



Wetenschappelijk Onderzoek- en  
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Cahier 2024-7

# Plan- en procesevaluatie Mediation in Strafzaken

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**Cahier**

De reeks Cahier omvat de rapporten van onderzoek dat door en in opdracht van het Wetenschappelijk Onderzoek- en Datacentrum is verricht. Opname in de reeks betekent niet dat de inhoud van de rapporten het standpunt van de Minister van Justitie en Veiligheid weergeeft.

## Summary

### Victim-offender mediation during the criminal justice process in the Netherlands

#### An examination of policy design and implementation

Since 2017, victims and defendants in criminal cases in the Netherlands can be referred to victim-offender mediation during the criminal justice process (in Dutch: *mediation in strafzaken*). During victim-offender mediation (VOM), victims and defendants discuss the offence under the guidance of two professionally trained mediators. Arrangements that are agreed upon during the mediation encounter – for example in relation to compensation of damages – are taken into account by the public prosecutor or the judge during the remainder of the criminal justice process. In this study, we conducted an evaluation of the policy design and implementation of VOM in the Netherlands. We looked at policy objectives in relation to existing national and international research on VOM and studied the implementation of the policy. We did not look at the effects of VOM on victims and defendants, this will be part of a future study.

The results of this study present a mixed picture. Seven years after its nation-wide introduction, VOM is now clearly part of the criminal justice system. Public prosecutors, judges, criminal defence lawyers and professionals working in other judicial organisations are increasingly familiar with VOM. Implementation largely takes place in accordance with the agreed upon procedures and these are predominantly perceived as workable and useful.

At the same time, the position of VOM within the criminal justice system is still relatively marginal. Less than 1% of criminal cases are referred to VOM. Interviewed professionals indicate that there is a large untapped potential of cases in which victims and defendants could benefit from VOM, but which are currently not being referred. Furthermore, more effort is needed to make VOM an integral part of working processes in the Public Prosecution Services and the judiciary and to stimulate involvement of other relevant judicial organisations.

Based on the findings of this study, we formulate four proposals to stimulate referrals to VOM and improve its effectiveness. Starting point of these proposals is that careful consideration of possibilities for VOM should be considered a right of victims and defendants within the criminal justice process. In the following, we outline the main findings of the research and our proposals.

#### Research questions and methodology

In this study, the following research questions were answered.

- I What policy objectives underlie the adoption of VOM in the Netherlands and how do these relate to the (international) literature on restorative justice?

## II How is VOM implemented in practice?

In order to answer these research questions, we conducted an analysis of EU and Dutch legal texts and other documentation relating to policy design and implementation. In addition, we conducted an analysis of (international) literature regarding restorative justice with a specific focus on VOM. Finally, we analysed data on referrals to VOM in the period 2017-2022 and interviewed 47 professionals. These professionals worked as mediators (9) or criminal defence lawyers (6) or were part of the judiciary (12, including both judges and officers of the mediation bureau), the Public Prosecution Service (11), the Child Care and Protection Board (3), Victim Support Netherlands (2), the probation service (2), or worked for a separate organisation offering VOM outside of the criminal justice process (2).

### Policy design

#### Legal context

The legal basis of VOM lies in Article 51h of the Dutch Code of Criminal Procedure. This article was added to the Code of Criminal Procedure in 2011 in accordance with European regulations and expanded in 2012 and 2015. Article 51h states that the public prosecutor promotes mediation between the victim and the accused or convicted person when this has the consent of the victim. When mediation between the victim and the accused leads to an agreement, the judge takes this into account when deciding on the case. Preconditions for participation in VOM are formulated in the Victims of Crime Decree (2016). These preconditions stem from European regulations and aim to protect victims from secondary and repeat victimisation, intimidation, and retaliation.

Policy-wise, a distinction was long made between mediation relating to compensation of damages, which could take place during criminal proceedings, and mediation aimed at emotional needs, which could only take place after the criminal justice process. The 2020 policy framework *Restorative Justice Facilities in the Criminal Justice Process* introduced the umbrella term restorative justice facilities, within which a distinction was made between VOM during the criminal justice process (VOM or *mediation in strafzaken*) and mediation outside of the criminal justice process (restorative mediation or *herstelbemiddeling*). The difference between these facilities lies in their relationship to the criminal justice process: VOM takes place during ongoing criminal proceedings and the outcome of the mediation is taken into account by the public prosecutor or judge when dealing with the case. During the mediation encounter, participants can make arrangements relating to both emotional and material needs (for example, compensation of damages). Restorative mediation can take place at any time, including before or after criminal proceedings. Restorative mediation focuses on emotional recovery and does not affect the criminal case. When the criminal justice process is still ongoing, participants should first be referred to VOM before attempting restorative mediation.

#### Organisation

VOM during the criminal justice process was first applied in the context of two pilot projects: a project by the Amsterdam District Court and the Public Prosecution Service in 2010-2011 and a project in six District Courts (Amsterdam, North Holland, The Hague, Rotterdam, East Brabant and Zeeland-West Brabant) in 2013-2016. Based on the findings from this last project, VOM was implemented nationwide in 2017 and

uniform working procedures were developed. VOM during the criminal justice process is funded by the Dutch Ministry of Justice and Security in the form of an annual budget for the mediation bureaus of the courts and a case fee for mediators.

VOM during the criminal justice process is possible in all criminal cases (including appeals and complaints against decisions not to prosecute) in which there is a victim and a prosecutable case, regardless of the nature of the offence. The only condition is that the accused must acknowledge the facts of the case. Only public prosecutors and judges can refer cases to VOM. Parties themselves or their lawyer can issue a request for a referral, but this decision remains at the discretion of the public prosecutor or judge.

The mediation bureaus of the district courts are in charge of organising the mediation. A mediation officer first informs the defendant and then the victim about the referral and checks whether they agree to participate. If so, the agency assigns two mediators to the case and provides them with the necessary documentation. The mediation itself consists of an intake meeting with the parties individually, followed by a face-to-face encounter between the parties. Arrangements made are recorded in a closing agreement. If parties cannot reach a closing agreement, they can also make unilateral statements. The public prosecutor or the judge receive the closing agreement or unilateral statements and take these into account when dealing with the case. However, they do not have to motivate how this is done.

### **Policy objectives in relation to the (international) literature**

Referral to VOM during the criminal justice process is the exclusive preserve of public prosecutors and judges. No right of parties exists to have options for VOM explored in their case and parties are not routinely informed about the existence of VOM. Previous research shows that such exclusive referral practices result in high selectivity. As a result, it is likely that a sizeable number of potentially suitable cases are overlooked.

The Dutch form of VOM differs from similar facilities in other countries in a number of respects. VOM during the criminal justice process takes place under the guidance of two mediators and within a limited time frame – a maximum of six weeks (four in juvenile cases) for the organisation of the mediation, with the intake meetings and the face-to-face encounter taking place in the course of one day. Previous research has shown that having well-trained mediators is important to prevent negative experiences. Availability of two mediators may be an additional safeguard. Regarding the limited time frame, previous research shows that, especially in more severe offences, victims may need more time before they agree to contact with the defendant. In the Dutch system, this may mean that such cases are more likely to end up in restorative mediation as, contrary to VOM, restorative mediation is also possible after the criminal case has ended. However, which restorative justice facility is preferred depends largely on the needs of victims in a specific case.

For a long time, policies in the field of restorative justice were primarily viewed as a service to victims. It was expected that restorative justice could help victims process the crime and provide them with a sense of agency. After the adoption of the 2020 policy framework, more focus has been given to the value of restorative justice for the defendant. Participation in restorative justice facilities would enable defendants to take responsibility for their actions, which can contribute to lower recidivism rates. In addition, it is expected that VOM during the criminal justice process will reduce the workload of the judiciary as this may result in fewer cases being referred to a court hearing and less preparation time is required.

Previous research suggests that participation in VOM has beneficial psychological effects for both victims and defendants. Negative effects may occur but have not been reported in Dutch research. For victims, VOM can reduce feelings of fear, anger, and powerlessness. For defendants, it can promote feelings of empathy and guilt. The extent to which these effects occur and how long they last vary. Many studies also show that defendants who participate in VOM are less likely to reoffend. Again, strength and duration of these effects vary. Finally, a few studies provide evidence that mediation can be cost-effective. However, these studies have only looked at the impact of lower recidivism rates and other societal benefits, and not at efficiency gains in the justice process itself.

## Policy implementation

### Selection and referral of cases

Between 2017 and 2022, 7,905 cases were referred to VOM during the criminal justice process, including 1,431 cases with a juvenile defendant. The majority of cases (53%) concerned assault. For cases tried before the district courts, the vast majority (92%) are referred by public prosecutors. Cases before the Court of Appeal are mostly referred by judges (89%). Of all referrals to mediation within the judiciary in the period 2017-2022, including mediation in civil and administrative justice cases, 42% concerned VOM. However, VOM is employed in only a small number of criminal cases (less than 1%).

The interviews also show that VOM is used only rarely. Public prosecutors and judges struggle to fit the mediation process into their regular workload. Due to a high turnover, constant education about the possible benefits of VOM is needed. Respondents also report the existence of misconceptions among coworkers, such as that VOM cannot be employed if the case is referred to a court hearing. The interviewed public prosecutors prefer to refer cases to VOM as early as possible so that there is no need to wait for the mediation outcome when deciding on the case. In practice, early referral is often not feasible because victims and defendants need more time or the criminal investigation is still ongoing. When the case is referred by the Public Prosecution Service, victims are usually contacted by Victim Support Netherlands, the police, or the Victim Information Point of the Public Prosecution Service before a referral is made. Defendants are usually contacted by the police, their lawyer, or the Child Care and Protection Board in juvenile cases. Judges almost always refer cases to VOM during the court hearing and not beforehand. This means that after the mediation has finished, a new hearing has to be planned. This is considered undesirable for reasons of timeliness and efficiency. Interviewed judges usually discuss the possibility of VOM directly with the parties during the hearing. Compared to public prosecutors, they may be inclined to be more directive by strongly suggesting that parties will benefit from VOM.

The probation service and the Child Care and Protection Board examine the possibility of VOM in every criminal case in which they are involved. The extent of this examination varies. Victim Support Netherlands gauges the willingness of victims to participate in VOM when it has indications that this will be received favourably or at the request of the public prosecutor. VOM can also be a topic of discussion when legal counsellors of Victim Support Netherlands meet with the victim to discuss their personal injury claim. Lawyers can also explore VOM with their clients. Most of the interviewed lawyers do this only incidentally. Lawyers and other organisations may not

refer parties themselves but must submit a request for a referral to the public prosecutor or the judge. In the perception of some respondents, especially public prosecutors can be reluctant to refer cases to VOM or refuse to contact victims more than once. Since 2020, the Child Care and Protection Board can report cases directly to the mediation bureaus which then take care of the referral. Experiences with this practice are positive.

The interviewed public prosecutors and judges consider cases where the victim and the defendant know each other to be most suitable for VOM. Serious traffic accidents are also considered to be very suitable. Respondents argue that traffic accidents can happen to anyone; defendants in such cases may experience intense feelings of guilt. The strong focus on 'relational' criminal cases can be explained through the fact that public prosecutors and judges view VOM primarily as a way to restore the relationship between parties and achieve lasting solutions to protracted conflicts, which can also prevent future criminal charges. This focus on relational cases results in strong selectivity in the referral process. As a result, other potentially suitable cases are missed. Moreover, the type of cases that are currently most commonly referred to VOM are not necessarily the most successful. Mediators indicate that in longstanding conflicts, the time available for mediation is not always sufficient. Also, the focus on the offence can be prohibitive in these cases, as often both parties feel victimised by the other.

In addition, several other selection criteria are employed. Which criteria are used differs between respondents. Often mentioned criteria are the severity of the offence in combination with the (assumed) interests and wishes of the victim. When the offence is serious and victim and defendant do not know each other, public prosecutors and judges may be hesitant to suggest VOM and assume that victims do not desire contact with the defendant. However, the data studied in this research show that when such cases are referred, parties are equally likely to agree to mediation and to reach a closing agreement.

### **The mediation process**

Of all cases referred to VOM between 2017 and 2022, mediation took place in over half (57%). When no mediation takes place, this is usually because the victim and/or the defendant do not want to participate. In addition, mediation officers may reject cases when they see no leads for a successful mediation. Despite the agreement that during ongoing criminal proceedings, VOM takes precedence over restorative mediation, a substantial number of cases are still referred to the wrong agency. These cases are transferred back to the mediation bureaus.

Depending on the mediation bureau, the parties are first approached by letter or by telephone. In their contacts with victims and defendants, the mediation officers pay close attention to the voluntariness of participation and the commitment of both parties. Which mediators are assigned depends on the characteristics of the case, while taking into account an even distribution of cases across mediators in the court district.

During the intake meetings, mediators pay close attention to the motives and expectations of defendants and victims and their voluntary participation. They also prepare parties for the face-to-face encounter and explain the rules of the mediation. In the face-to-face encounter, victim and defendant each tell their stories and the mediators try to get them to talk to each other about the offence and possibly come to



an agreement. Third parties such as lawyers and parents (in juvenile cases) may also be present at the face-to-face encounter. In exceptional case, shuttle mediation can take place, where there is no direct contact between the parties and the mediators convey messages.

Mediators report spending between six and ten hours on an 'average' case. They regularly have more complex cases where an additional meeting is needed, or the closing agreement has to be adjusted several times. According to the mediators interviewed, the remuneration for the mediation is too low in relation to the time spent, especially in more complex cases. In addition, travel costs are not reimbursed, and mediators receive a lower fee when no face-to-face encounter takes place. The organisation of the mediation takes on average between 64 and 76 days over the period 2018-2022. However, according to the mediation officers interviewed, mediations are usually organised within the maximum time frame (six weeks for adult defendants, four weeks in juvenile cases). In a minority of cases more time is needed. When there is no strict deadline (for example because a date for a court hearing has not yet been set), priority might be given to more urgent cases, which might explain that average processing times exceed the maximum time frame.

Most mediations are concluded with a closing agreement between the parties (84%). Almost a quarter (24%) of closing agreements include agreements on financial compensation. The interviews show that unilateral statements occur infrequently. Judges and public prosecutors value the closing agreement as they see it as evidence of the defendant taking responsibility. In many cases, successful VOM results in a (conditional) dismissal of the criminal case, a suspended sentence or a guilty verdict without imposing a sentence. Participation in VOM is also taken into account in the penalty demanded by the public prosecutor and the sentencing advice given by the probation service and the Child Care and Protection Board.

### **Variations in the implementation of VOM**

The implementation of VOM is broadly in line with the agreed upon procedures. Deviations from these procedures usually come down to the mediation bureaus being given a larger role in selecting suitable cases or contacting parties. This is done to increase the number of referrals and to lighten the workload of the Public Prosecution Service. Interviews reveal variation in when cases are referred to VOM and which information is given to parties prior to referral. These points are not covered in existing working procedures. In addition, not only the Child Care and Protection Board but also probation officers and lawyers sometimes register cases directly with the mediation bureaus rather than going through the public prosecutor.

The interviews did not reveal any differences between VOM with adult or adolescent (18-23 years) defendants. VOM with juvenile (<18 years) defendants is largely the same as with adult defendants. In juvenile cases, public prosecutors and judges value quick turn-around times. This may lead to juvenile criminal cases not being referred to VOM when the perception is that this will slow down the handling of the criminal case. Respondents also note that juvenile defendants may have more trouble taking responsibility for their actions. In addition, juveniles are more likely to commit crimes in a group setting. This complicates the VOM process both in terms of logistics – as there may be multiple defendants meeting with the victim – and in terms of taking responsibility for one's own part. When the VOM encounter takes place, mediators report that young people easily engage with each other and share their emotions.

The study revealed some differences in the referral process between public prosecutors and judges. Public prosecutors prefer to refer cases to VOM as early as possible. They generally do not contact parties directly. In contrast, judges usually refer cases at the hearing and prefer to inform parties themselves. No differences were found between referrals in cases tried at first instance and cases tried before the Court of Appeal.

No major differences were found between mediation bureaus. Differences mostly concern how parties are contacted (first by telephone or first by letter).

### **Proposals to stimulate referral to VOM and improve its effectiveness**

This study makes clear that there is a large untapped potential of cases in which victims and suspects could benefit from VOM, but which are currently not being referred. Furthermore, more effort is needed to make VOM an integral part of working processes in the Public Prosecution Services and the judiciary and to stimulate involvement of other relevant judicial organisations. Based on the findings of the study, we have made some suggestions to improve effectiveness of VOM and ensure that VOM is used in more cases when this is appropriate. We have compiled these suggestions into four overarching proposals:

- 1 Combating unwarranted selectivity in the referral process. This could include further integration of VOM in the everyday work of the Public Prosecution Service and the judiciary, continuous efforts to raise awareness among employees of these institutions, and better substantiation of rejected requests for VOM.
- 2 Strengthening the position of the mediation bureaus. This could include enabling direct registration of cases by all relevant judicial organisations, lawyers, and victims and defendants themselves. Additionally, consider having mediation officers be the first point of contact for the victim in all cases to prevent disparities in information and lighten the workload of the Public Prosecution Service.
- 3 Strive to make VOM an integral part of the criminal justice process without losing its unique character. Suggestions to achieve this are more involvement of lawyers and judicial organisations such as Victim Support Netherlands in the mediation process and informing mediation bureaus and mediators of the decision in the criminal case.
- 4 Areas of focus in information and communication: Make sure that information provision – including the timing of the VOM request – meets the needs of victims and defendants. Improve awareness among public prosecutors, judges, and other judicial organisations of the possible psychological benefits of participating in VOM for both victims and defendants, including for victims of more severe offences and in cases where the parties do not know each other. Emphasize that VOM does not replace criminal proceedings.

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