Gedragsdeskundigen in strafzaken

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Summary

Expert witnesses in psychiatry en psychology within the Dutch criminal justice system

Introduction

Every year, behavioural experts conduct around 8,500 assessments in criminal cases, which can have far-reaching consequences. As such, criminal cases in which the suspect is involved in behavioural assessments attract a lot of attention from newspapers and other media. For example, on 20 March 2009, the Dutch daily newspaper *de Volkskrant* carried the headline "Unjust detention under hospital order (TBS) terminated after 15 years" ("*Onterechte TBS na 15 jaar opgeheven*"). This subject not only attracts public interest, it is also a key focus area for science, the legal professional practice, the professional practice of behavioural experts and legal policymakers. Some critics maintain that the courts are happy with the work of behavioural experts, arguing they do not doubt the results produced, see psychiatrists as an indisputable authority and take their judgement as gospel. It is argued that the courts assume practically all of behavioural experts' conclusions and that the judgement lacks critical discussion. Meanwhile, the work of behavioural experts in criminal cases also regularly receives substantial criticism, with, for example, psychiatrists who carry out psychiatric assessments being branded as "suppliers of nonsense" and their statements being termed "lazy", "random", "twaddle", "delusion of the day" or "unscientific".

The above raises such questions as: what is the current situation as regards behavioural assessments in criminal cases and the reporting and use thereof? All things considered, the problem statement for this research tying such research questions together can be formulated as follows: What is the legal framework for the appointment of behavioural experts to criminal cases, for the activities performed by these experts and for the contents and use of the results they produce? And, in practice, what is the empirical reality with regard to the appointment of behavioural experts, the activities they perform and the contents and use of the results they produce? And in particular: To what extent do behavioural experts and other participants in proceedings assert their authority and to what extent do they adhere to their obligations in this respect? Do they exceed their authority?

From time to time, proposals are made to improve the quality of behavioural assessments in criminal cases and the reporting thereof. There is clearly a need for such improvements. However, there is a lack of knowledge necessary for the assessment of such criticism and of proposals according to their legal and empirical merits. The *aim* of this study is to acquire and analyse such knowledge, regarding the appointment of behavioural experts, their assessments, the contents of their reports and the use made thereof. Where the results of this study give reason to do so, recommendations will be made regarding improvements.

In response to the questions above, section I of the study gives an introductory analysis, section II gives an explanation of the legal framework regarding the appointment, assessments and reporting of behavioural experts and the use thereof by the participants involved in the proceedings. Standard definitions of these areas were used in the approach to this study, with the authorities and obligations of the participants in the proceedings in the areas mentioned being derived from legislation, case law, professional codes, professional ethics, views of the profession, guidelines and literature.

Section III of this study gives an account of empirical research into the state of affairs in practice, for which a file appraisal was performed in six districts. In selecting the districts, the aim was to represent a cross-section of the practice in the period from 1 January to 1 July 2001. A systematic sample was therefore taken from a total of 123 cases in the Amsterdam, Arnhem, Assen, Breda, Den Bosch and Dordrecht districts. All the cases selected involved adult suspects and were heard by a three-judge division of the district court – this

study is limited to such cases. In total, 131 cases were researched, concerning 123 suspects and 194 assessment reports. Of the 131 cases, 31 cases involved monodisciplinary psychiatric assessment, 30 involved monodisciplinary psychological assessment, 63 involved multidisciplinary assessments, and in seven cases, assessment which could not be attributed to one single behavioural expert.[1]

Relevant data from the case files was collected by means of an extensive checklist of, where possible, closed-ended questions, with the option '*Other [please specify]*' included among the answers. However, this answer was used so often that in some areas quantitative analysis of the assessment was not directly possible. A key factor in this was identified as the assessment style being too unspecific, variable, intangible and unstructured in practice. As a result, the answer to a number of research questions regarding the behavioural assessment was abandoned, such as the origins of the substantiation for conclusions and recommendations. The research questions relating to the practice correspond with the legal section of this study as far as possible. In addition to addressing the empirical questions in general, this study also addresses the extent to which diversity is relevant in this respect, considering such questions as: Is it relevant in which district the behavioural study is conducted? Is the research method in the case relevant? Is it relevant whether a psychiatrist or psychologist is appointed? Is it relevant whether there is supervision? Is the suspected crime relevant?

As stated above, the case studies concern criminal cases tried in 2001. These data are not outdated in the least, as is demonstrated by a study conducted commissioned by the Scientific Research and Documentation Centre (WODC) of the Dutch Ministry of Justice in the period from September 2007 to September 2008, among others. While the WODC study did not address all the aspects of this study, it is notable that the results of that study largely correspond to the findings of this study.[2] The findings of this study also correspond to the author's experiences in professional practice. There seems to be improvement in several areas and this will be pointed out where relevant.

1 In the case of (outpatient) multidisciplinary research, the psychiatrist and psychologist produce separate reports.

2 Nauta and De Jonge 2008.

Appointment of behavioural experts

How do behavioural experts become appointed to criminal cases? As described in the legal section of this dissertation, the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*) provides for many options in this regard, with the various participants in the proceedings having various authorities and, in some cases, obligations. As is demonstrated in the follow-up of this section, it appears to be relevant which behavioural expert assesses the suspect. It is therefore surprising that the *suspect and the defence counsel*, who have many rights in this regard, do not assert them more. The only right that is sometimes asserted, is the right to have a new inquiry initiated by the examining judge or the trial judge.

Until 1 January 2010, another participant in proceedings – *the public prosecutor* – also had the power to appoint a permanent judicial behavioural expert to assess and report on the suspect. The prosecutor had to request the appointment from the examining judge to appoint an expert who had taken an oath as a permanent judicial expert.[3] It has been demonstrated that in practice public prosecutors are involved in the appointment of behavioural expert in several ways. As indicated, until recently, public prosecutors were only permitted to appoint behavioural experts who had taken an oath as permanent judicial experts. However, some prosecutors exceeded their statutory authorities in this regard and appointed behavioural experts who had not taken an oath as permanent judicial experts. In some cases the prosecutors certified them themselves. This seems undesirable, not only as it nullifies the restriction provided for in the legislation, but also as magistrates should set an example to others with regard to compliance to lawful provisions. This raises the question to what extent the appointment of behavioural experts who were shown to be under qualified once the Experts in Criminal Cases Act (*Wet deskundige in strafzaken*) came into force can be used as legal proof. For this reason, this study also takes into account the appointment of unregistered behavioural experts by public prosecutors.

3 As of 1 January 2010, the public prosecutor is only permitted to appoint behavioural experts who are registered in the national public register of judicial behavioural experts. The requirement to be sworn as a permanent judicial behavioural expert lapsed on that date.

The *examining judge* may also appoint behavioural experts, and has many powers in criminal proceedings in this regard: the examining judge may appoint behavioural experts on his/her own initiative; at the request of the public prosecutor in the context of a preliminary judicial investigation; after the public prosecutor has suggested in the preliminary defence inquiry that a behavioural expert be appointed; and following referral by the trial judge.

Theoretically, the advantage of having a behavioural expert being appointed by the examining judge is that the suspect has more options for asserting influence on the assessment than if the behavioural expert is appointed by the public prosecutor. The suspect rarely makes use of some of his/her powers in this regard. In rare cases, the examining judge appoints a behavioural expert at the request of the suspect. Yet, not all suspects' requests are honoured by the examining judge, who is not obliged to do so. The *trial judge is* also often involved in appointing behavioural experts. In some cases this is his own initiative, while in others the trial judge appoints behavioural experts at the request or on the order of another participant in the proceeding, such as the public prosecutor, the suspect and his defence counsel or on the recommendation of the probation service. The involvement of the trial judge regards various tasks including assessing and reporting on the suspect, providing a second opinion and questioning the experts further. Although they are authorised to do so, trial judges never appoint behavioural experts themselves but instead refer the case to the examining judge or hand over the relevant documents to the public prosecutor – probably for pragmatic reasons.

In around one in five cases, the *probation service* is involved in some way with the appointment of behavioural experts. The probation service is authorised to advise participants in the proceedings in the case. The probation service regularly advises the examining judge, the public prosecutor and the trial judge about various aspects. While it is positive that the probation service is able to evaluate the need for behavioural assessments, this must occur timely and be well substantiated.

The *Netherlands Institute of Forensic Psychiatry and Psychology (NIFP)* also plays a significant role in the appointment of behavioural experts to criminal cases. The role of the NIFP takes a different form to that of the other participants in the proceedings named above. In most districts, the NIFP advises the examining judge or the public prosecutor with regard to the appointment of behavioural experts. The NIFP also often acts as an intermediary with regard to the actual involvement of the behavioural experts in the assessment. It is notable that the tasks fulfilled by the NIFP do not have any legal basis, with the procedure differing from district to district. This is probably a result of the course of events evolving over time. The NIFP regularly advises in the following areas, among others: evaluating the need for assessment and reporting; the assessment method; the most appropriate behavioural experts to conduct the assessment; suitability for detention; suspension of pre-trial detention and the conditions in this regard. The NIFP never advises on assessing the need for a second opinion. The suspect is often assessed by an NIFP psychiatrist before advice is issued by the NIFP, which the NIFP considers to be the most desirable course of action. Nonetheless, advice and mediation are regularly provided only on the basis of an examination of the documents in the case, which goes against the procedure considered preferable by the NIFP. The author of this dissertation shares the viewpoint of the NIFP, i.e. that strong preference should be given to assessing the suspect prior to the NIFP providing advice and/or mediation. This assessment should take place as soon as possible after the suspect is taken into police custody. The benefits of this procedure include the fact that information on the suspect's psychological state is available from an early stage in the proceedings, providing information necessary for determining the most appropriate assessment method and expert and providing information to various participants in the proceedings useful for decision-making as regards to the possibility of pre-trial detention, treatment in detention, etc.

The finding that there are differences in the procedure for evaluating the need for behavioural assessment was also found by the abovementioned study conducted in 2008. It is not possible to give a definitive answer with regard to whether this has consequences for the suspect subject to behavioural assessment. In any case, this seems to be detrimental to equality before the law. One sound approach to bringing about improvement in this regard is the application of the tool for the provision of support in decision-making with regard to the assessment of mental faculties: *Beslissingsondersteuning onderzoek geestvermogens.*

Assessments by behavioural experts

What can be expected of behavioural experts who conduct assessments in criminal cases? With the

priority being that the assessments are carried out with expertise and care, it is essential that all behavioural experts conduct assessments in the context of the applicable normative framework. This involves the behavioural expert fulfilling his/her tasks in good conscience, i.e. professionally, independently and impartially. The behavioural expert should limit him/herself to the area of science of his expertise and to responding to the specific purpose of the assessment. The behavioural expert must conduct the assessment according to the standard of his/her profession and the present state of the art. In other words, the assessment must be conducted by the behavioural expert in accordance with legal provisions, case law, the relevant professional and ethical codes, guidelines, etc.

To what extent do behavioural experts adhere to these obligations? Well-conducted behavioural assessments take time, and are determined by two aspects. Firstly, the number of interviews and their length. Several sources demonstrate that a single interview with the suspect is seldom sufficient. Yet, despite this, almost one third of assessments consist of only one contact session. Secondly, the amount of time invested in the assessment by the behavioural experts. A well-founded assessment should require at least two hours. There are no data on the amount of time spent on assessments for more than half of the assessments conducted. Nonetheless, in 20% of the assessments for which behavioural experts recorded the amount of time spent, the assessments lasted less than two hours.

As soon as language proves to be a problem, the behavioural expert must enlist the help of an interpreter. Interpreters are involved in approximately 10% of assessments. In some cases it seems that the decision to enlist an interpreter is – unjustly – avoided, with some behavioural experts indicating that the language barrier led to confusion at times, which seems to be an indication that the support of an interpreter was necessary.

Behavioural experts who conduct assessments in criminal cases are obliged to follow several assessment strategies. As is disclosed in the legal section of this dissertation, behavioural experts are obliged to consult a number of documents in the case, and compare the suspect's story with other sources. To what extent do behavioural experts comply with this obligation? Although it is perfectly clear that the official police report is included in the documents which the behavioural experts are obliged to consult, it has been shown that it is consulted in only 70% of the assessments. Other documents for which consultation is obligatory are consulted even less often, such as the official report of the interrogation by the examining judge and the excerpt from the Criminal Records Register (*Justitieel Documentatieregister*). Previously published reports are rarely listed among the case documents consulted, although these are admittedly not available for every case.

Furthermore, it is not sufficient for the behavioural experts to simply indicate that they have consulted certain case documents; they have to *use them*. How often does that actually occur? Research shows that many assessments do not include references to the use of the case documents listed. The charges, for example, form the basis for the assessment and as such are a necessary part of the report. Yet, in many cases they are not included in the report. Research shows that behavioural experts also fail to use other essential documents, such as the official police report, the excerpt from the Criminal Records Register and the consultation letter from the NIFP psychiatrist. With the exception of assessments by the Pieter Baan Centrum (PBC), earlier published reports are seldom used. This is not without risk. For example, one (outpatient) psychiatric report was found in this study, in which the psychiatrist issued a diagnosis, despite the fact that he reported that there were no symptoms for the diagnosis. He stated that the diagnoses had been made on the basis that it had been made in the past and had not yet been treated.

What is the state of affairs with the subject matter and contents of the *interviews* with the suspect? In a great many assessments, several subjects about which it is beyond dispute that the suspect must be asked are excluded, and when they are included in the interviews, the discussions do not comply with the requirements with regard to content. The only subject that is included in almost all assessments is the biography. Areas which are more or less excluded from interviews are: a discussion of (all) the charges, past charges, somatic aspects, use of substances in general, use of substances prior to the charges, the influence of substances at the time of the charges, the psychiatric and/or psychological history and the motivation of the suspect for potential treatment. Depending on the subject, it seems that the exclusion of one or more of these subject areas from an interview will impact the results to some degree. It seems impossible to establish a relation between a disorder and the charges, if the behavioural expert has not discussed the crime with the suspect.

The following can be noted about *somatic* and other *expert medical assessments*. Such assessments are only conducted when there are grounds to do so. For outpatient assessments it is often not clear to what extent such assessments have been conducted. Nonetheless, such assessments seem to be the exception rather than the rule. In clinical observations at the PBC, however, almost all suspects were somatically assessed. In this regard, there is great discrepancy between outpatient and clinical assessments. This raises the question: to what extent is this discrepancy justified?

What findings are there relating to the consultation of references? It should first be noted that behavioural experts are obliged to obtain information from 'professional' references, such as the probation service. However, this only occurred in around three in five assessments. The figures for the consultation of 'general' references by behavioural experts are lower still. Yet, this research method is considered *good practice* by NIFP experts. In practice, this occurs in only 16% of the outpatient assessments. It is notable that the researchers at the PBC always consult these references. Judges and public prosecutors are often of the opinion that the reports by behavioural experts can be one-sided, substantiated only by the suspect's story. This seems to be argument enough to ensure that consulting those close to the suspect is not too easily disregarded. Behavioural experts should have to justify why this is the case.

The next area of interest is psychological *testing*. What is the state of affairs in this regard? Testing provides added value to psychological assessments, yet is not a common assessment method for psychiatric assessments. While psychologists are not obliged to conduct testing, they should have good reasons for not doing so. Testing of all kinds was disregarded in over 10% of the psychological assessments. The psychologists conducted *intelligence tests in* around four of the five assessments. However, many of the tests did not fulfil the requirements of the Committee On Test Affairs in the Netherlands (COTAN). In around one in three assessments, psychologists used *organic tests* (*organiciteitstest*). (Such tests are only conducted when there are grounds to do so.) *Personality questionnaires* are also used. In outpatient assessments, behavioural experts rarely comply with what is considered *best practice* by NIFP experts with regard to this type of testing. Concerning psychological assessments, this is in stark contrast to practice at the PBC, where assessments almost always meet the requirements. Opinions are divided with regard to *projection tests*. Some forensic psychiatrists question the permissibility of such tests, which are used in around half of the psychological assessments.

Opinions are also divided with regard to the extent to which *consultation with the partner reporter* is permissible and/or necessary. Legislation in this regard can be summarised as "It can but does not have to take place". In most cases, the behavioural experts consult with one another. There are many sound reasons for doing so. After all, psychiatric assessment is not the same as psychological assessment. The findings of the assessments from each discipline can be important for the others. This should not result in behavioural experts being obliged to reach identical conclusions and issue identical advice. Furthermore, the behavioural experts should not send their reports to the partner reporter "for approval", as was found to occur in some cases. Differences between the two are permissible. Nonetheless, behavioural experts should give reasons for differences in opinion.

The following can be said of consultation with the probation service. It is essential that such consultation occurs in all cases and in good time. Nonetheless, this occurs in fewer than half of the assessments. Disregarding this is undesirable, as can be demonstrated by the fact that in many cases the probation service is involved with implementing the advice issued by the behavioural experts. Aside from other information that the probation service can provide, consultation is often essential in order to simply establish the feasibility of the advice.

Once the assessment has been completed, behavioural experts have three obligations with regard to the rights of the suspects: they must provide them opportunity to discuss the report, inspect the report and make suggestions and any corrections. Some behavioural experts consider only the right to inspection necessary, at the suspect's request. The behavioural expert discusses the report with the suspect in around one in five of the assessments. Some behavioural experts consider discussion of the report the task of the defence counsel. Both of these standpoints seem incorrect. In practice there seems to have been some improvement recently with regard to the last point: behavioural experts are regularly discussing the report with the suspect. None of the reports demonstrate that the suspect had had the opportunity to make suggestions or corrections. This seems to be a significant violation of the rights of the suspect. It is essential that behavioural experts comply with this obligation, especially as the conclusions and

recommendations of the behavioural experts can have far-reaching consequences for the life of the suspect.

Suspects who deny the charges or refuse to cooperate form a category of their own. Opinions are divided with regard to the extent to which these suspects may be and must be assessed. Some believe that the provisions of international treaties regarding *privacy* and the right to a *fair trial* apply to *suspects who refuse to cooperate*. Others refer to provisions of the Dutch Code of Criminal Procedure, arguing that the suspect has an obligation to tolerate behavioural assessment. No insurmountable objections to assessing and reporting on a suspect who refuses to cooperate can be found in professional codes, codes of conduct, case law or health law. Opinions are also divided with regard to *suspects who deny the charges*. Some argue that psychologists are permitted to report on suspects who deny the charges "if and in as far as the charges are considered proved". This qualification does not seem satisfactory, as it seems that it regularly provides a license for far-reaching speculative comments. The author of this dissertation shares the standpoint of those who believe that a suspect who denies the charges may be reported on. It goes without saying that this only applies in so far as the behavioural experts' statements can be substantiated.

By and large, it can be concluded that behavioural experts should take greater notice of the professional standards applicable to psychiatric/psychological assessment in criminal cases. This concerns not only the amount of time the behavioural experts invest in an assessment, but also enlisting the help of an interpreter and adhering to assessment strategies. There seems to be room for improvement with regard to behavioural assessments in criminal cases, particularly with regard to specific forensic aspects.

Assessment reports

Following on from the findings relating to the behavioural assessment, what can be said of the assessment reports? Reports for behavioural assessments in criminal cases can best be described as 'impenetrable'. Behavioural experts must write their reports in correct Dutch, the reports must be understandable, balanced and avoid suggestive language, etc. Yet, the most complicating factors in the reports, which impede a proper analysis of the assessment report, are the use of language, with reports including many supplementary and contradictory statements and vagueness in many forms such as: a lack of explicit use of language; a lack of decisiveness, precision and justification; conditional statements; a lack of commitment to an opinion; unclear or completely incomprehensible statements and the use of jargon. In addition, the structure of the reports varies greatly, which certainly does not promote clarity in a wider context.

The legal section of this dissertation demonstrates that the report must present the arguments that support the conclusion in a clear and consistent manner; that the arguments presented must in turn be sufficiently and demonstrably supported by facts, circumstances and findings presented in the report; that the arguments must justify the conclusions drawn, etc. Almost all reports have several shortcomings with regard to one or more of the essential components set out below – substantiation of conclusions and advice is not the only area in which the reports are unsatisfactory.

For example, the behavioural experts must indicate in the *diagnostics* the extent to which any disorder identified in the suspect can be considered as either a defect in the development of the suspect's mental faculties or a mental disorder. In many cases, for reasons unknown, this is not included. Where behavioural experts have included this information, what one expert terms 'defect in the development of the suspect's mental faculties', the other often terms 'a mental disorder', and vice versa. Additional details of either of these should be accompanied by the behavioural expert's diagnostic reasoning, which should include an indication of the symptoms, the resulting impairments and the forensically relevant factors. This information is key in making clear the relationship between the disorder and the charges. In some cases this section is missing entirely. Where reports do include diagnostic reasoning, information that should be contained in this section is often missing, such as the reasoning which led to the diagnosis.

The description of the relationship between the disorder and the charges is essential in a forensic behavioural assessment report. In this section the behavioural expert should make clear how and to what extent the disorder was a contributing factor in the charges being committed. This description should form the basis for advice regarding areas such as legal accountability, the risk of reoffending, the legal framework for the treatment and the treatment itself. However, only one in three reports give a clear – or less clear – description of the relationship between the disorder and the charges. Yet, the

behavioural experts must use this description as a basis for their assessment of the meaning of this description for the advice regarding legal accountability. The advice should be a logical conclusion. How concludent is the advice?

As the description of the relationship between the disorder and the charges is insufficient in most reports, it cannot be ruled out that this has consequences for the advice regarding *criminal responsibility*. Behavioural experts label around one in five suspects as *fully* criminally responsible and 8% as not criminally responsible on account of a mental disorder. Most suspects are therefore considered to be somewhere between these two extremes. Here too, the logic of such advice is not very apparent. For example, in many cases, behavioural experts indicate that suspects who they labelled as criminally responsible have a mental disorder or a defect in the development of mental faculties which was a contributory factor in their committing the charges, and in many cases no description was included of the relationship between the disorder and the charges for suspects who were considered not criminally responsible on account of a mental disorder. Both arguments are incomprehensible. In addition it is notable that when suspects are assessed twice by different behavioural experts, the results with regard to legal accountability can vary considerably.

What were the findings with regard to analysing the *risk of re-offending*? The risk analysis is often complicated by the factors indicated above. The behavioural experts did not use the method considered as *state of the art* – the structured clinical method – in any of the cases. Behavioural experts should include a range of components in the risk analysis. A simple statement of the risk of re-offending should the mental disorder persist is insufficient. An indication must also be given of the other risk factors present and the protective factors that are considered to be present. The behavioural experts should systematically indicate how all these factors contribute to the risk of re-offending. Improvements need to be made with regard to this section. For example, only one in five of the behavioural assessments included factors other than the mental disorder in the analysis of the risk of re-offending. It cannot be concluded that all advice issued is the best it can be. In almost all cases, information is lacking regarding the weighting of the various factors. In few cases do the behavioural experts focus on factors which limit the risk of re-offending and most of the analyses of the risk of re-offending are far from sufficiently substantiated.

What is the effect of the above on the treatment advice? As in many cases the analysis of the risk of re-offending left a lot to be desired, the logic behind the treatment advice was also often lacking. This advice should focus on preventing reoffence. According to behavioural experts, more than half of the treatment advice issued had such a focus, but in many cases the justification for this was lacking. Furthermore, not all advice can be as easily used and implemented. In many cases behavioural experts do not commit to their opinion. It is often unclear why behavioural experts advise treatment, which treatment they have in mind and who should administer it. It may be possible to explain this by the assessment focus in some districts. To what extent do the behavioural experts have sufficient experience and expertise to issue advice on treatment, whether clinical or outpatient? To what extent are behavioural experts who have limited or no experience in treatment in a position to issue such advice?

The criminal measures for treatment must be taken into consideration with regard to the legal framework for treatment. This should apply not only when behavioural experts advise such measures, but also in some cases when they do not. What can be said about such advice? In 7% of cases, behavioural experts advise an order for admission to a psychiatric hospital and in 20% they advise detention under hospital order (TBS). For orders for admission to a psychiatric hospital and for TBS, the law explicitly requires that behavioural experts substantiate their advice. It is also a requirement that these measures only be imposed on the suspect if the mental disorder means he/she is dangerous. As this legal framework can have far-reaching consequences, behavioural experts are obliged to indicate why they are of the opinion that a less radical measure would not be sufficient. Where relevant, they must also indicate why a more severe setting was not advised. Behavioural experts seldom do so, regardless of the legal framework. It is striking that in almost all cases behavioural experts who conduct multidisciplinary outpatient assessments and jointly consider the suspect not criminally responsible on account of a mental disorder almost always advise an order for admission to a psychiatric hospital. Yet, in more than half of these cases the advice does not establish a relationship between the disorder and the charges, meaning that labelling the suspect as not criminally responsible on account of mental disorder is not a logical conclusion. This raises the question: to what extent is an order for admission to a psychiatric hospital

legally possible and/or indicated? Behavioural experts rarely indicate the danger that is posed by the disorder. Yet, it would seem that this information in particular is pivotal to the legal framework for treatment. Regarding advice for TBS, it is notable that behavioural experts often indicate that this advice is based on the severity of the charges. However, not everyone is sentenced for that which he/she is charged. Furthermore, it would seem that sentencing is, by definition, the responsibility of the court.

From the above, the only conclusion possible is that there is, to a lesser or greater extent, room for improvement with regard to reports of behavioural assessments in criminal cases. For example, improvements with regard to the use of language and structure are urgently needed. It would seem that the shortcomings in the reports can largely be traced back to the manner in which the assessments were conducted. For example, behavioural experts regularly fail to consult (several) obligatory documents in the case. In several cases, the interviews that the behavioural experts conduct with the suspects are far from the best they can be, regarding both subject matter and content. There are also areas of improvement concerning assessment methods other than the interviews with the suspects. One consequence of this is that many reports are lacking in one, and often more than one, component. This is not surprising, as a shortcoming in one component almost always has consequences for a subsequent component. It would seem impossible to establish a relationship between a mental disorder and the charges if there has been little or no discussion of the charges with the suspect, or if the diagnostics are inadequate. If the description of this relationship is lacking then it cannot be possible to issue logical sufficient advice regarding the extent to which the suspect is criminally responsible. Shortcomings in the abovementioned aspects must also have an effect on the analysis of the risk of re-offending. If the circumstances at the time of the charges and the contributing factors are unclear, it would seem that risk analyses are groundless. This must have consequences for the treatment advice and its legal framework.

Use of the assessment reports

As can be concluded from the above, there is certainly room for improvement regarding several areas of behavioural assessments and the reports thereof in criminal cases. The question now is, how are the reports used by the court?

Quotations or paraphrased passages from the reports are included in approximately 80% of the sentences. Around 10% of the reports are not mentioned in the sentence at all. The other reports are only mentioned or referred to by the court. The court is more interested in some sections of the report than others. For example, the diagnostics are included in 58% of the sentences and the description of the relation between the mental disorder and the charges is included in 46%. The court has relatively little interest in the analysis of the risk of re-offending, with this advice being mentioned in 27% of the sentences. The legal framework in this advice is mentioned in 36% of the sentences. A critical analysis of the report is seldom included in the sentence. This only occurs if behavioural experts really go to extremes.

The next question that arises is: To what extent does the court *use* the behavioural assessment reports to substantiate the decisions made? The court must first give an opinion regarding the extent to which the case is considered to be proved pursuant to Article 350 of the Code of Criminal Procedure. Behavioural experts often argue that their report may not contribute to the *evidence* in criminal cases. But is that really the case? As shown in the legal section of this dissertation, this seems to be legally incorrect, at least with regard to the conclusions of the assessment. The conclusion of the report is sporadically used by the court to corraborate the evidence for the charges. This seems completely legitimate.

If the court considers the case proven, a decision must then be made regarding the criminal responsibility of the offence. The report of the behavioural assessment was not used to this end in one single case, nor does it seem likely that the report would contain information that would contribute to this decision.

This is not the case, however, with regard to the *criminal responsibility* of the suspect. One aspect of this is 'accountability' in terms of the judicial decision (referred to as criminal responsibility in the behavioural assessment and report). If the court rules that a suspect is not criminally responsible due to a mental disorder, he/she is not punishable. From a legal point of view it is only relevant whether the court finds someone criminally responsible. As such, the court sentence does not have to explicitly indicate the extent to which the suspect is criminally responsible. Nonetheless, this is explicitly mentioned in around four of the

five sentences, showing that in 11% of the cases the court considers the suspect fully criminally responsible, in half the cases less or somewhat less criminally responsible, in 10% less to significantly less or significantly less criminally responsible and in 8% not criminally responsible on account of a mental disorder. In all cases, the sentence corresponds with the advice issued by at least one of the behavioural experts. This does not mean that the court always *substantiated* the decision regarding the criminal responsibility of the suspect. The court may do so but is not obliged to. Nonetheless, the advice regarding the criminal responsibility of the suspect was used to substantiate the decision regarding criminal responsibility in more than half the cases. This judgement can have far-reaching consequences. This is the case when the judge considers the suspect as being criminally responsible or not criminally responsible on account of a mental disorder. As regards both decisions, the court follows advice which, as demonstrated above, is questionable.

Another aspect of the criminal responsibility of the suspect for which behavioural assessment reports are used is the defence of duress in terms of justification. Opinion is greatly divided regarding the role the behavioural assessment reports may play in this regard. In some cases, participants of the proceedings use arguments to substantiate or refute pleading duress which are more related to aspects associated with criminal responsibility than duress. This appears to be legally incorrect.

The final decision to be made by the court relates to imposing a penalty pursuant to Article 350 of the Code of Criminal Procedure. Before considering the use of the behavioural assessment reports with regard to imposing treatment in a legal framework, the penalty imposed by the court on the subject of the behavioural assessment will be considered. In about a third of the cases, the penalty was a fully nonsuspended prison sentence. In around half of the cases, the suspects were sentenced to partially nonsuspended and partially suspended prison sentences. In 14% of the cases, a fully suspended prison sentence was combined with community punishment. Except for those considered not criminally responsible due to a mental disorder, the court imposed treatment in a legal framework alongside one of the abovementioned penalties. The behavioural assessment reports were used to substantiate the penalty type and severity in approximately a third of the cases.

With regard to the legal framework of the treatment imposed, it is notable that not only all advice from behavioural experts stating that the suspect was not criminally responsible on account of a mental disorder is followed by the court, but also that the legal framework for the treatment of these suspects is also followed. In eight of these cases, an order for admission to psychiatric hospital was imposed in one, TBS with compulsory treatment was imposed in one other and no treatment at all was imposed in a third case. In the last case only a psychiatric assessment had been conducted. This assessment and report raises questions, as do the other reports for suspects whom the court labelled not criminally responsible on account of a mental disorder. These questions relate not only to the diagnostics, the advice regarding criminal responsibility and the analysis of the risk of reoffending, but also the advice regarding the legal framework of the treatment. This advice often lacks sufficient arguments.

One issue of the advice that is seldom followed by the court is that of TBS with conditions. It is possible that this is due to the fact that it is often unclear why a less severe legal framework would not suffice or why TBS with compulsory treatment was not imposed. In addition, it is often unclear to what extent the advice issued could be practically implemented. The court never imposes TBS with conditions if this is not advised by the behavioural experts. TBS with compulsory treatment, however, is imposed more often than advised by the behavioural experts. This raises the question: to what extent do all the reports fulfil the requirement that the assessment is conducted by at least one psychiatrist? For example, for some assessments conducted by a trainee psychiatrist it is not clear which part of the assessment was conducted by the supervisor. In these reports, too, there was generally some aspect lacking, often including the substantiation of various crucial components of the advice. In around two-thirds of the cases in which the court imposed TBS with compulsory treatment, at least one of the behavioural experts recommended imposing this measure. In many cases, the court imposed TBS with compulsory treatment in cases in which at least one of the behavioural experts advised TBS with conditions. In some cases, the court imposed no treatment at all and in some cases it only imposed treatment in the framework of a special condition in a suspended sentence. Particularly in cases involving TBS, it cannot be said that the court necessarily follows the advice blindly.

The court imposed treatment in the framework of a special condition for a fully or partially

suspended sentence in almost half of the cases for which a behavioural assessment was conducted. In most cases this concerns outpatient treatment, with the advice being followed in 10% of the cases. In most cases, the court leaves it to the probation service to decide which treatment should be imposed on the suspect based on the advice of the behavioural expert. However, while this working method has several practical benefits, the decision is not made by what would seem to be the correct party: the court. The court seldom imposes clinical treatment as a special condition. While this is contrary to case law, in one case the court also left this decision to the probation service. In around a quarter of the cases, the reports were used for substantiation of the legal framework for the imposed penalty. This corresponds with the number of reports required for imposing a criminal measure for treatment.

This section will be concluded with the question posed earlier: do the courts in fact have a lot of confidence in the reports? Although the courts do not always follow the advice of the behavioural experts, it can nonetheless be concluded that the court does have a lot of confidence in the reports of the behavioural assessments. This can be seen not only in the advice which is followed by the courts without further ado (even if this often raises questions), but also in the 47% of sentences which indicate that "the court took on the expert's conclusions and adopted them as its own." According to some lawyers, this statement suggests that the court fully grasps and verifies the 'scientific' statements of the experts and therefore argue that the courts should not use this statement. The findings of this study confirm that it would be better if the courts did not use this statement. In some cases the court adds that it does so partly in view of the substantiation. This study shows that it is fully misplaced to conclude that the court only adds this when the substantiation is abundantly clear.

Diversity

Is it relevant in which *district* the behavioural assessment of the suspect is conducted? There are numerous differences between the districts, regarding the involvement and appointment of behavioural experts, the behavioural assessment they conduct and the report and the use thereof by the court for the sentence. Below is an attempt to characterise the six districts.

In *Breda*, behavioural experts are appointed to most cases on the public prosecutor's own initiative and he/she establishes the assessment focus. The public prosecutor also assigns the NIFP far-reaching authorities concerning the appointment of the behavioural experts. It is unclear what forms the basis for the decisions of the NIFP. With regard to the assessments by the behavioural experts, it would seem that the experts in *Breda* do not invest as much in these as in other districts, with regard to the number of interviews, the amount of time spent and the assessment methods used. In Breda relatively few suspects are considered to have a mental disorder. It is possible that this is because in many cases the suspect does not have a mental disorder. It is probably also as a consequence of this that behavioural experts consider many suspects fully criminally responsible and that advice for a legal framework for treatment is issued relatively less often. Relatively more suspects are considered *somewhat* less criminally responsible in Breda than in other districts and it is relatively less common that the court "takes on the conclusions and adopts them as its own".

In most of the cases in *Arnhem* the public prosecutor appoints the behavioural experts on his/her own initiative, on the advice of the NIFP psychiatrist, following assessment of the suspect. The assessments conducted by the behavioural experts vary little from the 'average' assessments in the other districts. Behavioural experts in Arnhem consider the suspect to have a personality disorder relatively more often than in other districts. The reports are mentioned by the court in all sentences. Many suspects are considered less criminally responsible by the court. The court often uses the reports to substantiate the decision regarding criminal responsibility but not regarding the type or severity of the penalty. In many cases, the court "takes on the conclusions and adopts them as its own".

In *Amsterdam* behavioural experts are appointed by the examining judge, for which he/she makes relatively little use of the services of the NIFP. For example, it is the examining judge that determines whether there is a need for a behavioural assessment and the form that it should take. He/she asks for the advice of the NIFP regarding the expert to be appointed. The NIFP usually issues advice on the basis of the case dossier, i.e. without assessing the suspect. In Amsterdam more behavioural experts than in other districts indicate that they invest more in some aspects of the assessment, regarding not only the amount of time but

also the number of assessment activities. Relative to other districts, behavioural experts in Amsterdam advise an order for admission to psychiatric hospital or TBS remarkably rarely. In Amsterdam, the assessment reports play a relatively small role in the sentences, with relatively few references to the reports, few quotes from the reports and few explicit statements regarding the extent to which the suspect is criminally responsible.

In *Den Bosch* behavioural experts are also always appointed by the examining judge, often at the demand of the public prosecutor, following assessment of the suspect by the NIFP psychiatrist, who issues written advice. It is rarely the case that the NIFP psychiatrist refers to the case dossier in this regard. Behavioural experts in Den Bosch rarely report on the amount of time spent on the assessment and when they do so, they account for two or more hours. They rarely indicate using the excerpt from the Criminal Records Register. Psychologists in Den Bosch often mention the use of the abridged Groninger Intelligence Test. Behavioural experts often advise TBS, i.e. in around one in five reports. It is possible that this is connected to the fact that in Den Bosch behavioural experts consider a relatively high number of suspects – one in three – to be less or not criminally responsible on account of a mental disorder. Relatively few reports are used to substantiate the decision regarding criminal responsibility, while a relatively high number is used to substantiate the type and severity of the sentence.

In *Assen* behavioural experts are usually appointed by the public prosecutor on his/her own initiative, which almost always follows the written advice of a NIFP psychiatrist who in many cases first assesses the suspect. The public prosecutor sets his/her own assessment focus. In Assen, behavioural experts often indicate spending less than two hours on the assessment, and indicate using the documents in the case relatively often. However, it is often unclear to what extent all the charges are discussed with the suspect. In Assen it is extremely rare that the behavioural expert considers the suspect less or not criminally responsible on account of a mental disorder. In Assen TBS is advised in a relatively high number of cases and it is relatively rare that the reports are used to substantiate the type and severity of the sentence.

In *Dordrecht* behavioural experts are always appointed by the examining judge, often at the demand of the public prosecutor. An assessment by an NIFP psychiatrist always precedes the appointment of a behavioural expert, which in most cases is based on the NIFP psychiatrist's assessment of the suspect. In Dordrecht, the NIFP is never involved in the appointment of behavioural experts. The examining judge sets his/her own assessment focus. Behavioural experts often report investing less time than is generally considered necessary. Attention is paid to the somatic history in a relatively high number of cases. They seldom discuss the report with the suspect. In comparison to other districts, the behavioural experts in Dordrecht often advise TBS or an order for admission to a psychiatric hospital. The report is always mentioned in the sentence, with the court often using it to substantiate its decision regarding the legal framework.

To what extent are there differences between the *assessment methods* used by the various *disciplines*? In the *assessment methods* used for outpatient assessments, differences are found between disciplines regarding the number of interviews and the total interview length of the assessment. Most of the reports of only a single contact session are by psychiatrists conducting mono disciplinary outpatient assessments. This group invests the least amount of time in this regard. Comparatively, psychologists who conduct mono disciplinary assessments invest the most time.

As regards assessment, behavioural experts at the PBC indicate using a range of assessment methods significantly more often than all other behavioural experts conducting outpatient assessments, not only in relation to discussing various subjects with the suspect, but also consulting references, etc.

A description of the relationship between a disorder and the charges is never missing from PBC reports. Such a description is included significantly less often in mono disciplinary psychiatric assessments, although more often than in mono disciplinary psychological assessments. The assessment method used varies according to the expected severity of the psychopathology, from mono disciplinary psychological assessment, to mono disciplinary psychiatric assessment to multidisciplinary assessment. It is notable that the suspect is considered more criminally responsible in mono disciplinary psychological assessments than in mono disciplinary psychiatric assessments, and the least criminally responsible in multidisciplinary assessment. The suspects were considered fully responsible in 37% of mono disciplinary psychological assessments and in 9% of multidisciplinary assessments. Criminal measures for treatment are

advised much more often in multidisciplinary assessment.

Suspects subject to multidisciplinary assessment are by and large considered less criminally responsible than those subject to mono disciplinary assessment. The court rarely considers a suspect subject to mono disciplinary assessment not criminally responsible on account of a mental disorder. In cases where this does occur, it is according to the advice of behavioural experts. Suspects subject to multidisciplinary assessment are more often sentenced to a fully non suspended prison sentence. Only suspects subject to multidisciplinary assessment are sentenced to criminal measures for treatment, which is not surprising as this is a statutory condition for imposing this penalty. Quoting or paraphrasing the report in the sentence is the most common for reports of multidisciplinary assessment. One in five outpatient reports are not referred to or included in the sentence at all.

Is it relevant whether the behavioural expert conducts the assessment under *supervision*? This appears to have little effect. Two or more interviews are relatively more common in assessments conducted by behavioural experts under supervision, although in some cases in which the behavioural expert is under supervision only one interview is held. Behavioural experts under supervision summarise the official police report quite often.

Are there any other differences to note regarding the offence for which the suspect is charged? The defence is more often involved in appointing behavioural specialists in cases of property offences. Two hours or less is invested in assessments of suspects charged for sex crimes more often than in other cases. While these suspects are considered to be fully criminally responsible less often, they are considered to be somewhat less criminally responsible more often. It is more common for assessments of suspects charged with homicide to miss the deadline.