

***Recommendation from the Council for the Administration of Criminal Justice
and Protection of Juveniles***

- Summary -

Defendants' refusal to cooperate with a psychiatric assessment

Issued to: State Secretary of Security and Justice

date : 1 February 2012

Placement under a hospital order (in Dutch 'Terbeschikkingstelling' or TBS) is a court-imposed treatment measure for persons who have committed a serious offence while suffering from a psychiatric illness or disorder. The aims of TBS are treatment of the disorder and protection of society. TBS may or may not be imposed in combination with a prison sentence, depending on the person's degree of accountability.

The State Secretary of Security and Justice wants to make it possible to breach medical confidentiality when defendants refuse to cooperate with a psychiatric assessment in an attempt to evade TBS. Such an assessment is mandatory if the court considers imposing TBS in the pre-trial or trial phase. The Government proposes an amendment to Section 37a of the Dutch Criminal Code for this purpose. As a result of this amendment, care providers can be compelled by means of court order to provide information from old medical files that are covered by their medical confidentiality. In the opinion of The Council for the Administration of Criminal Justice and Protection of Juveniles an infringement of medical confidentiality is not proportional and appropriate in this situation. It warns of the negative consequences of this proposal in its recommendation published on 1 March 2102.

The Council believes that the proposal adversely affects, to a significant degree, the public interest of having unrestricted access to (mental) healthcare. It points out that medical confidentiality protects the privacy of information. Its general interest lies in the fact that it safeguards the public's trust in the (medical) profession and the accessibility of care.

This enables citizens to freely seek help and assistance from a care provider without having to fear that sensitive data will be provided to third parties. The Council fears that as a result of this proposal people will avoid (mental) health care, with related risks for the persons themselves and for the safety of society. The Council also points out that documents from previous health care contacts were not intended to be used for criminal law purposes and that if this information is now used for such purposes, there is a risk of incorrect assumptions.

According to the Council, the solution to the problem of refusal to cooperate should not be sought in breaching medical confidentiality but in tackling the underlying reasons for refusal. Support for TBS in the criminal law chain has drastically declined. The Council proposes in its recommendation that improving the image of TBS and, related to this, limiting the increasing duration of the treatment should be considered when seeking a solution to this problem. This will enable both lawyers and defendants to gain more trust in a just enforcement of the measure. In order to achieve the foregoing, the Council refers to the recommendations in its report on the increasing duration of TBS, which it published in 2011. Moreover, the Council points out that criminal law already provides for the possibility of imposing TBS on defendants who refuse to cooperate with a psychiatric assessment; this possibility is also used in practice.

A copy of the Recommendation can be obtained on request from the Secretariat of the Council

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