, making the workload considerable. The members of ACAS also have a heavy workload, while they receive very limited remuneration for the work they undertake. Currently, the respondents said that they could 'cope' with the workload, but suggested this would change if one or more large cases were submitted in the near future.

### *Empirical findings in respect of review applications and the amended new evidence criterion*

The empirical findings in respect of review applications and the amended new evidence criterion are discussed in chapter 4. On the basis of the research, the finding is that, on balance, the legislative amendment of the new evidence concept has, in practice, added value. The added value lies in the fact that the legislature has made it clear that it wants to widen the legal concept of new evidence, despite that, in practice, there was almost no longer any strict necessity for this. The general idea was that the Supreme Court, and possibly the procurator general, could, if necessary, also work towards new evidence under the old legal formulation. In cases in which it was obvious that the conviction could not stand, the

Supreme Court was, at the end of the day, creative in respect of the old criterion. Consequently, in practice the old new evidence concept was workable. However, the cases of the Putten murder and that of Lucia de B. in particular provided insight into the fact that the legal limits of the old definition were being reached, because the principal rule was that it must relate to a new circumstance of a factual nature. In that context, the amendment in the legal definition from 'a single circumstance' to a 'given' brought an end to the discussion as to how far a new development in the case had to relate to a circumstance of a factual nature. The legal definition of new evidence as a given now corresponds better with the explanation that the circumstance as a new evidence element had previously acquired in practice. This, therefore, confirms the added value of the legislative amendment. However, as yet, this has not led to any changes in the way lawyers practise.

Subsequently, the question is whether the legislature has imparted a sufficiently clear definition of a 'given' to the bodies that have to work with it. It appears that there is a difference of opinion in this respect. On the one hand, people understand the widened scope as such which, for the first time, includes the revised opinion of an expert. However, the legislature does not wish to limit the statutory widening to this, but examples of what else the widening includes have not been defined, nor could they be named by the respondents interviewed during the research. In addition, several of the respondents said they were not sure when there was a question of an expert revising his or her opinion. When does another weighting of the facts in a case by the expert, which fails to provide new evidence, become an expert opinion with sufficient impact to be able to be considered new evidence? In this respect, the Supreme Court has consciously set high requirements before it accepts that there are strong suspicions that the court would have come to another judgement if it had known about the new given. The lack of certainty about when an expert opinion constitutes new evidence was apparent among several of the respondents, both respondents from the procurator general's office and respondents who were lawyers. Various respondents are concerned that, once again, review cases will become a *battle of the experts*, whereby it will be difficult to establish which expert is correct. Hereby the question of when someone is an expert also plays a part. The Supreme Court has consciously formulated requirements in this respect.

A potential widening of the new evidence concept in the sense that 'serious doubt' should be sufficient was badly received by most of the respondents. The scientists and some lawyers were in favor of such a widening, whereby the English standard of an *unsafe conviction* could be used. This would enable more cases to be reviewed. However, the rest of those interviewed believed that this would, to too great an extent, open the floodgates to reviews. They believed there would be no end to criminal cases as, in a considerable number of cases, there has and will always be scope for discussion. Review would then be a fourth authority, a situation they deemed undesirable. In their opinion, a further widening in the direction of 'serious doubt' does not fit into our system of legal remedies. It would create problems for the authority of court judgements, for the capacity of the organisations involved and could cause unnecessary disquiet among victims and their surviving dependants. In their view it would be undesirable to widen the scope of the new evidence concept any further.

### *Empirical findings other legislative amendments*

The empirical findings in respect of other legislative amendments are presented in chapter 5. In respect of the compulsory legal representation, it can be concluded that the legislative amendment has partially had the intended effect: in advance, lawyers select the cases they deem suitable for a review application to the Supreme Court or for a request for further investigation by the procurator general. Consequently, compulsory legal representation fulfils a sort of filter function, as the legislature intended. Moreover, the respondents were of the opinion that the quality of the applications and requests for further investigation was generally good. However, it is impossible to be sure that only the cases that were 'certain to fail' were not selected, in the sense that they were held back by the legal representative. Various lawyers indicated they would not take on any more legal aid review cases, because the financial remuneration for these review cases was not always in proportion to the effort (and work) required. As a result, it appears that compulsory legal representation forms a financial threshold for any former suspect with limited means, which was explicitly not the intention of the legislature.

From the above, it can be concluded that this point of the legislative amendment saves the Supreme Court work, as the review applications are of a better quality and cases are selected in advance by lawyers on the basis of their feasibility. At the same time, the lawyers indicated that they receive insufficient (extra) remuneration for submitting review applications and requests for further investigation. As a result, it is possible that no application or request is submitted for cases that could be (and probably should be) considered.

The other amendments – being: submitting documents instead of a statement of the evidence, the widening of the review grounds after a successful complaint to the ECHR, the legal opportunity of imposing a lighter sentence after committal and the provisions about payment/repayment of compensation and legal costs by the former suspect – were all viewed positively by the respondents. At the same time, there were no practical examples of these elements of the new statutory provisions being applied, so that regarding this point no research results about the effectiveness of the legislation can be reported.

Regarding the information provision to victims and their surviving dependants, the research showed that the public prosecutor's office had sought contact with victims and their surviving dependants whenever a request for further investigation was submitted to the procurator general. When a review application is submitted, information is provided to victims and their surviving dependants on an ad hoc basis. There is no policy in this respect. However, the importance of this was acknowledged by all the respondents. Therefore, having a policy governing communication with victims and their surviving dependants would appear to be required.

### *Conclusions*

Chapter 6 presents the conclusions with extensive answers to the sub-questions and, ultimately, to the principal question about the effectiveness and effects of the Reform of

Criminal Cases Review Rules in favor of Former Suspects Act. For ease of reading, the sub-questions are presented again.

1. What are the nature and scope of the use of the new opportunities/elements of the Reform of Review in favor of Former Suspects Act? Which type of cases does it involve?

In the period October 2012 to the end of December 2017, a total of 42 requests for further investigation were presented to the procurator general. These primarily related to cases of murder. In four cases, the request for further investigation was allowed (the Hilversum showbiz murder case, the Butler murder case, the Olaf H. case and the Deventer murder case).<sup>1</sup> Moreover, in the same period, 194 review applications were dealt with by the Supreme Court, and in 21 of these applications use was made of the widened scope of the new evidence criterion. Three of these 21 applications were upheld (the Hilversum showbiz murder case and two cases in which the main theme was the categorisation of weapons).

2. Under the new legislation, what are the numbers and duration of each type of case and phase of:
  - requests for further investigation;
  - requests for advice submitted to ACAS, the Advisory Committee for concluded criminal cases (*de Adviescommissie afgesloten strafzaken*);
  - advice from ACAS;
  - further investigation by the procurator general at the Supreme Court, subdivided into investigations by:
    - the procurator general him/herself;
    - the investigating judge;
    - the investigating team;
  - review applications subdivided into:
    - applications on the grounds of a given that falls under the concept of new evidence;
    - applications in which use was made of the new investigation opportunities;
    - other review applications.

In the 28 concluded requests for which ACAS was asked for advice, ACAS required an average of 274 days to furnish its advice, and the procurator general subsequently required an average of 186 days to reach a decision on the basis of the ACAS advice (and the potential reaction of the lawyer to the advice). In respect of the 194 applications dealt with in the research period October 2012 until the end of December 2017, the average duration from the moment that a review application was submitted to the Supreme Court until the date the Supreme Court passed judgement amounted to 233 days. In the 21 cases in which use was made of the wider new evidence concept, the procedure took an average of 238 days. In three cases, following on from a request for further investigation a review application was submitted to the Supreme Court.

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<sup>1</sup> In two other cases some further investigation took place, based on the new legal possibilities. See para. 3.2.3.

These cases were the Hilversum showbiz murder, the Butler murder and Olaf H. In these cases the Supreme Court procedure lasted 798 days, 158 days and 141 days, respectively. The duration of the Hilversum Showbiz murder case was therefore far longer than the average period within which the Supreme Court dealt with review applications, but in this case a further investigation was carried out by an examining justice after the review application had been submitted.

3. What are the reasons for deeming inadmissible, rejecting or upholding:
  - requests for further investigation;
  - review applications submitted after a further investigation;
  - review applications submitted after a further investigation has been rejected?

There are various reasons for rejecting requests for further investigations: the points on the basis of which a further investigation is requested were already considered when the case was dealt with and cannot, therefore, provide any grounds for a recommendation for further investigation, the assertions put forward are speculative or contain too many assumptions, the facts were assessed differently, the request is either not or insufficiently substantiated, further investigation is unnecessary on legal grounds, there are doubts regarding the revised expert opinion being presented, because in the cases in which there is a specific new given, insight or alternative scenario, the other evidence was sufficient even without the evidence under discussion or the new givens cannot provide any (potential) new evidence.

Regarding the review applications which were carried out after a further investigation (three cases), one application was upheld by the Supreme Court (the Hilversum showbiz murder, as - after an assessment by experts - sufficient doubt existed as to the correctness of the confession statements of the former suspect). The other two applications were deemed unfounded because the new givens about the cause of the victim's death summoned up insufficient doubt about the earlier, judicial ruling on the evidence of fact finding (the Butler murder case) or because the earlier court judgement also already knew of the potential unreliability of the witness's memory due to brain damage (Olaf H.).

Two review applications were submitted after a request for further investigation had been deemed inadmissible. In case B, two review applications were submitted to the Supreme Court during the period of the current research; however, these were declared inadmissible as the applications were based on the same grounds as the review applications which had previously been submitted and rejected. In case M, the review application was deemed unfounded as no new given was advanced.

4. The effects, appreciation and assessment of the effectiveness of a further investigation. What are the intended and unintended effects of the legislation, and which impediments occur during its implementation (for example regarding the new evidence criterion, the opportunity threshold for initiating a further investigation, periods of time/duration, compulsory legal representation, financial thresholds/claims, magnetic effects or any other)?

5. How are the opportunities offered by the legislation and its implementation appreciated by those involved and what are their criteria in this respect?
6. When the legislation is implemented, are its objectives being fulfilled in practice? How is the opinion in this respect substantiated?

In contrast to the quantitative research questions 1 to 3, the questions 4, 5 and 6 are less suitable to be answered and discussed separately. They were therefore answered collectively.

In general, the new opportunity the legislation offered the procurator general, when preparing a review application, to initiate a further investigation into new evidence as grounds for a review was deemed a desirable widening of the law. The new statutory provisions have therefore fulfilled a need, despite the compulsory legal representation. On the basis of the results of a further investigation, it is easier to weigh up and decide whether or not to submit a review application; and, if a review application is submitted, it can be substantiated better.

The legislature's objective when introducing the opportunity of being able to request a further investigation as part of the statutory provisions of the remedy of review (in favor of former suspects) in the Dutch Code of Criminal Procedure was to (slightly) mitigate the former suspect's lack of evidence, given he or she could not undertake a specific investigation him or herself (or have one undertaken). In this respect the legislation is effective, as if sufficient indications generate new givens, their suitability will at least be considered as grounds for a potential review on the basis of new evidence while, under old legislation, these grounds would never have been generated. The effectiveness is illustrated by the fact that, more than was previously the case, the new investigation does indeed offer the opportunity to put forward a better substantiation of either a review application or the reasons for deciding not to proceed, without the exceptional character of the review remedy being lost.

The question formulated regarding the effectiveness of this part of the legislative amendment was answered as follows. Regular use was made of the opportunity to request the procurator general to initiate a further investigation. To date, the result of these requests is that one case led to a review and subsequently to the former suspect being acquitted. In another case, the guilt of the former suspect was confirmed. Use is being made of the opportunity to have a further investigation carried out and this alone is effective. However, for example, in comparison to the number of applications at the time of the CEAS arrangement and also given the expectations expressed, few requests are being submitted and even fewer are being deemed admissible. The 'lack of evidence', formerly highlighted under the old statutory provisions, appears to have simply been moved from the moment of submitting a review application to the moment of submitting a request for a further investigation. Despite the fact that the (new) legislative system means that less evidence needs to be advanced, there is still a certain evidence threshold whereby the phenomenon of a certain lack of evidence can arise. Some experienced (review) lawyers and scientists believe ACAS is too strict when forming an opinion about whether there are sufficient indications to initiate a further investigation. For this reason, the stage of the procurator general is omitted and a review application submitted directly (whether or not with a subsidiary request to the

Supreme Court to order a further investigation). Consequently, the provisions are raising a threshold that is inconsistent with their intention. The fact that a decline in the number of requests has been detected could be a cautious indication of the system 'faltering' in this respect.

To the extent these effects act as an impediment to the effective use of the amended arrangements, these are not effects which the legislation intended. They are, or could be, detrimental to the effectiveness of the law in this respect. To this extent, there is, at the same time, a question of shifting the lack of evidence as an inherent aspect of the review as an extraordinary remedy. Even under the new provisions, sufficient indications of the potential existence of new evidence are required for a further investigation. The legislature did not introduce the further investigation in order to generate these indications.

The statutory new evidence criterion has been reformulated and substantively widened, so that the Supreme Court no longer needs to make use of 'constructions' to be able to assume that new (forensic) expertise, in particular, is viewed as new evidence in relevant cases. In respect of this point the legislation is effective, as the previously established and more relaxed jurisprudence of the Supreme Court on the level of legislation is sustained by means of a clear new evidence criterion and as, since then, more cases are being considered for review, without the exceptional character of the revision remedy being lost.

The question that was formulated regarding the effectiveness of this part of the legislative amendment was answered as follows. Through the legislative amendment of the new evidence criterion, the wider application of the old criterion - by the Supreme Court in certain cases - has acquired a permanent character. Consequently, in a case when a circumstance is not of a factual nature, the former suspect is no longer dependant on whether or not, in a specific case, the Supreme Court applies a wider interpretation of the old terminology, leaning in the direction of making an 'exception' to the law. The Act now prescribes that even givens that are not of a factual nature can provide new evidence. To this extent, the new terminology creates clarity in the way the legislature intended.

Given the figures, it can be stated that under the new legislation more cases are actually being considered for a review than under the old legislation. This is despite the fact that there is, in practice, a lack of clarity about the exact scope of the wider law. Following on from the legislature, the Supreme Court has also indicated that if an expert merely weighs up evidence in a different way than the court, this will not, on its own, be deemed sufficient for it to be classified new evidence. It is still debatable when an expert's opinion is more than just another view and becomes new evidence. Furthermore, it is also unclear what, in addition to an expert opinion, can provide a given which would not have been considered a circumstance under the old legislation.

The research illustrated that when the legislature's intended widening of the new evidence definition has been applied, this has not been at the expense of the retention of the exceptional character of review in favor of former suspects as an extraordinary remedy. Because not *every* given – however (more) widely the element is defined in the Act – results in a decision that a judgement must be reviewed. If there is a question of a given, it is still a requirement that this given was unknown to the court during the hearing and that the given gives rise to serious suspicions that, should this given have been known to the court, the



investigation into the case would have resulted in the former suspect being acquitted, or discharged from prosecution, or the prosecution being barred, or to the application of a lesser penal provision. Nor did the legislature wish to change the exceptional character of the remedy, a fact with which the respondents sympathise. In that respect, the Supreme Court has consciously set high requirements. And, to that extent, the legislation has been effective.

In the opinion of the researchers, there is no reason to widen or change the new evidence concept (any further) to reasonable doubt about the correctness of the decision, or to a question of an *unsafe conviction*. There are good reasons for retaining the exceptional character of the review. If there is little chance that new evidence would result in an acquittal etc, there is no need to doubt the irrevocable final judgement such that a new investigation of the case under review is necessary. Having a new investigation during the review is not, therefore indicated; it could unfairly raise expectations and bear witness to inadequate effort on the part of both legal and other capacities. This assertion can also be defended given that, in the past, the Supreme Court has - in cases in which a review definitely appears to be indicated - eventually opted not to have the formal statutory framework hold it back.

As far as compulsory legal representation, the following applies. The widening of the opportunities to eventually arrive at a review on the grounds of new evidence could result in a huge influx if a defence counsel did not have to assess whether submitting a request or application was opportune. The counsel must be able to prevent needless procedures and therefore acts as a filter. According to the legislature, the compulsory representation should also have a beneficial influence on the quality of the requests and applications submitted, because a defence counsel will be better equipped than the former suspect to explain the case well to the procurator general and the Supreme Court.

In respect of this point, the legislation is effective if, due to the compulsory representation, a defence counsel can, on the one hand, actually dissuade a former suspect from submitting a futile review application to the Supreme Court or from submitting a request for further investigation to the procurator general while, on the other hand, the requests to the procurator general to initiate further investigations and the review applications are of a better quality than they were.

Given the number and the responses from the lawyers, the intention of limiting the influx has been successful. The lawyers acknowledge that they filter cases when they think a request or application has no chance of success. Moreover, it became apparent that the lawyers do not think that having a concluded criminal case reviewed is any easier now than it was previously. It is not, therefore, the case that, under the new legislation, former suspects are submitting review applications any faster than before. Regarding the quality of the applications and requests, the response from those practising was mixed. By and large, the applications and requests are of (satisfactory) quality, but applications and requests are also submitted which, according to the respondents, are below the expected standard.

In this section of the research it could be relevant that only a limited number of lawyers specialise in these types of cases and the remuneration, on the basis of financed legal aid, for any former suspects of limited means is (too) low, given the number of hours that have to be spent on such cases. This is a point that gives cause for concern, as this could impact the operation of the law. If (experienced) lawyers are no longer prepared to do any (or as many)

cases for former suspects of limited means, this would put at risk the access these convicted persons have to the reformed review provisions.

More generally, no or very few provisions have been made to create extra capacity (or as the case may be financial remuneration) for all the parties involved in the review procedures. To a great extent the adequate functioning of the revised statutory opportunities are therefore dependent on the individual goodwill and efforts of those who work at all the organisations involved in this research. Should the goodwill and commitment shown by these people decline in future, this could hinder the operation of the legislation.

The general objective of the legislation was to find a better balance between, on the one hand, the adequate establishment of the truth, including the legal protection of former suspects, and, on the other hand, legal certainty, in which context it is essential that the starting point can and must be the correctness of the outcome of final judgements in criminal cases. On balance, the previous sentence means that the legislature has successfully offered more scope to former suspects to have their judgements reviewed whether or not after further investigation, as introduced by the legislation, or to investigate the need of having them reviewed, without the legislative amendment making it possible for previously irrevocable judgements being called into question too quickly or too often. There is now a better balance between legal protection – in the light of new evidence – against a possible unjust conviction on the one hand, and the idea of legal certainty through finite legal proceedings on the other. Combining these findings, the decided opinion is that the legislation can be deemed effective. Although, as mentioned above, there are a few problem areas.

### *Recommendations*

Finally, in the researchers' opinion, no recommendations ensue from the research which entail amendments be made to the statutory provisions as these are currently laid down in the Dutch Code of Criminal Procedure. However, the research did reveal some points of attention which can possibly be realised by making a few practical changes. One of these relates to the provision that, after a further investigation has been carried out, the procurator general should inform the former suspect whether a formal review application is to be submitted (and within what period).

Another practical point is the completeness and accessibility of the file and other documents or, as the case may be, evidence to the former suspect and anyone else involved in (the request to have) a further investigation. This causes problems and delays in both starting and settling review cases. It seems appropriate to have access to the documents in a central place, for example in the procurator general's office at the Court of Appeal, and to adhere to a uniform policy when documents are made available to former suspects.

The fact that ACAS members (can or must) retire from their positions more or less simultaneously (this would appear to be the case in 2020) could negatively affect the committee's experience and 'memory'. Consequently, one recommendation is that a phased schedule is drawn up, on the basis of which members and deputy members would join and retire from the committee.

Currently the Public Prosecution Service has no policy governing the provision of information to victims and their surviving dependants. It is unclear precisely what information it is desirable to pass on. Moreover, between the organisations involved, there appears to be no agreement about the information provided to victims and their surviving dependants. To ensure a uniform approach, it would be better to have a policy established in this respect.