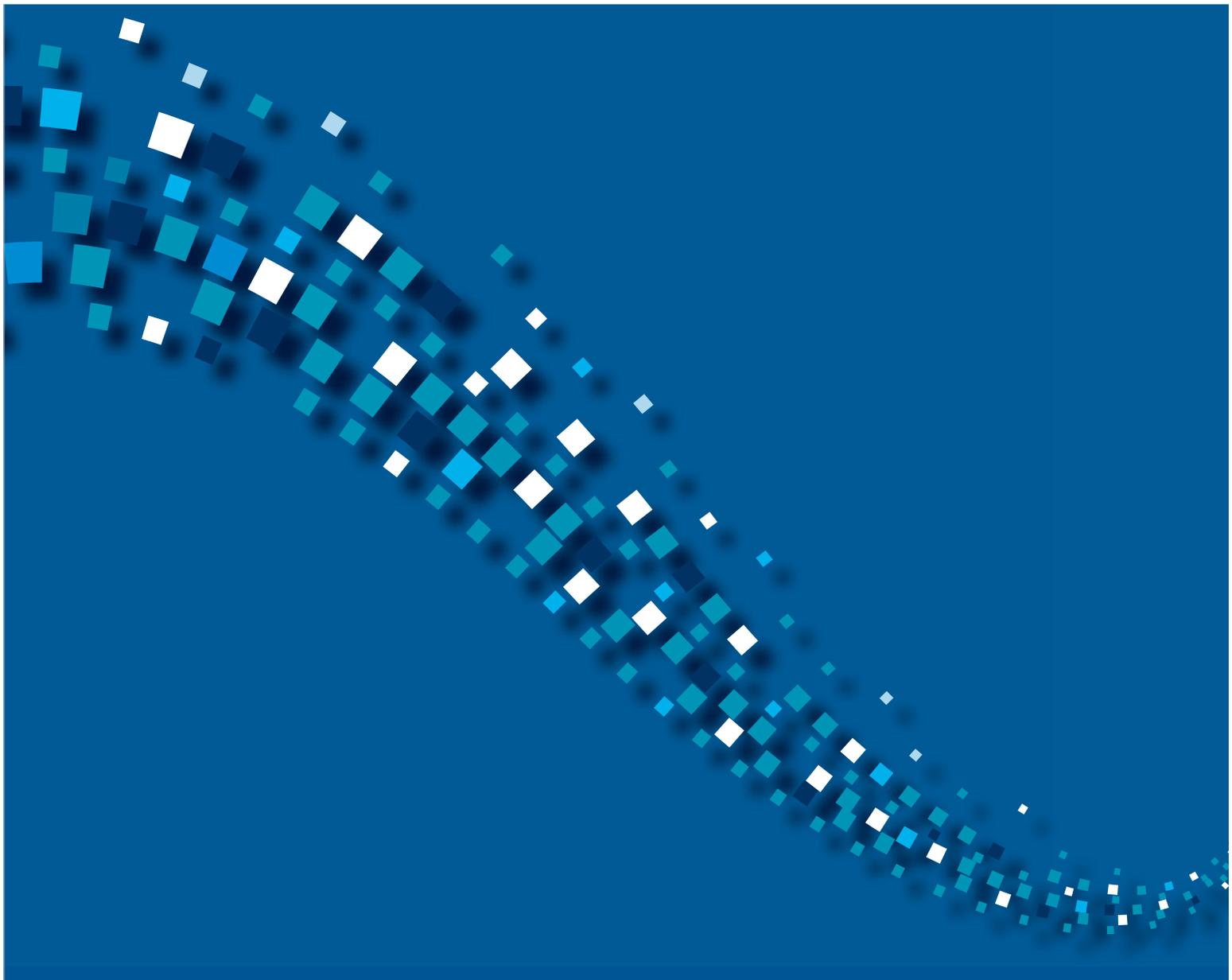


Report 2018:4



Limitations of investigation

Aspirations and reality

brå

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English summary of Brå report 2018:4

The Swedish National Council for Crime Prevention (Brå)
– centre for knowledge about crime and crime prevention
measures

The Swedish National Council for Crime Prevention (Brå)
works to reduce crime and improve levels of safety in so-
ciety. We do this by providing factual information and
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crime prevention work, first and foremost to the Gov-
ernment and law enforcement agencies.

This report is a summary of the Swedish report
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Summary¹

Brå has been instructed by the Government to track how limitations of investigation are put into practice and to analyse, among other things, the extent to which the decisions come into conflict with other central goals of the justice system.²

The basic rule set forth in Chapter 23, section 1 of the Penal Code is that a preliminary investigation must be initiated as soon as there is reason to believe that an offence has been committed. The purposes of the preliminary investigation include, among other things, investigating whether an offence has been committed and who might be suspected of the offence, as well as collecting sufficient material to enable the public prosecutor to take a decision regarding whether to prosecute. However, there are certain exceptions to the duty to conduct a preliminary investigation. One such exception is comprised in the provisions regarding limitations of investigation³ set forth in Chapter 23, section 4 a of the Code of Judicial Procedure (see appendix 1). This section provides that a preliminary investigation need not be commenced, or may be closed, when:

1. the maximum penalty for the offence is not more than three months' imprisonment and continued investigation would lead to unreasonable costs (known as *dispropor-*

1 The Swedish original of this summary is available on Brå's website, www.bra.se. Click on the Publikationer tab, then enter the report number in the search field.

2 This is the second instruction to Brå regarding limitations of investigation. The first was in 2015 (Report 2015:17).

3 Hereinafter sometimes abbreviated as "LI".

tionality cases)⁴;

2. when there is reason to believe that the offence will not lead to any prosecution due to the rules regarding waiver of prosecution (*waiver of prosecution cases*) or special examination of prosecution (*special examination prosecution cases*), and there will be no disregard of a significant public or individual interest.

The rules regarding waiver of prosecution cases make it possible for the police and public prosecutor to close a matter by taking an LI decision in the same situations in which the public prosecutor is entitled to decide to waive prosecution. The rules regarding special examination prosecution cases involve decisions in conjunction with offences which are not subject to general public prosecution, but which may only be investigated if the injured party reports the offence and wants it prosecuted. Defamation is one example of such an offence. Moreover, in order to commence an investigation in such a case, the prosecution must be deemed necessary in the public interest. In the event no such public interest is found, no investigation is to be commenced – instead, there will be an LI for the offence (Swedish Prosecution Authority, 2008).

In other words, police and public prosecutors may take an LI decision in the same situations in which the public prosecutor is entitled to decide to waive prosecution. Accordingly, the ability to subject an offence to an LI can be discerned from the Code of Judicial Procedure's rules regarding waiver of prosecution (Code of Judicial Procedure, Chapter 20, section 7). That section provides that a public prosecutor may decide to waive prosecution, provided there is no disregard of any significant public or individual interest:

1. where it can be assumed that the offence would not lead to any sanction other than fines;
2. where it can be assumed that the sanction would be a conditional sentence and there are special reasons to waive prosecution;
3. where the suspected person committed another offence and the sanction for such offence obviates the need for a sanction for the offence in question;
4. where psychiatric care or assistance is at issue on the basis of the Support and Service (Certain Persons with Disabilities) Act (1993:387).⁵

⁴ Such cases are relatively uncommon and are not addressed in detail in this report.

⁵ Decisions to waive prosecution may also be taken in situations other than those enumerated above where, due to special reasons, it is clear that no sanction is necessary in order to prevent the suspected

According to the Swedish Prosecution Authority, the most resources will be saved in cases which fall under item 3. Cases involving multiple criminality often involve situations with serial criminality or the commission of lesser offences in connection with serious criminality and can be divided into 3 different categories:

- situations where the public prosecutor tries, on a single occasion, several different suspected offences in respect of the same perpetrator (*coincident cases*);
- situations where the perpetrator, after having been convicted or having accepted a summary sanction order for another offence, is suspected of having committed an additional offence prior to the decision or order (*newly discovered offence*);
- situations where the perpetrator, after having been convicted or having accepted a summary sanction order for another offence, is suspected of having committed a new offence close in time to the decision or order (*new offence*).⁴

The purpose of the LI rules is to achieve efficient processing of offences, particularly in respect of offences committed by criminally active individuals. The ability to place the focus of the investigations of their offences on the offences which are significant for sentencing purposes will save both police and prosecutorial resources. When investigation is limited in the less serious offences (which cannot affect the meting out of punishment) both investigative efforts and administration in the matter are reduced for the police and the public prosecutor.

The public prosecutor has had the ability to limit investigations since 1982, but attention on the mechanism has increased since the police were also given such authority in 2013. It is against this background that Brå has been instructed by the Government to track usage of the mechanism and analyse, among other things, the extent to which the decisions come into conflict with other central goals of the justice system.⁶ The delineation is based primarily on criminal statistical data, interviews, and polls taken of public prosecutors and police investigation officers.

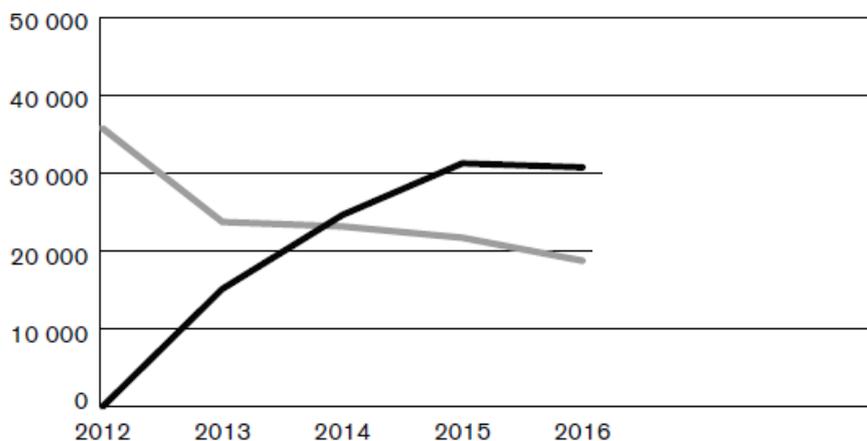
person from additional criminality and, in light of the circumstances, there also no other reasons to commence prosecution.

⁶ This is the second instruction to Brå regarding limitations of investigation. The first was in 2015 (Report 2015:17).

The nature of offences for which investigation is limited

The number of LI decisions increased noticeably during the first three years after the police were authorised to limit investigations, specifically from 52,032 cases in 2012 to 66,168 cases in 2015.⁷ In 2016, the increase stalled and, instead, the number of LIs decreased by almost 4,500 cases. Both the increase and the subsequent decrease are attributable exclusively to waiver of prosecution cases.⁸ The number of special examination prosecution cases has remained relatively unchanged at around 12,000 throughout the period.

Figure 1. Trend in number of LI decisions adopted based on the rules regarding waiver of prosecution, 2012-2016, based on agency taking the decision.



The authority to limit investigations has meant that, to a great extent, the police have taken over the task from public prosecutors. This means that the police's decisions increased to slightly more than 35,000 in 2012, while the public prosecutors' decisions decreased from 35,000 to slightly fewer than 19,000.

At the time of preparation of this study, Brå's criminal statistics did not extend beyond 2016. However, information from the police indicates that police decisions to limit investigations increased during 2017.

Percentage of LIs relatively unchanged

The number of LIs increased by almost 10,000 from 2012 (the year prior to the reform) up to and including 2016. However, if this is compared to the number of processed offences, the increase is not as apparent. Since 2010, the percentage has hovered between 3.5 per cent and 4 per cent.

⁷ Unless otherwise stated, all figures in the chapter are based on criminal statistical data.

⁸ As stated in the previous section, waiver of prosecution cases are those decisions where the LI is used as an alternative to a waiver of prosecution.

The effect of the reform is clearer if the LIs are broken down into cases involving offences in which there is a person suspected on reasonable grounds and cases where there is not. Cases which involve offences where there is a person suspected on reasonable grounds essentially correspond to waiver of prosecution cases, while decisions regarding offences without a person suspected on reasonable grounds relate to special examination prosecution cases. The percentage of special examination prosecution cases among all processed offences without a person suspected on reasonable grounds has not increased while, on the other hand, the percentage of offences with a person suspected on reasonable grounds with an LI (essentially waiver of prosecution cases) has increased by slightly more than two percentage points. There was an LI in almost one-tenth of all such offences during 2016.

"Guilty of other offence" most common basis for the decision

It is clear that the most common basis for LI decisions is "guilty of other offence". This was the basis for slightly more than one-half of the police decisions in respect of waiver of prosecution cases and a full 70 per cent of the public prosecutors' decisions. The most common categories of offences in conjunction with *waiver of prosecution cases* are shoplifting and theft, narcotics offences, and fraud offences.

In respect of *special examination prosecution cases*, the LIs relate primarily to defamation cases. Defamation cases constitute more than one-half of the approximately 12,000 offences in 2016 for which investigation was limited.

The reform has not reduced the average processing time

The length of time from reporting to LI in waiver of prosecution cases in 2016 is the same as it was the year prior to the reform⁹ (84 days, compared with 85 days in 2012). In other words, the reform has not, in total, contributed to a shorter processing time.

However, if one breaks the decisions down based on the agency taking the decision, interesting differences appear. One can see that since the initial year (2013) the police succeeded in cutting the average time from reporting to LI decision by 20 days, from 80 to 60. Meanwhile, processing time when the decision is taken by the public prosecutors increased by 33 days since 2012, from an average of 85 days to an average of 118 days. As a result, the average of the

⁹ The reform in 2013 which gave the police authorisation to take LI decisions.

processing times is essentially unchanged.

The fact that the police's processing time is shorter than the public prosecutors' is consistent with the fact that a greater number of the LIs by police relate to less complicated matters, such as offences punishable by the payment of fines.

Geographic and individual variations in the application

Statistics from the Swedish Police and the Swedish Prosecution Authority show that the percentage of matters¹⁰ in which investigation is limited varies based on geographic location. In 2016, the variation in the percentage of LI matters between different local police areas ranged from 0.8 per cent to 13.4 per cent. The variation in the number of LI matters between different prosecutorial offices ranged from 2.4 per cent to 15.4 per cent. The fact that different police and prosecutorial agencies have different views of what, and how much, investigations should be limited was also clear from the interviews and the polls. One-half of the respondents to the poll submitted to police stated that practical application was not consistent. Among the public prosecutors, the corresponding figure was closer to one-third.

Views of the police and public prosecutor on usage

Based on open interviews and open poll responses, it is clear that it is not always simple to assess whether investigation of an offence should be limited. However, many respondents nevertheless emphasise that the possibility to limit an investigation – particularly when the police limit the investigation – contributes to increased efficiency in the justice system. However, many respondents emphasise that investigations should be limited should be made as early as possible during the investigatory process in order to realise optimal gains in efficiency.

It is in this context that many public prosecutors state that the police should limit investigation more than they do at present. Along the same lines, many public prosecutors perceive a need for increased police proficiency in this area. One-third of the public prosecutors who responded to the poll thought that most police investigation officers lack sufficient skills for the task. In the study, both public prosecutors and police provide a series of proposals for increasing police proficiency.

¹⁰ The Police and the Prosecution Authority do not use identical metrics in this measurement.

Would there have been person-based clearance of the offences had investigation not been limited?

The police and public prosecutors who were interviewed believe that there would have been a person-based clearance in a significant percentage – but far from all – of the offences with a person suspected on reasonable grounds had investigation not been limited. They estimate that one-half or slightly more than one-half could have been cleared.

The next question is how much the offences for which investigation was limited can be assumed to affect the total person-based clearance rate for all offences. In the previous report (Brå 2015:17), Brå's "max hypothesis" as to the impact of LIs on the person-based clearance rate was a 1.9 percentage point decrease. This is the greatest possible impact which can be had from LIs, and the observation is also made in the investigation that it would be reasonable for it to be considerably less. Based on the interviews which were conducted with public prosecutors and police, it is clear that, in round figures, a more realistic estimate of the impact was approximately one-half as much (approximately 1 percentage point). However, in Brå's opinion, this cannot be calculated with any greater precision.

What is the relationship of limitations of investigation to cases with increased clearance and prosecution?

A central task of the justice system is to ensure that the offences which are reported are investigated and prosecuted. The percentage of reported offences with person-based clearances has declined successively over recent years. There is a great demand that this trend be reversed. An additional, increasingly emphasised, task for the justice system is to protect the needs and rights of crime victims. As a result, the polls of the police and public prosecutors included a question regarding how they see LIs in relation to this goal. Table 1 shows that a relatively significant percentage, particularly among the police, perceive that an LI sometimes, or in general, comes into conflict with the goal of investigating and prosecuting reported offences.

Table 1. The percentage of police and public prosecutors who perceive that the LI mechanism gives rise to a problematic conflict with the legal policy goal of investigating and prosecuting reported offences (n=145/132).

	Police	Prosecution Authority
No, not as it is applied today	32	49
Yes, in certain types of cases	48	43
Yes, generally	19	8

Those police who believe that there is a conflict say things like "the discount for multiple offences borders on shocking" and "professional criminals shouldn't have a discount on penalties". There are also both public prosecutors and police who question whether LIs are consistent with the general sense of justice.

How do limitations of investigation affect the efforts in respect of crime victims?

One consequence of limiting investigation in an offence against a person is that the victim finds it more difficult to obtain damages. In a criminal case, the public prosecutor can try the issue of damages in the criminal trial on the victim's behalf. However, if there is an LI for the offence, the victim's only possibility for trying the issue of damages is to do so personally in civil litigation. If the LI decision was taken early in the investigation, there is also seldom sufficient evidence to support civil litigation.

The injured party can seek compensation from the Swedish Crime Victim Compensation and Support Authority (*Brottsoffermyndigheten*, BrOM) even if no damages are awarded. However, this often requires prosecution in those cases where there is a person suspected of the offence, or a confession or credible evidence, which

is often not the case is in cases subject to LIs.

Approximately 70 applications for crime victim compensation in 2016

BrOM has, on Brå's behalf, identified all closed matters regarding crime victim compensation from 1 January– 4 June 2016 which relate to offences where the preliminary investigation was closed. They found 28 matters which involved offences which had been the subject of an LI. If the flow of matters remained constant throughout the year, this would mean that during 2016, approximately 70 matters came in which related to damages as a consequence of offences which were subject to LIs. By way of comparison, the number of offences against the person which were subject to LIs the same year was approximately 11,000 (primarily defamation and non-sexual molestation).

Six of the 28 applications studied were granted, i.e. slightly more than 20 per cent. In a review of the 28 matters, it is clear that one-fourth involve offences with an LI on the grounds of "special examination prosecution", while three-fourths had limitation of investigation based on "waiver of prosecution".

Special examination prosecution cases involve defamation and libel, and none of these applications for crime victim compensation were granted.

The 21 waiver of prosecution cases involve a variety of different types of offences against persons such as illegal threat, nonsexual molestation, and burglary. Essentially all applications involve compensation for personal offence, sometimes in combination with compensation for pain and suffering. In most cases, the application was dismissed on the grounds that the personal offence was not sufficiently serious to grant compensation. In approximately one-third of the cases, the application was dismissed for lack of proof that the applicant had been the victim of an offence. These are the cases in which an LI itself may have had a detrimental impact on the applicant's possibility to receive crime victim compensation. The reason is that there may have been more evidence of an offence had the investigation not been closed through an LI.

Taken as a whole, the review shows that the LIs are seldom significant to the issue of whether applications for crime victim compensation are granted. In respect of offences with LIs, it appears that there are some, albeit few, cases in which the LI was significant in terms of the decision to pay compensation to a victim.

The applications do not give the entire picture

One should bear in mind that a review of applications to the BrOM does not provide the whole picture regarding the conceivable im-

pact of LIs on the extent to which the victims receive crime victim compensation. Such a review does not shed light on those victims who may have refrained from seeking compensation for the specific reason that there was an LI of the offence in which they were the victim. They may have refrained because they believed it was pointless to apply for compensation because the investigation was closed. There is no knowledge regarding these undetected cases.

Brå's proposal

Brå's study shows that the police and public prosecutors entertain many different opinions regarding LIs. There is a variety of opinions regarding the extent to which the mechanism should be used. However, most respondents see the LI as valuable opportunity to streamline work if it is applied in a skilful and responsible manner.

In the report, Brå provides a number of suggestions regarding how the identified shortcomings can be rectified. Brå proposes, among other things, the following:

Police preliminary investigation officers should receive more training and continuation training on limitations of investigation

It is important that each person who will become a preliminary investigation officer receives sufficient training regarding LIs. The police should also organise more regular continuation training sessions where preliminary investigation officers can discuss issues regarding practical application with a prosecutor. It may also be valuable to include, sometimes, investigators and personnel in the field, so that these groups recognise when an LI may be relevant.

Possibility for direct limitation of investigations should be used more

LIs should take place as quickly as possible. It is therefore important that the police develop routines to increase contact between personnel in the field and preliminary investigation officers in potential LI matters. This will, in turn, avoid the risk that police in the field will conduct unnecessary investigation of offences for which investigation is subsequently limited.

In this context, there is also cause for the police to review whether on-call preliminary investigation officers sufficiently limit investigations or if they "fob off" the decision to the regular preliminary investigation officers.

The formal decision regarding limitations of investigation should be registered earlier

At present, cases often end up piled up at the police after the preliminary investigation officer has decided that investigation should be limited. In order to gain an accurate picture of processing time,

the formal LI decision should be taken at the same time as the matter is, for practical purposes, closed.

The agencies should regularly follow up on the extent to which the limitation of investigation rules are used differentially

The Swedish Prosecution Authority and the Swedish Police should regularly follow up on the range of variation in the use of the LI rules in respect of individual decision makers in the same part of the organisation and those in different parts of the organisation.



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