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**Legitimiteit en rechtswaarborgen bij gesloten plaatsingen van kinderen:
de externe rechtspositie van kinderen in gesloten jeugdhulp gezien
vanuit kinder- en mensenrechten**

Kruijf, M.P.

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Summary

THE LEGITIMACY OF CLOSED YOUTH CARE PLACEMENTS FOR CHILDREN AND ASSOCIATED LEGAL GUARANTEES

Exploring the legal status of children in closed youth care from a children's and human rights perspective

This research places its central focus on closed youth care, and in particular, closed out-of-home placements for children and young people in the Netherlands. Closed youth care has been regulated in the Dutch Youth Act (*Jeugdwet*) since 2015. Previously, this form of alternative care was included in the Youth Care Act (*Wet op jeugdzorg*). Prior to 2008, closed out-of-home placements were established under Book 1 of the Dutch Civil Code and these children were placed in juvenile institutions together with juveniles under criminal law.

A number of the rights of the child established under the UN Convention on the Rights of the Child are endangered when children and young people are placed in closed youth care. When a juvenile is placed in an institution for closed youth care, this amounts to a deprivation of liberty and places at risk the child or young person's rights under Article 37 CRC. As a consequence of their placement in closed youth care, the child or young person is separated from his or her parents and siblings. Closed out-of-home placements therefore also lead to an infringement of the juvenile's right to live together with his or her family (Article 7(1) CRC). The ways in which closed youth care impinges on the rights and freedoms of children and young people means that it is the most far-reaching form of youth care in the Netherlands. In addition, an authorisation for a child or young person to enter closed youth care is often accompanied by a care order or supervision order (amounting to an order with the effect of assigning partial formal guardianship of the child to the State, with parents retaining parenting authority or parental responsibilities, but a family guardian representing the State holding authority for decision-making over things such as the help and care the child needs). A closed placement on this double title is one of the most far-reaching child protection measures used in the Netherlands and raises significant concerns from a child rights perspective.

On a large scale, authorisations for closed youth care are provided by the juvenile court. Over the past decade, thousands of children have been placed in closed youth care institutions. Over this time, across legal practice, science

and social discourse, issues associated with the practice of out-of-home closed youth care have been identified which raise significant concerns about the legitimate application of this form of alternative care in the Dutch context. This includes concerns about the tensions which exist when children are held in closed youth care for educational purposes; the custodial nature of closed youth care which heightens the vulnerability of children and young people; the suitability of closed youth care for children and young people with complex psychiatric problems; and the overall effectiveness of closed youth care, which remains insufficiently answered and understood. This doctoral research has been motivated by these issues, and the following research questions which are central to this study:

1. *What standards and requirements exist under the international and European frameworks of children's rights and human rights which are applicable to the legality of decisions to place children in closed out-of-home youth care placements?*
2. *To what extent does the Dutch legal framework comply with these standards and requirements?*

As analysed in Chapter 2 of this study, under both international and European child and human rights law and under Dutch laws and regulations, requirements are established to be identified which govern the legality of decisions to place children in closed out-of-home youth care. Based on these sources of law, this study takes as its starting point that a decision to place a juvenile in closed youth care is lawful when the legitimacy, subsidiarity and proportionality of the measure to place the child or young person in closed youth care have been weighed, and when the decision-making procedure complies with required procedural safeguards. Based on analysis of these requirements, Chapter 2 also presents a child and human rights assessment framework which has been drafted as a key feature of this study.

A central focus of this study is an analysis and evaluation of how and to what extent the requirements for the lawful application of closed placements were met between 2008 to 2017. An overview of the historical context concerning the focus years of this study is provided in Chapter 3, which shows that use of closed youth care during this period follows-on from a long historical tradition in the Netherlands of locking children up on educational grounds.

Chapter 4 of this study analyses the recent legislative history surrounding the research theme, followed by an extensive investigation of relevant jurisprudence. Based on 586 published judgments from 1 January 2008 up to and including 31 December 2017 (98 judgments made by juvenile criminal judges and the other 488 made by civilian juvenile judges), this study examines to what extent these judgments can be seen to have met the legality requirements under the children's and human rights assessment framework and are focused firstly on the substantive arguments which can be made for closed placements

to be used (the substantive criteria), and secondly the formal legal guarantees which should be in place around a closed placement. To inform this study from a child and youth participation perspective consistent with Article 12 of the CRC, as part of this research, 23 young people were also asked about their experience of the process that led to their closed placement: did they experience this process as honest, what was their own role in it, including in decision-making that led to their placement and could they put into words for what reason(s) they were placed in closed youth care? The findings and analysis of these interviews with young people are presented in Attachment I and provide a key perspective from the very people who are at the centre of and most directly affected by the practice of placing children in closed out-of-home youth care.

The child and human rights review framework developed in this study is completely clear when it comes to the importance of reasons for the placement that are based on the specifics of an individual child or young person's circumstances that necessitate their placement in closed out-of-home youth care. This immediately reveals a shortcoming of this testing framework: the standards exist under international and European children's and human rights law – especially concerning procedural principles – but lack specificity and are extremely vague concerning what a substantive consideration of a decision to place a child in closed youth care must include.

It can be inferred from the child and human rights review framework that the deprivation of liberty of children on educational grounds is, in principle, permitted. However, in particular the jurisprudence of the European Court of Human Rights regarding Article 5(1)(d) of the European Convention on Human Rights (ECHR) is of crucial importance to frame and guide the development of minimum guarantees in the practice of decision-making in this area.

The main principles that are developed in this study and part of the testing framework are the four core principles of the CRC (in close connection with the principle of individuality, the principle of suitability and the principle of legal certainty); the principle of the right to family unity; the principle that children have a right to grow up in a safe and stable environment; the principle of exceptionality; the principle of necessity (also: the requirements of proportionality and subsidiarity); the prohibition of arbitrariness and illegality, which translates concretely into the last resort principle; and the principle that deprivation of liberty should be applied for the shortest possible appropriate duration.

The review framework shows that the following question is relevant during the entire decision-making process concerning the placement of a child or young person in closed youth care, with regard to whether or not there is a rightful deprivation of liberty: 'In the circumstances, is there a less drastic measure which can be taken, that is, without depriving the child or young person of his or her liberty?' This principle requires an active, relentless search

for suitable and reasonable alternatives, and an approach which takes into consideration as a primary consideration the rights of the individual child. This obligation does not stop once the child is placed; rather this consideration should be ongoing. This is closely related to the principle that a placement must only take place for the shortest possible appropriate duration. Again and again, those responsible must ask themselves whether a closed out-of-home placement is still necessary for the individual child, based on the child or young person's individual circumstances, their family situation, and the alternatives for care of the child or young person which are available. Practical tools exist which can help to support the engagement of relevant professionals with this question, namely evaluating the progress made during the closed placement; the availability of assistance that is offered to the child or young person and its effectiveness; and the right to have the legality of the deprivation of liberty tested by a judicial appeal.

The sketch of the historical background of closed youth care, outlined in Chapter 3 shows that there is a recurring pattern in youth protection law in the Netherlands that child protection measures can be applied to a large number of different situations without setting clear boundaries for the legal grounds that are required to exist. In particular, justifying the use of closed out-of-home youth care placements as a measure that is in the best interests of the child has been seen to be on shaky ground from a child rights perspective. While it may be easy to justify such measure as in the best interests of children who have behavioural issues (i.e. when these issues are unable to be dealt with effectively in a way that supports the child at home), it is essential that adequate consideration is given to the child's other substantive rights affected, in all decision-making concerning the use of such measures. Rather than relying on 'best interests' as a standalone criterion which is vulnerable to being used and interpreted in many different ways, broader consideration of the child's rights will ensure a more holistic view of whether or not the use of a closed youth care 'solution' is consistent with the child's rights and actually in their best interests.

Indeed, from a legal history perspective it can be concluded that the criterion of necessity was the only legal criterion for a long time. An enormous drive to educate and improve the situation of children with behavioural difficulties has also manifested itself outside criminal law. In this context, the child has always been seen more as a 'care object' than a 'legal subject'. Analysis of the approach taken over time illustrates that the tendency to take a deficit-based approach – and therefore rely on closed custodial placements as an 'answer' – has resulted in a lack of focus on a future-oriented approach. This has been at the cost of a satisfactory consideration of what will be in the best interests of the individual child or young person and serve to support positive outcomes in their lives.

The recent legislative history analysed in this study shows that a consequence of placing such a strong focus on the termination of the placement with juveniles under criminal law has been that thorough thinking to inform the policy and practice underpinning the closed youth care system has been overlooked. When the Youth Support Act was introduced, the focus of legislators and policy makers was on the further development of the closed youth care system itself; the development of worthy alternatives lacked satisfactory attention, especially when the Youth Act and the accompanying large-scale cutbacks were being prepared. But it should also be noted that with the arrival of a clearly visible legal system for children who are placed in out-of-home care in closed settings, this group of children received more specific attention than before 2008, including from legislators, researchers and the associated inspections of closed youth care institutions.

Given the children's and human rights review framework (described in Chapter 2), which is characterised by very general principles, the challenge for judiciary in the Dutch juvenile court is to apply these general starting points to the specific circumstances of the case and the individual child. The broadly formulated substantive legal basis for closed youth care offers room for a variety of judicial decisions. On the one hand, this takes into account the diverse nature of the problems facing young people. However, on the other hand, the outcome of a judicial decision about the placement (to be continued) cannot easily be predicted. The decisions analysed in this study do not provide a coherent picture of minimum requirements that a placement in closed youth care must meet, therefore creating a very uncertain reality for the children and young care who find themselves the subject of closed youth care, and others involved in these arrangements, such as the lawyers representing children and young people in these cases.

The jurisprudence studied in this research also shows that the judicial justification is problem-solving in nature rather than goal-oriented and solution-oriented. This is particularly problematic from a child rights perspective, which requires that judicial decision-making should be focused on taking an outcomes approach concerning the child and what is in their best interests. From this it can be concluded that children's judges test the criterion of necessity in particular, and to a lesser extent the efficiency criterion. This is particularly problematic when an extension decision is taken regarding a child or young person already in closed youth care. The jurisprudence examined shows that doubts are often expressed by children's judges in their reasoning as to whether the use of closed youth care is appropriate for the child or young person, but it is often of decisive importance that there is no suitable alternative to pursue instead of a closed placement. This is due, among other things, to the lack of an unambiguous definition of 'appropriate treatment' in the applicable legislation. One clear function of a closed placement is that it is used to create peace and stability for the child or young person. But does a closed

placement meet the legality requirement when the treatment no longer provides more than that? Combined with concerns about safety within closed youth care institutions, the biggest challenge in the coming years lies in the need for clarity in the legislation and the judicial decision-making concerning what 'appropriate treatment' means and for what ends? The most important conclusion from the analysis of the published case law undertaken in this study is the lack of suitable alternatives to a closed youth care placement. The broadly formulated substantive criteria for a placement in a closed youth care institution that are tested by the juvenile court judge maintain this practice. The fact that the governing legislation is left open to interpretation and without specificity allows a great deal of scope for judges to take a creative approach to filling in what the criteria means in practice.

Furthermore, this research shows that the juvenile criminal justice system benefits from a well-functioning system of closed youth care i.e. that some children who might otherwise be in the criminal justice system end up being placed in closed youth care instead. Coordination between the two systems is often lacking, meaning that many young people who are placed in closed youth care are also going through criminal justice proceedings. There are also high rates of offences committed by juveniles during a stay in closed youth care institutions. It is now different on a case-by-case basis how this is handled. The (re)interweaving of these systems is not a solution with regard to the need for care and support for these groups of children, however, greater thinking is needed at the policy level to develop a more holistic and system-wide approach that will support positive outcomes for these groups of children and young people.

The analysis of the published jurisprudence presented in this study clearly shows that children's judges rigorously test the formal requirements for a closed placement, but where necessary take a pragmatic approach. In recent years, judges have been including in their judgments greater judicial reasoning for why they have taken a certain approach.

The legal status of juveniles for whom an authorisation for closed youth care is requested compares favourably with that of juveniles who have 'only' been removed from their homes, and for whom this removal does not result in them ending up in a closed out-of-home youth care placement. Nevertheless, on a number of fronts the legal position of juveniles who are placed in closed youth care should be improved. In Chapter 6 of this study, various practical recommendations have been formulated. For example, in most cases the behavioural scientist assigned to work with the child or young person has a close relationship with the Youth Care Agency. In practice, this has had the effect of placing at risk the requirement that the behavioural scientist is independent. It also proves difficult to give concrete form to the right of access for juveniles whose parents agree to an authorization for closed youth care. In addition, the application of Article 800(3) of the Dutch Civil Code of Proced-

ure (not hearing the young person in a crisis situation) detracts from the strict requirements that apply to deprivation of liberty in the context of closed youth care, which are intended to safeguard children's rights and best interests.

This study has served to provide multiple outcomes and impacts which are relevant to inform improvements to the law, policy and practice in the Netherlands concerning the placement of children and young people in closed youth care. It has strongly emerged through using the child and human rights review framework, that any deprivation of liberty by means of an authorisation for closed youth care requires a strong basis grounded in motivation(s) concerning the child or young person's welfare and best interests and a strong consideration and weighing of the legal position of the young person. The intrusiveness of such a placement should never be underestimated, not least because of the risk of both short and long-term damage to the child or young person (often unintentional, and sometimes with harmful side effects) that a deprivation of liberty entails. The boundary between protection and upbringing on the one hand and punishment and an unjustifiably punitive response on the other is extremely thin. In combination with the observation that the regulation for closed youth care is typical 'safety net legislation' at which substantive criteria are used, there is a high risk that the law, which in itself meets the child and human rights review framework, will invite to unlawful application. The research presented in this study also shows that placement in closed youth care institution is often not a choice for closed youth care based on any benefits it might be able to offer to the child or young person in their individual circumstances, but more often a choice that is made in the absence of other, more suitable alternatives. This study exposes the difficult dilemma of the juvenile court in this respect: the choice for closed youth care is often seen to be the only solution available for young people whose complex problems if left untreated or unsupported will increase, especially when it comes to children and young people with psychological and psychiatric problems.

The interviews undertaken with young people as part of this study clearly show that young people experience the freedom-constraining aspect of closed youth care as very violent and they tend to express themselves negatively about their placement (they express the feeling that they often just resign themselves to wait until their time in care is finished or until they turn 18). These interviews show even more clearly how important high-quality treatment and aftercare is for the child or young person's outcomes, sense of wellbeing and outlook on life. A fair attitude towards the younger and essential attention of all actors in the decision-making process is perceived by young people as crucial.

The study provides a number of recommendations to improve the situation of children in closed youth care in the Netherlands, and to improve legislation, policy and practice relating to closed youth care and care alternatives. These

recommendations are presented in Chapter 7, and are divided into recommendations to the legislature and recommendations to various actors in the youth care sector. The recommendations put forward by this study are summarised as follows:

Recommendations to the legislature:

- The legal assessment framework to test the necessity for and efficiency of a closed youth care placement must be reviewed, revised and deepened;
- The applicant for a closed placement must explain the reasons for why foster care and other forms of alternative residential care (i.e. non-closed youth care) are not possible for the individual child or young person or are no longer possible;
- An authorisation for placement of a child or young person in closed out-of-home youth care should be for the shortest period of time appropriate and may only be issued for a maximum period of six months (with the possibility of extension);
- The substantive requirements for the declaration of consent made by a behavioural scientist need to be tightened;
- In the case of an extension decision, the institution for closed youth care should have a (still modest) role in the decision-making procedure;
- Limit the use of closed youth care for children aged 12 to 18, prioritising the use of non-closed alternative care arrangements;
- Expand the possibility for juvenile court judges to also issue 'ordinary' out-of-home placement authorisation orders or to use the Psychiatric Hospitals (Compulsory Admissions) Act mandate (from 2020 an authorization under the Law on mental health care), in instances where an authorization for closed youth care is imposed.
- When making decisions concerning closed youth care, juvenile court judges must include in their judgments concrete goals and outcomes which are intended to be achieved through the placement, and document the views and participation of the child or young person in the decision-making process;

Recommendations to other actors:

- Halve the number of placements available for children and young people in closed youth care, in order to discourage the use of closed youth care as an alternative care option;
- Develop suitable alternatives to closed youth care that will cater effectively to the needs and best interests of children and young people who are in need of alternative care;
- Use family group plans to involve the young person's family and wider network in private treatment, support and/or rehabilitation;

- Have a substantive expert judge as a third judge in all cases concerning the possibility of closed youth care which are handled by multiple chamber court;
- Develop a stronger vision concerning the role of the family guardian and the juvenile lawyer in closed youth care placements.

