

**De rol van herstelbemiddeling in het strafrecht**

**Eindrapportage**

**Onderzoek pilots Herstelbemiddeling**

**ENGLISH SUMMARY**

**I. Cleven**

**K.M.E. Lens**

**A. Pemberton**

## **De rol van herstelbemiddeling in het strafrecht**

### **Eindrapportage**

#### **Onderzoek pilots Herstelbemiddeling**

I. Cleven, MSc

Dr. K.M.E. Lens

Prof. dr. A. Pemberton

Dit boek is een uitgave van:

International Victimology Institute Tilburg (INTERVICT)

Tilburg University

Postbus 90153

5000 LE Tilburg

Telefoon: 013-4663526

E-mail: [intervict@tilburguniversity.edu](mailto:intervict@tilburguniversity.edu)

Website: [www.tilburguniversity.edu/intervict](http://www.tilburguniversity.edu/intervict)

Bezoekadres:

Montesquieu Gebouw

Warandelaan 2

5037 AB Tilburg

INTERVICT is gelieerd aan Tilburg Law School van Tilburg University.

Dit onderzoek is uitgevoerd in opdracht van het Wetenschappelijk Onderzoek- en Documentatiecentrum.

Alle rechten voorbehouden. Behoudens de door de Auteurswet 1912 gestelde uitzonderingen, mag niets uit deze uitgave verveelvoudigd (waaronder begrepen het opslaan in een geautomatiseerd gegevensbestand) of openbaar gemaakt, op welke wijze dan ook, zonder voorafgaand schriftelijke toestemming van de uitgever. Hoewel aan de totstandkoming van deze uitgave de uiterste zorg is besteed, aanvaarden de auteur(s), redacteur(en) en uitgever geen aansprakelijkheid voor eventuele fouten of onvolkomenheden.

© WODC 2015

## English summary

### Introduction and objectives

The practice of mediation in criminal justice is gaining ground in the Netherlands. In recent years the Ministry of Security and Justice and various relevant criminal justice actors (the Council for the Judiciary, the Public Prosecutor's Office, the police, Rehabilitation, Victim Support the Netherlands, 'Victim in Focus' (i.e. '*Slachtoffer in Beeld*'), and the Dutch federation of mediators (i.e. '*Mediatorsfederatie Nederland*') have voiced their support for the introduction of mediation in criminal justice. Their shared vision is the foundation of this research.

The research describes the experiences gained during the pilot studies on mediation financed by the Ministry of Security and Justice. In 2013 the Ministry asked various actors in the field to submit project proposals for pilot projects on mediation. Five projects received funding. These can be categorized by their connection to the criminal justice process:

- Two pilots in the post-sentencing phase (i.e. *Locatie en Contactverbod* and *EKC*), in which mediation is complementary to the criminal proceedings.
- Two pilots in the police phase (i.e. *Politiepijlot Spijkenisse* and *Vreedzame Wijk Utrecht*), in which mediation is conceived to be an alternative to criminal proceedings;
- One pilot in the prosecutorial/pre-sentencing phase (i.e. *OM/ZM* pilot, in which mediation is part of the criminal proceedings;

The objective of the research is to contribute to the policy framework 'Mediation in criminal justice' ('*Herstelbemiddeling in het strafrecht*'), by providing insights into the lessons learned from the pilots regarding possibilities, impossibilities and necessary conditions of mediation in criminal justice. In this report a distinction is made between the terms mediation and mediation in criminal law. The former entails all forms of guided meetings between victims and (alleged) perpetrators of criminal facts. The latter concerns a specific form of mediation in which the meeting is intended to result in a judicial agreement and/or of which the result can be taken into account in the criminal procedure.

It is important to stress that this research has been carried out in a pilot phase, during which work processes concerning mediation were still in the process of being established. Therefore the research findings should not be viewed as a final evaluation of mediation. Instead, the authors hope that this report will contribute to the continued development of the practice of mediation in the Netherlands.

Moreover, the report only focuses on the aforementioned five pilot projects. The practice of mediation, however, is already established in the Netherlands as is shown, for example, by *Slachtoffer in Beeld*

and their nationwide service of victim-perpetrator dialogues, which are not included in this research. The report focuses on mediation in criminal law, because of the development of the pilots over time. The empirical research solely relates to this form of mediation and it is the focus of both the cost-benefit analysis and the majority of the recommendations.

## **Research Methods**

In this research four different research methods have been used. Firstly, 35 professionals have been interviewed. Interviewees were mediators, pilot project employees, referring organisations, Public Prosecutors and judges. These interviews aimed to answer the following questions:

1. What are similarities and differences in the progress and results of mediation in the various pilots?
2. What participation criteria are used by referrers and mediators
3. How does the Public Prosecutor deal with mediated settlement agreements?
4. Does mediation in criminal law influence the course of the criminal procedure?
5. What are benefits and suggestions for improvements according to mediators?

Secondly, characteristics, experiences, motives and expectations of participating victims and (alleged) perpetrators were investigated. The research involved 186 participants, of which 102 were victims and 84 were (alleged) perpetrators. All of them are participants in the pilots *Vreedzame Wijk* and *OM/ZM*. For that reason the results can be viewed as a research on mediation in criminal law.

A prominent component of this part of the research was a quantitative, longitudinal survey among victims and (alleged) perpetrators. This was done at three different moments in time: one before mediation had taken place (T0) and two after mediation had taken place (one month after (T1) and over six months after (T2)). At the moment of writing not all respondents had completed all questionnaires. Particularly the response on the T2-questionnaire was low. Aside from the survey interviews were held with 37 participants. The questionnaires and the interviews aimed to (partially) answer the following research questions:

1. Who participated in mediation in criminal law?
2. What are features of mediation in criminal law according to participants?
3. What are the effects of participation according to participants?
4. What are the consequences of mediation in criminal law for participants?
5. What is the social return of mediation in criminal law?

Thirdly, the registration data of the pilots and judicial districts involved were analysed. The registration data entails the registration forms of the pilots, the settlement agreements and the records of the judicial districts concerning the outcomes of the cases that have been referred to mediation. This analysis provides an (partial) answer to the research questions:

1. In how many of the referred cases has mediation been initiated and how many of these initiated cases resulted in an agreement?
2. What are the characteristics of mediation in criminal law?

Fourthly, the costs and benefits of the implementation of mediation in criminal law were analysed. In the first place insights have been gained into the costs and benefits for the Judiciary. The actual costs for mediation will be compared with the estimated costs of the alternative in these cases. What would have been the costs without a referral to mediation? In the second place the results of the empirical research and the literature study provide information that offers an insight into the social return. The analysis gives a cautious first answer to the following research questions:

1. What are the estimated costs and benefits of mediation in criminal law for the Judiciary?
2. What is the social return of mediation in criminal law?

This summary consists of four main sections:

- *The pilots in practice, learnings and suggestions for improvement.* This section concerns the results of the interviews with professionals involved. These results also relate to some results of the analysis of the registration data, which will therefore also be presented here. The characteristics of the pilots, the progress of the pilots over time, the criteria as applied by referrers and mediators, the interaction with the criminal procedure and the yields and suggestions for improvement according to the parties involved will be discussed.
- *The results of the empirical research among participants.* This section covers the characteristics of participants, their expectations and motives for participation, their judgment on the settlement agreement and the effects and results of their participation.
- *The costs and benefits of mediation in criminal law.* What is the cost of mediation and what is the return of mediation in terms of the judicial procedure and outcome for the Judiciary. In what domains can social return be gained and what are the estimated effects on these domains?
- *Recommendations.* The research specifically aimed to provide recommendations for the policy framework for mediation in the Netherlands. Based on the current research results recommendations have been made concerning the criteria and quality assurance, the importance of defining the judicial frame, the incorporation of mediation in organisations and the finances. Furthermore suggestions have been made for future research.

## The pilots in practice, learnings and suggestions for improvement

### *Short overview of the pilot projects*

- *Pilot Locatie- en contactverbod*. This pilot aimed to mediate between victims and perpetrators in restraining order cases with or without Electronic Monitoring. Slachtoffer in Beeld (SiB) carried out the mediations, while supervisors of Reclassering Nederland (RN) and casemanagers of Slachtofferhulp Nederland (SHN) handled the preparatory phase. The pilot involved severe cases, so-called High Impact Crimes (HIC). These cases are referred after the verdict and did not influence the course of the legal process. The pilot is based on the idea that there is a realistic chance that victim and perpetrator will encounter each other after the restraining order has been lifted. Mediation can benefit victims by reducing their fear of these encounters and improve the course of these encounters. Until November 2014 21 RN cases have been selected based on their potential suitability for the pilot, of which two have resulted in a dialogue.
- *Eigen Kracht Centrale (EKC)*. In this pilot Reclassering Nederland (RN) and Eigen Kracht Centrale (EKC) explored the possibilities of deploying conferences in cases involving adolescent perpetrators. Perpetrators were between 16 and 23 years old and were supervised by RN. The RN supervisors would check which cases would be suitable for mediation, after which EKC would take over and carry out the mediation. In 182 cases the project coordinator requested supervisors of potential files to discuss mediation with their client. Thirteen perpetrators were interested in participation. Only two cases resulted in mediation, partly because of problems related to the possibility to contact victims.
- *Pilot Spijkenisse/Nissewaard*. In this pilot police staff and social workers of the municipality and HALT were trained to carry out mediation. Police officers have the possibility to refer mediation cases to the municipality, which is called the “scaling-up phase”. This phase focuses on cases that demand more expertise and time to come to a solution. Community workers and school attendance officers carried out mediations. In this pilot 23 cases resulted in mediation, of which five in the scaling-up phase.
- *Pilot Vreedzame Wijk*. The Utrecht pilot ‘*Verwijzing naar mediation door politie in de vreedzame stad*’ (‘Referral to mediation by the police in the peaceful city’) is part of the Vreedzame Wijk (‘Peaceful City’) project, in which the so-called Utrechtse Mediatie model (‘Utrecht Mediation Model’) was developed. This project already offers two forms of mediation, district-mediation and neighbourhood-mediation. This pilot provides a third option, a referral to professional (MfN) mediators. Unlike the cases in the pilot Spijkenisse/Nissewaard in almost all of these cases a report to the police has already been made. Furthermore these cases need to entail sufficient evidence for (successful) prosecution of the alleged perpetrator. In the cases involved the police assesses that the legal procedure will not solve the underlying

problem. This is presumed to be the result of the fact that the parties involved in the report live near each other and/or the high probability that they will encounter each other on a regular basis. In this pilot 54 cases were registered, of which 44 are currently completed. A majority of these resulted in a successful mediation.

- *OM/ZM pilot.* The largest pilot was carried out in the prosecutorial/pre-sentencing phase. In terms of Groenhuijsen (2000) mediation in this pilot is *part of* the criminal law and it concerns the second form of the aforementioned two forms of mediation, i.e. mediation in criminal law. When handling a case the participation in and the outcome of mediation can be taken into account. The pilot involves the judicial districts Amsterdam, Noord-Holland, Den Haag, Rotterdam, Brabant-Oost and Breda/Middelburg. The pilot concerns a collaboration between the Public Prosecution's Office ('Openbaar Ministerie', OM), Judiciary ('Zittende Magistratuur', ZM), the MfN-mediators selected by the court (Mediatorsfederatie Nederland) and Slachtoffer in Beeld (SiB)<sup>1</sup>. Cases are referred to the mediation offices of the courts by judges and public prosecutors. Subsequently cases were alternately carried out by MfN-mediators selected by the court and SiB. Until the 1st of March 2015 a total of 766 cases were referred to mediation. Most cases, 55%, were referred via the ZSM-procedure. Currently 716 cases are completed, 50 cases are still running. Of the completed cases 367 cases resulted in mediation. More than three quarters of these cases were successful, meaning that mediation either resulted in a settlement agreement or – as in a few cases – even in absence of an agreement the mediation is viewed as successful by the parties involved.

### *Learnings of the pilots*

The most important results concerning the advance and the results of the pilots are the following:

- *Differing pilot advancements.* All pilots ran a different course over time. Both pilots in the post-sentencing phase barely brought about mediations. According to parties involved the pilot Spijkenisse/Nissewaard confirmed the added value of mediation for police officers, however the question remains whether police officers should be appointed for carrying out mediations. This research cannot provide insights into whether participants would agree with this judgement, because of the low number of cases in the so-called scaling-up phase. From a quantitative perspective the pilots Vreedzame Wijk in Utrecht and the OM/ZM pilot were more successful, the latter even significantly more. Participants of the empirical research consist exclusively of participants of these two pilots.
- *Significant willingness to participate in mediation.* Experiences with the pilot Vreedzame wijk and OM/ZM show that a significant willingness exists to take part in mediation in criminal law, despite the fact that mediation is relatively unknown in the Netherlands. Almost half of the

---

<sup>1</sup> Overigens zijn er bij SiB ook MfN-gecertificeerde mediators werkzaam.

cases in which an attempt is made to initiate mediation result in mediation. A small part of the victims say they declined because it is too burdensome, an equally small part does not want to participate because they feel that mediation should not influence the legal procedure. (Alleged) perpetrators do not mention these reasons for not participating, instead they claim not to participate because the counterparty declined.

- *Similarities in experiences.* Every pilot faced the major dilemma of offering customized service and defining uniform criteria. The subtitle 'Criteria' below addresses important learnings and suggestions for improvement.

Furthermore every pilot stresses the importance of incorporating mediation into the organisation. The alignment of mediation with the organisational processes is crucial to successfully establish the practice of mediation. In each pilot this alignment took up a substantial amount of time and even in the relatively large OM/ZM pilot this process continues.

- *Similarities and differences between Vreedzame Wijk and pilot OM/ZM.* Most of the mediation cases were carried out within the pilots Vreedzame Wijk and OM/ZM. At the start of the pilots the Ministry regarded the pilot as belonging to the police phase, but many similarities with the pilot in the prosecutorial/pre-sentencing phase exist. The similarities concern the case type of completed mediations – generally relatively simple cases of violence between individuals that know each other – and the relation to the legal procedure. The majority of the cases in the pilot Vreedzame Wijk were taken up after a report to the police. The Public Prosecutor was closely also closely involved.
- There are a few differences between Vreedzame wijk and the pilot OM/ZM, as is exemplified by the major role of the police and the alignment with other social services in the district in the Vreedzame Wijk. As a result cases can be referred to mediation in an earlier phase. The police involvement contributes to the acknowledgement of the usefulness of mediation in the police organisation. It also provides opportunities to better align mediation with other interventions and aid activities that can contribute to dealing with neighbourhood conflicts.

#### *Criteria of referrers and mediators*

- *Criteria versus customized service.* Despite major differences in the pilot set-up and in the course they ran over time the ideas concerning referral and mediation criteria are remarkably uniform. All stakeholders indicated that they experienced the dilemma of offering a customized service to solve the situation at hand and defining uniform criteria for referral to mediation. It is significant that most of the stakeholders did not mention specific criteria. It underlines the notion that the implementation of mediation and a set of crime categories are not compatible.
- *Relatively minor (violent) crimes in mediation.* However, mediation – in the prosecutorial, pre-sentencing phase - seems to be offered in cases in which a possible outcome of the mediation in itself can be viewed as a sufficient and proportionate settlement for the crime. A small part

of the cases in which mediation was successful do result in a legal process, but in a majority of cases a successful mediation leads to a dismissal.

- *Voluntary participation.* Instead of listing crime criteria, stakeholders emphasize procedural guarantees (Lauwaert, 2008; Zalm, 2012). Firstly, the core principle of mediation is voluntary participation. All stakeholders regard it as a crucial aspect of the mediation process. In most cases voluntary participation appears to be well assured. This finding is also reflected in the participants' view, a majority of the participants agree with the statement that their participation was voluntary. Simultaneously, there are some indications that voluntary participation is under pressure. This applies specifically to cases in which mediation can influence the legal process. It is crucial to note that initially participants may not always fully comprehend the mediation request. This unfamiliarity applies to the mediation process itself, but also to the legal process in general. Interviews with professionals and participants show that in a minority of cases (alleged) perpetrators may experience pressure in the preparatory phase. This pressure is not exerted by mediators, but rather by parties who inform (alleged) perpetrators beforehand about the possibility to participate, such as police staff and/or the Public Prosecutor's Office.
- *Neutrality and empowerment.* Results show that participants regard mediators as neutral. Furthermore, they feel that mediators give them primacy in determining the outcome. When participants regard themselves as unjustified alleged perpetrators, they are more inclined to criticise mediator neutrality. In such cases mediators are judged to lean too much towards the victim. These participants also indicate to relate less well to the final outcome.
- *Confidentiality.* With no exceptions stakeholders agreed that mediation should be confidential. Both participants and stakeholders judge confidentiality to be well guaranteed. The question remains to what extent the preparatory phase prior to the decision to participate should be equally confidential. The strict confidentiality that applies to mediators during the mediation process does not apply to stakeholders who initiate the first contact with potential participants. This brings up the question of what type of information regarding the willingness to participate may be passed on to those who lead the legal process, such as the Public Prosecutor.
- *Taking up responsibility.* A specific criterion for mediation in a criminal setting is that the (alleged) perpetrator needs to take up responsibility for what happened. According to the EU-Victims Directive the (alleged) perpetrator needs to acknowledge the facts underlying the crime. This seems to be the case in a majority of cases. On the one hand the question remains whether it is always clear which exact facts have been acknowledged. There is an essential difference between acknowledging the facts underlying the crime and consenting to the allegations. However, mediation seems to have taken place in cases in which (alleged) perpetrators did not take up responsibility or contested to be the (alleged) perpetrator.
- *Provable case.* A final criterion concerns the provability of the case, meaning that the Public Prosecutor needs to have sufficient evidence for a possible successful prosecution. In the pilot

*Vreedzame Wijk* two problems related to this criterion emerged. Firstly, a focus and commitment to determine the provability can delay and complicate the potentially beneficial initiation of mediation. Secondly, police officers may be difficult to convince to refer cases to mediation, especially in cases that are easy to prove and prosecute.

### *Interaction with the legal process*

One of the most important innovations of the pilots in the Dutch context is the relation between mediation and the legal process. The following is a selection of important results:

- *Successful mediations most often result in a dismissal.* Successfully mediated cases are being dismissed in a majority of the cases, more specifically in 75%. The remaining share appears before the court. Only 30% of the referred cases in which mediation was not initiated resulted in a dismissal, and 60% of these cases appears before the court. The share of sentences involving community service and deprivation of liberty is significantly higher in this group compared to the successfully mediated group.
- *Dealing with the mediated settlement agreements.* The Public Prosecutor generally does not include an addition to the mediated arrangements. A successfully mediated case on the Public Prosecutor's level typically results in a conditional or complete dismissal. At present, referrals at this level seem to apply to cases in which Public Prosecutors regard dismissal as a realistic outcome of the case. The pilot's results seem to indicate that the Public Prosecutor decides to summon clients of more severe cases before the court
- *Conditional dismissal?* The linking to the legal procedure requires further considerations. Many successfully mediated cases result in a non-conditional dismissal. In the event of non-compliance with the settlement agreement a victim can appeal to an art. 12 procedure. Instead many respondents emphasized the importance of a conditional dismissal. The conditions would concern the compliance with the mediated agreements (see also Claessen and Zeles, 2013). At present most conditional dismissals merely seem to entail a general condition – that the alleged perpetrator will not commit a crime within a certain time period.
- *Relation settlement of damage/legal settlement and immaterial conflict solution.* Respondents point out that various elements of the mediation process can be at odds with one another. An example is the relation between the settlement of damage and/or the legal settlement and the remaining, more immaterial elements of mediation. In some cases mediation can contribute to improve the relationship between participants, but that may be precisely because the settlement of damage and/or the legal settlement is arranged outside of the mediation context. It seems that for some participants the fine-tuning of this follow-up in the process and the outcome of mediation were not as expected.
- *Mediation after initiation of examination in court.* A special situation arises when a case is referred to mediation when already in court. After the onset of the examination in court it is not

possible to refer a case back to the Public Prosecutor and to dismiss. In such cases a successfully mediated case still comes to trial. The question remains whether this is desirable. It begs the question whether it would be possible to provide a possibility for these cases to subsequently be settled at the level of the Public Prosecutor. It is beyond the scope of this research to judge this suggestion on its own merits, but when developing the legal framework to link mediation in criminal law it seems to be important to include a solution for these type of cases.

- *Relation with criteria.* As mediation and criminal law become more intertwined, pressure on the various aforementioned procedural guarantees increases, as is the case for mediation in criminal law. Therefore guaranteeing these criteria is of increased importance.

#### *Benefits and suggestions for improvement according to stakeholders*

All stakeholders who were interviewed share the idea that mediation in criminal law is complementary to the legal process, or a substantial alternative. This idea is, with certain nuances, reflected in the results of the research among participants.

- *Aforementioned suggestions for improvement.* Many of the suggestions of improvement were mentioned in prior paragraphs. These suggestions concern the importance of incorporating mediation in organisations; securing voluntary participation; defining what encompasses ‘taking up responsibility by the (alleged) perpetrator; and the importance of a more detailed legal framework for linking mediation and the legal process.
- *Guaranteeing mediator quality.* In the big OM/ZM pilot mediations were carried out by two groups of mediators, mediators chosen by the court and SiB. In most part they have a similar approach, but differences in vision were noted. Sometimes these differences resulted in mutual critique. This critique can be useful in that it can contribute to a quality guarantee of mediators. Guaranteeing mediators’ knowledge of civil and criminal law, understanding and responding to the special needs of participants of mediation in a criminal context, guarding voluntary participation and confidentiality: these are all issues that may be included in a possible quality register for mediators.
- *Financing of mediation.* In many situations the mediation fee seems to be sufficient. It is important to note that cases that do not result in mediation are being captured in time. Many respondents question the practice of only compensating for successfully mediated cases. Furthermore, the current fee does not cover expenses for more complicated cases. In these types of cases the fee should be reviewed. On the one hand the fee creates an imbalance between the input of the mediator and the financial compensation, while on the other hand it limits the possibility to provide customized service.

## Results empirical research among participants

### *Characteristics of participating victims and (alleged) perpetrators*

The results of the empirical research merely concern the experiences with mediation in criminal law. Participating victims and (alleged) perpetrators show similarities with the total population of (alleged) perpetrators and victims in the Netherlands in terms of sex and – in the case of victims – prior victimisation. A few striking differences were also noted:

1. *Demographic factors:* Firstly, participants (both victims and (alleged) perpetrators) appear to be relatively older, with a relatively high proportion stating to be in a relationship. The education level of the (alleged) perpetrators in the sample was higher than in the comparison population. This gives rise to several questions. To what extent do a low education and the possibly related communication difficulties pose a barrier for participation? And how should a possible age effect be interpreted? Are these demographic effects the consequence of the preferences of the participants, a consequence of the choices that referrers make and/or an artefact of the research sample?
2. *Crime factors:* Secondly, participants that consent to mediation seem to be involved mainly in violent crimes – that differ in type and intensity. This is consistent with experiences in the already established practice of victim-perpetrator dialogues (e.g. Zebel, 2012, Laxminarayan et al, 2013).
3. *Acquaintances/family:* Thirdly, participants seem to know each other prior to the crime. A large majority reported this was the case. This finding is in stark contrast with research on victim-perpetrator dialogues in the Netherlands (see Laxminarayan et al., 2013) in which a large majority did not know the counterparty prior to the crime.
4. *Emotional impact:* The analysis of psychological characteristics shows that participating victims generally experience a small but significant emotional impact of the crime. They report symptoms of traumatic stress, anxiety, and anger about what happened to them. Results suggest that these symptoms and complaints are fewer compared to the group of victims who used the right to speak/written victim impact statement (SSV) in the research by Lens et al. (2010). It is important to note that this research involves more recent crimes than the right to speak/SSV research.
5. *Trust in the policy and Judiciary:* Participating perpetrators and victims seem to put a relatively high trust in the police and Judiciary. It is striking that the scores of perpetrators and victims are more or less equal, but that victims in the current research report more trust compared to victims who used the right to speak/SSV. Belief in a just world by perpetrators and victims shows a similar pattern.

6. *Guilt and shame*: The psychological characteristics of perpetrators are more difficult to compare to prior research. Results seem to indicate that feelings of guilt and shame are experienced slightly more by participants in this research sample when compared to non-forensic samples. For a minority of the participants strong feelings of shame and guilt appear to be part of the reason to participate.

### *Expectations and motives*

Respondents barely have experience with mediation. This underlines the importance of a good briefing by referring parties. At present few respondents will seek out the service of mediation themselves, when there is no *active offer*. A frequently mentioned reason to participate –by more than 80% of respondents – was the mere fact that the opportunity was offered to them. The current most important gatekeepers, the police and the Public Prosecutor's Office, play a major role in this regard. Compared to victim-perpetrator dialogues, a relatively bigger share of the participants states to experience pressure to participate, and a minority perceived participation as a duty.

Insofar as expectations are concerned, aspects of procedural justice, justice restoration and therapeutic jurisprudence play an important role. The most frequently mentioned expectation regarding participation is that it will result in a solution of the conflict. A majority of participants mentions reasons in line with the experience of procedural justice. About eight in ten respondents lists active participation in the dialogue, co-deciding and co-determining the solution as reasons to participate. Furthermore, a majority of victims hope that participation will prevent recidivism in the future. 88% lists *preventing future crimes* as a reason to participate. A majority hopes to receive an expression of regret by the (alleged) perpetrator. Conform the thoughts of Schnabel and Nadler (2008) regarding restoration, many (alleged) perpetrators hope that through participating they can show that they are not evil persons and that victims can gain an understanding of their actions. Many (alleged) perpetrators hope to improve their shattered social and moral image through participation. This reason seems to be more important than contributing to restoration of the victim.

For both parties the *dialogue in itself* is an important motivation to participate. A majority regards participation as an opportunity to talk to the counterparty, to express one's feelings, to ask question (victims) and to answer question ((alleged) perpetrators). Regarding *therapeutic jurisprudence* and the impact on their own feelings, this seems to be related to the extent in which one experiences emotions such as fear, shame and guilt. Victims who are relatively afraid of the (alleged) perpetrator more often claim to participate to reduce their fear; (alleged) perpetrators who report high levels of guilt and shame, claim more often claim to participate to reduce feelings of guilt and shame. Regarding the latter it should be noted that these two motives (shame and guilt) are not frequently reported, more specifically by a mere quarter of participating (alleged) perpetrators.

### *(The judgement of) the settlement agreement and the content of the agreements*

Respondents report that in 70% of the mediations an – almost always written – agreement is reached. This finding is consistent with the results of the analysis of the registration data that shows that over three quarters of mediations result in a settlement agreement. Almost all respondents understand the agreement (95%). Approximately 75% states to be satisfied with the agreement, 15% states they are not.

The content of the agreements varies: in about half of the cases it entails an explanation regarding the source of the crime and in one third of the agreements the (alleged) perpetrator explicitly acknowledges his or her culpability. In 40% of the agreements parties have made arrangements regarding future interaction and in 20% a promise is made to the counterparty.

At the moment of questioning, 21% respondents state to not have come to an agreement. Of the 79% who did come to an agreement, a small minority of 11% states that their requests are insufficiently reflected in the agreement. In sum, the share of participants who reached an agreement that satisfies their requests is currently a little over 70%.

### *Experiences with mediation*

#### *1. High level of procedural justice*

Without question participants consider the process experience positively. Participants report to have been treated with respect, to have been given the opportunity to provide input, that there was sufficient time for the mediation and that confidentiality was guaranteed. The mediator was also positively evaluated. According to participants mediators were objective, took their requests into account and provided ample support. Participants report they received sufficient information prior to the mediation and a large majority considered the briefing positive.

A small majority claims that through participation they were able influence the case. Most participants also feel like mediation gave them the opportunity to co-determine and co-decide on the solution of the case. This applies to victims and (alleged) perpetrators equally. This experience is consistent with the difference between mediation in criminal law and victim-perpetrator encounters that do not influence the legal process.

#### *2. Participants less positive about restoration*

At the same time a minority of participants stated that expectations regarding the mediation were not met. A substantial share (26% of victims and 17% of perpetrators) is dissatisfied with the course of the mediation process and an equal part is dissatisfied with the outcome (23% of victims and 29% (alleged) perpetrators is dissatisfied). The average score on a scale of 1-10 for (alleged) perpetrators is a 7,2 on average and for victims a 6,9. Results suggest that the interaction with the opposing party is crucial in

this regard. Expectations prior to mediation regarding restoration seem to be relatively high on both sides – of victims and (alleged) perpetrators - but relatively often these expectations are not met. Where reports regarding the mediator, the briefing, and the preparation prior to mediation generally are (very) positive, reports regarding the opposing party are more often negative. For example, many victims stated preventing recidivism was an important motivation to participate. In retrospect a minority of victims report that they felt mediation contributed in this regard. A (mere) third of participating victims claim to have received a sincere expression of regret.

In the case of participating (alleged) perpetrators, they hoped that mediation would help the victims gain understanding of their actions. In retrospect less than a third felt the mediation was successful in this regard. The share of (alleged) perpetrators that experienced an increase in understanding by the victim, gained more insights into the counterparty, and/or was able to help him or her is equal to the share that has not experienced mediation this way. Furthermore, only a few perpetrators seem to receive positive, re-integrative feedback during the mediation.

Other research also shows that the interaction with the counterparty does not always live up to prior expectations. The differences between expectations and experiences in the current research seem to be more pronounced, also compared to victim-perpetrator dialogues. In part this could be due the research design. Generally participants are asked about their expectations retrospectively. In this approach their answers are biased by the actual experience, and as a result it complicates detecting possible differences between expectations and experiences.

Future research could focus on the question whether it is necessary to lower expectations prior to mediation, to prevent disappointment. It should also look into the extent to which a mismatch of expectations and experiences involves certain types of crime. The qualitative interviews among participants show that predominantly victims and (alleged) perpetrators involved in complicated, longstanding conflicts in the domestic sphere seem to be dissatisfied. They judged mediation to be insufficient to tackle the problems underlying the recurring conflicts. In these situations a combination of mediation and other interventions would be worth considering.

### 3. *The effects and results of mediation*

This section zooms in on the results in terms of *therapeutic jurisprudence*. This story is twofold. On the one hand – and in line with other research - participants experience an (positive) impact through participation on wellbeing. According to 40% of victims mediation contributed to restore the damage, and for an equal share of victims mediation contributed to cope with the crime. A substantial share (about 40%) of victims and (alleged) perpetrators state that they feel better now they participated in mediation, and they also experience personal strength and the strengthening of relationships.

On the other hand, the comparison of psychological-emotional constructs of the T0 and the T1 mitigate the expectations regarding the impact of participation (see also Pemberton et al. 2010). Research on the impact of participation in restorative justice procedures finds small effects (e.g. Angel, 2005; Zebel, 2012). These findings can be expected when considering the limited time of the mediation procedure. At present, the results confirm the expectation that the impact of mediation on traumatic stress, anxiety and anger (for victims) and feelings of regret, guilt and pride (for (alleged) perpetrators) are small at best. The results indicate a small effect on anxiety for victims and a feeling of pride for (alleged) perpetrators. However these findings also could be due to the effects of time. On the other psychological measures no statistically significant differences were found.

Furthermore (alleged) perpetrators and victims have varying experiences. In case of victims, the share that agrees with the statements that the process entails sufficient acknowledgement of what has happened to them, the process held the (alleged) perpetrators responsible for his actions and/or contributed to a just outcome is more or less equal to the share that disagrees with these statements. The way in which (alleged) perpetrators look back on mediation shows a similar pattern. An important question for future research is to what extent are positive and less positive results ‘embedded’ in the experiences of certain respondents. And subsequently what characteristics of mediation – and particularly the interaction with the counterparty – are related to these experiences.

### **The cost and benefits of mediation in criminal law**

The cost per successful mediation was deducted from the project budgets of the OM/ZM pilot and is estimated to be slightly less than 1500 euro. This estimation also takes into account the overhead and the costs that are made for referred cases in which mediation is not initiated or did not lead to a successful outcome. This estimation can also be deduced from the – rejected – budget of the Attorney’s General Office. This budget is based on a procedure in which mediation offices first explore the possibility of initiating mediation, prior to referral to mediators. This seems to reduce the time and efforts spent on cases that do not result in successful mediation. Costs appear to be higher when cases are referred to mediators in an earlier phase – as was done in the pilots of Slachtoffer in Beeld. Furthermore results show that a break-even level is not always guaranteed in complex cases.

The benefits of mediation are visible in two domains. Firstly, benefits arise regarding the possible legal settlement. These benefits concern the Judiciary – mediation eliminates costs regarding the prosecution, conviction and the execution of the penalty. Secondly, benefits arise in terms of social return: the assessment of a decline of harm done to society by crime. These benefits entail a decrease of recidivism by (alleged) perpetrators, the contribution to coping by victims and the increased legitimacy of the legal system for all participants.

### *Legal settlement*

The benefits in terms of a legal settlement were estimated as follows. Firstly, the costs for the legal procedure for successfully mediated cases were estimated. This was done by analysing the data of legal districts concerning the outcome of cases, subsequently an average cost per case was estimated using the known cost components of the legal procedure. These cost components involve costs made during prosecution (dismissal, prosecutorial settlement, summoning), the trial (a single-judge trial) and the execution of the penalty (a fine, community service sentence, deprivation of liberty sentence, and deployment of the Central Collection Agency “*Centraal Justitieel Incasso Bureau*”). For example, a dismissal costs about 800 euro, community service sentence involving adults 1370 euro and a deprivation of liberty sentence of a month involving adults 7500 euro.

This calculation results in an average amount of 1890 euro per case. In the majority of successfully mediated cases only the costs of a dismissal are incurred (800 euro), in a smaller share of cases other costs are made as well. This average amount excludes the costs of mediation itself

These costs were balanced against the referred cases in which mediation was not initiated. It is assumed that these cases are representative for what would have happened in case mediation would not be offered. These costs are estimated to be approximately 3330 euro. The higher costs are due to the fact that a higher number of cases will appear before the court, and the fact that more – and relatively expensive – sentences will be applied.

Prudence is warranted when interpreting this estimation and comparison. Firstly, at present these results are based on a relatively small sample size. Small shifts in the proportion of the various outcomes, especially regarding deprivation of liberty sentences, may have great consequences for the comparison at hand.

Secondly, the calculation is based on certain assumptions. The calculation involves an average amount per costs component that is assumed to be equal for successfully and non-successfully mediated cases. It remains to be seen whether this is true. Furthermore, we have shown that the calculation is sensitive to the assumptions regarding deprivation of liberty sentences. At an average deprivation of liberty sentence of two months the difference is 1140 euro, at an average sentence of one month it is 1050 euro and a deprivation of liberty sentence of three months 1850 euro.

Lastly, the assumption of the similarity of successfully mediated and non-initiated mediation cases is debatable. The latter group in this research sample involves a larger number of assault causing bodily harm and aggravated assault. This group faces relatively severe sentences. When excluding these crimes from the comparison, the resulting difference is 1250 euro: 1470 euro for successfully mediated cases, and 2740 for non-initiated mediation cases.

Therefore the exact amount of the ‘sentencing settlement yield’ is difficult to determine. It is also not clear whether this yield covers the current costs of mediation, including the costs of non-successfully mediated cases and non-initiated mediations. However current results seem to indicate that it is likely that mediation in criminal law results in such yield. This sentencing settlement yield is a consequence of the share of cases that currently appear before the court, but that will be dismissed at the level of the Public Prosecutor after mediation.

### *Damage*

It remains difficult to estimate the social return of restorative justice. It is not clear whether the findings of the present most methodologically well-designed overview of studies – the Campbell Collaboration-review by Strang, Sherman and colleagues in 2013 – can be translated to the Dutch context. In this regard this research provides at best new points of departure, but it does not offer a basis for firm judgements.

At the same time it must be noted that almost every research on restorative justice shows that restorative justice entails substantial advantages on the aforementioned domains (recidivism, coping and legitimacy) compared to the mainstream legal procedure (see also Vanfraechem, Bolivar and Aertsen, 2015). It is shown over and over again that for those who want to participate in restorative justice participation entails advantages, which involve financial consequences as well. Results show that the possible effects in terms of recidivism offer a major potential. A major research study in the United Kingdom shows that the effects in terms of a decrease in recidivism are a multitude of the costs of mediation (Shapland et al., 2011). More importantly, this was the case despite the fact that no effect in terms of sentence settlement yield was found. This finding seems to work out well in the Dutch context, given the fact that in the Dutch context a large share of the costs of mediation in criminal law can be covered by this yield. The same holds true for the prevention of ‘victim-recidivism’. Various cases in this research involve situations in which crimes are committed to each other back-and-forth. Solving the underlying issues can prevent future harm done by the current victim to the current perpetrator.

Based on the current results these effects seem to be more likely than expecting major coping and healing effects experienced by victims, which is nevertheless a recurring claim regarding all forms of mediation (see also Angel et al., 2014). Firstly, generally the primary impact of crimes involving mediation is relatively small. Consequently costs in terms of healing are correspondingly small. Therefore, the impact on healing is limited, insofar as it occurs at all. The fact that most findings regarding healing effects are derived from studies that did not involve a pre-test severely complicates the interpretation.

Future research could focus on a more precise assessment of the costs and benefits of mediation, which we view as an important subject. The current research seems to support optimism regarding the possible positive contribution of mediation in terms of social return.

## **Recommendations**

Based on these research results two expert meetings were held attended by 18 professionals from academia and the field and policy makers in which recommendations regarding the policy framework of mediation were discussed. These meetings resulted in recommendations in the following domains:

- The added value of mediation in criminal law
- Criteria and quality guarantees
- Legal framework
- Embedding in organisations
- Financing
- Further research

We would like to add that we are under the impression that these recommendations are widely shared by the experts, but nevertheless the responsibility for determining the recommendations lies completely with the research team.

### *The added value of mediation in criminal law*

This research confirms the added value of mediation in criminal law. Surely, remarks and points of improvement regarding the implementation of mediation in criminal law can be derived from the pilots. For example, a share of participants viewed their participation as unsatisfactory or downright negative. In each pilot it took longer than expected to reach the anticipated numbers and important questions remain regarding the organisational embedding, the legal framework and the financing of mediation in criminal law. However, the following remarks support a positive judgment:

Firstly, over 70% of participants regard their participation as positive. This holds equally true for victims and (alleged) perpetrators and in particular regarding the procedural justice and the judgment regarding the mediators.

Secondly, it is crucial to note that when participants judge the outcome of mediation negatively this is mostly related to the counterparty, and not as much to the mediator or the mediation itself. Participants more positively judge mediators and participation in mediation than the counterparty. However, it seems unlikely that an alternative would have resulted in a better solution.

Thirdly, several shortcomings can be regarded as teething problems. The research was carried out while the pilots were still in the start-up phase. From an organisational perspective, but sometimes also in the implementation, changes were made throughout the duration of the pilot. The reported learnings and suggestions for improvement can contribute to the practice and organisation of mediation in criminal law.

Fourthly, the current preconditions – particularly the financial one – regarding some of the more complicated cases seem to be at odds with achieving a positive outcome. Especially in such cases participant experiences seem to disappoint. These results appear to be due to the preconditions under which mediation in such cases needs to be carried out, and not to the instrument of mediation itself.

#### *Criteria and quality guarantee*

*Procedural guarantees.* Most criteria observe procedural guarantees. Criteria concern not the case type, victim and/or perpetrator type, but concepts such as voluntary participation, confidentiality, neutrality, taking up responsibility, provability of the case. At the same time these concepts can be interpreted in various ways and many potentially successful mediation cases may not fit in this framework. It appears to be important to create a uniform definition of these concepts. To what extent is voluntary participation at odds with the notice to (alleged) perpetrators that participation increases the chance of a dismissal? Or is this essential information the (alleged) perpetrator requires in order to voluntarily participate? What is meant by the phrase ‘acknowledging the basic facts of what has occurred’? Does confidentiality entail that rejection of mediation is a confidential matter? This research does not provide answers to these questions. However, we would like to point out that the translation of these concepts into practically applicable criteria needs further consideration

#### *Mediation and mediator quality guarantee*

An important mediation quality guarantee lies in the quality requirements for mediators in criminal law. This concerns not only prior education and accreditation, but also excellent and continuous intervention. The mediation offices and SiB used different methods to carry out mediations in the pilots. These methods concern the number of mediators used in mediation (single or co-mediation), the earlier handing over of cases to mediators in the case of SiB, and the way neutrality and confidentiality are conceived. This research does not provide a final answer regarding the preferred method. This is due to the few cases that were referred to the research by SiB. Even the question whether it matters for participants which choice regarding the method will be made remains unanswered.

#### *Guaranteeing a good and accurate link between mediation and the legal process.*

Timeliness and accuracy are crucial in order to link the mediation and the legal process smoothly. It is also important that mediators with a certain expertise can be matched to a relevant case. This research does not provide a final answer regarding the way in which this link should be organised. Respondents emphasize the role of the mediation office in this regard. This may function as a key linking pin to the other parties involved.

### *Legal framework*

Generally mediation in criminal law gives rise to a few legal issues for which it is necessary to review the current legal framework and criminal procedures. Inspiration may be drawn from the elaborate Belgian legal framework for mediation. This framework highlights the following issues:

- Are conditional dismissals implemented in such a way that they can be taken into account into the imposed sanction? Are the conditions as written in the settlement agreements appropriate to be included as a condition for dismissal?
- Referral before the court is an important option. However, it is complicated by the legal framework. In some mediated cases this return to court can function as a last resort. In other mediated cases this return to court is unnecessary and sometimes contra productive for both participants and the judge. Therefore, the legal framework should be reviewed.
- The same also applies to the status of settlement agreements, and for the documents that mediators can look into when preparing the mediation. Currently these rules differ per legal district.

### *Embedding in organisations*

The incorporation of mediation in organisations requires a long-term approach. Experiences in Flanders and Austria show that even an elaborate framework, and a relatively long tradition of mediation in criminal law do not necessarily result in mediation being valued by police, the Public Prosecutor's Office and the Judiciary. Given the fact that these actors currently prioritise reporting and prosecuting a cultural shift may be necessary. In every pilot it turned out to be difficult to incorporate mediation in the potential referring organisations. Even in the large OM/ZM pilot progress remains dependent on the willingness of individuals to cooperate.

This is problematic in many ways, but of major importance are the difficulties posed for referral and briefing. In these circumstances potential cases are not referred, or cases unsuitable for mediation are referred. Furthermore, most misunderstandings on the part of participants are the result of the briefings prior to mediation. These misunderstandings compromise voluntary participation. If potential participants are incorrectly informed about mediation and the potential usefulness in their situation, they are not able to come to a voluntary decision regarding participation.

It is of major importance to incorporate mediation in organisations in order to successfully implement mediation in criminal law. It is beyond the scope of this research to determine how this should be done. We do emphasize that this issue requires continuous consideration.

### *Financing*

Mediation can contribute to decrease the workload for the Public Prosecutor's Office and the Judiciary. The current research results do not provide an answer to the extent to which this leads to a direct cost-reduction. In this regard there are too many ambiguities concerning the costs – is mediation organised in the most efficient way – and benefits. It appears that the legal settlement yield and the social return combined provide ample support for optimism regarding the financial benefits of mediation for the criminal law. Furthermore, results indicate that the current mediation fee covers expenses of relatively simple cases, but not always of more complicated cases.

### *Further research*

Although cliché, we find it important that research on mediation in criminal law in specific and mediation in general will be continued. Aforementioned recommendations included several issues that require support by social-scientific and/or legal research.

This research was carried out in a pilot phase. Consequently results may be biased when organisational and substantive teething problems affected participants' experiences. Furthermore, we are under the impression that the pilot phase moderated the research response. When work processes are still being developed, it may be difficult for staff to implement a rather demanding research project. Therefore it may be desirable to repeat this research in the future, with a larger research population. This research could also involve experiments on further developing mediation in criminal law. To what extent is it possible to apply mediation in multiple judge-cases? And is further attention warranted for certain target groups, for example in cases involving cross-cultural settings?

This current research does not sufficiently clarify the reasons for non-participation. In the future this could be examined in more detail. Why do people decline the offer of mediation?

The cost-benefit analysis shows the importance of further determining the social return. This may be a topic for future research. Currently research on recidivism after mediation is already being carried out in Maastricht. We believe that the phenomenon of victim-recidivism could be researched in addition.