Summary

Mediation Monitor 2005-2008 – Final report

Pretext
Mediation is a form of dispute resolution whereby an independent neutral third party, the mediator, helps parties to find a solution for their mutual conflict. While taking account of each of the parties’ interests, the goal of mediation is to reach jointly supported results which are optimal for each of said parties. Mediation is regarded as one of the instruments which can contribute to a system of appropriate conflict solutions (TK 2003-2004, 29 528, no. 1). In this system the aim is to provide the most satisfying or efficient form of dispute resolution based on the nature of the conflict situation. The objectives on which this is based are:
1. To de-legalise the dispute settlement process.
2. To facilitate the settlement of disputes in a way which is qualitatively the best and optimally effective.
3. To take account of society’s need for more multiform access to justice, whereby the parties (citizens, the business community and the authorities) bear primary responsibility themselves for resolving their disputes.
4. To reduce the burden on the courts and tribunals.

In order to investigate whether structural mediation referral provisions within the legal infrastructure are justified and, if so, how these could be embedded in the most effective and efficient way, two national mediation projects started in 1999, namely the Judiciary [Rechtelijke Macht] project and the Financed Support [Gefinancierde Rechtsbijstand] project. The evaluation of these projects led to the publication of the WODC (Research and Documentation Centre) report entitled Room for Mediation [Ruimte voor mediation] (Combrink-Kuiters et al., 2003). As a result of the conclusions of Room for Mediation the Ministry of Justice introduced a number of policy measures in April 2005 which were intended to help parties to consciously weigh up the pros and cons when solving conflicts and to opt for mediation when necessary. The following policy measures have been implemented:
- Financial provisions to prevent parties from avoiding mediation for financial reasons
  - A mediation legal aid permit [mediatietoevoeging]
  - An incentive contribution [stimuleringsbijdrage].
- Referral provisions at the Legal Counter offices and the courts
- The provision of information to citizens and institutions regarding the possibilities of mediation via various general information channels.

The referral provisions were phased in from April 2005 onwards. This process was completed in 2006 in the case of the Legal Counters and in 2007 in the case of the courts.

Objective of the research and research questions
The aim of the research is to analyse to what extent the financial and referral provisions have been used and what results the mediations have produced. Given that the various policy measures have been introduced at the same time, it is not possible to determine the effect of the various measures individually. However, the results of the financial and referral provisions during the years 2005-2008 are
available and that makes it possible to identify a trend. In this respect, the following two research subjects, which are divided into various subquestions, are key:

1 How has the use of the financial and referral provisions developed?
   - How often has a mediation legal aid permit been requested?
   - How often has the incentive contribution been requested?
   - How many mediation proposals have been made?
   - How many referrals were made to a mediator?
   - How has people’s awareness about mediation developed?
   - What motivates parties to opt for mediation?
   - What motivates people to refer matters for mediation?

2 What results has mediation produced and what factors have affected these results?
   - To what extent have the mediations led to resolutions?
   - How long did the mediation process last?
   - How satisfied were the parties about the mediation and the mediator?
   - To what extent have the agreements made been observed by the parties?

Research methods
This research is based on various data sources. The description and analysis of the introduction of the financial and referral provisions to the Legal Counters and the courts and tribunals is based on documentation, policy documents and annual reports from the Ministry of Justice, from the Legal Counters, from the National Bureau for court-connected Mediation and from the Council of Legal Aid. The research also focuses on the development of the number of proposals for mediation, the resulting referrals, the results of the mediations and the level of satisfaction of the parties using registration and questionnaire data. Data are available of 2,501 finished mediations which where referred via the Legal Counters, of 6,289 finished mediations referred via the courts, and of 3,886 finished mediations that were not referred via a Legal Counter or court. Separate research into compliance with mediation agreements was also performed as well as research at the court in Zwolle into grounds for the refusing parties.

In view of the substantial differences between the projects as regards the Legal Counters and the courts and tribunals, such as the referral moment (at the beginning versus the end of the chain) and the availability of the financial provisions (no versus an incentive contribution), the results for both organisations are described separately in this report.

The use of mediation and results achieved with mediation
The use of mediation has increased since the countrywide introduction of the policy measures. This is shown by the annually increasing number of referrals to a mediator via the Legal Counters (from 1,412 referrals in 2006 to 2,419 in 2008) and via the courts (from 2,133 referrals in 2006 to 3,708 in 2008). Despite the increase in the number of referrals to mediation via both organisations, the number is still low when compared to the total number of cases and referrals to the Bar. For example, in 2008 the number of referrals to the Bar at the Legal Counters was 37,011.

Since the introduction of the financial provisions in April 2005, the use of the mediation legal aid permit and the incentive contribution has increased annually in absolute terms. The total number of mediation legal aid permits issued has risen from 2,514 in 2006 to 5,524 in 2008. Nevertheless, the mediation legal aid permits still make up only a small part of subsidised legal aid. In 2008 the Council of Legal Aid issued 230,000 mediation legal aid permits. The number of incentive contribu-
tions issued has risen from 1,000 in 2006 to 2,316 in 2008. Between 2005 and 2008 a total amount of at least € 988,200 was issued on incentive contributions. In addition to the financial provisions being used more, the way they are used has also changed. As the number of Legal Counter cases for which a mediation legal aid permit was issued increased more slowly than the court and tribunal cases and cases outside the referral provisions, the proportion of mediation legal aid permits issued in the case of the Legal Counters has decreased. It has also become apparent that the number of times that the incentive contribution is requested did not increase in proportion to the number of referrals to a mediator via the courts and tribunals. The proportion of cases for which the incentive contribution was requested has therefore decreased in relative terms during the past few years.

By far the majority of cases (96%) which were referred to a mediator via the Legal Counters concerned disputes relating to law of persons and family law. Approximately three-quarters of the mediations referred by the courts and tribunals concern civil cases with the remaining quarter concerning administrative law cases. Almost a third of the mediations in the administrative sector concern tax-related cases. In the civil sector the majority of mediations result from family-law cases and then particularly divorce-related family-law cases (66%).

The awareness of parties referred to a mediator via the Legal Counters has scarcely increased in recent years. In 2005 19% of the parties (referred to a mediator via a Legal Counter) was aware of mediation; in 2008 this was 21%. This is not directly a general reflection of the level of awareness as regards mediation in the Netherlands as a whole. After all, it is conceivable that the parties that are aware of mediation do not request it via the Legal Counters. It is, for example, clear that the level of awareness among parties referred to a mediator by the courts and tribunals is not only greater than among those referred via the Legal Counters, but also that this level of awareness has also increased over the past year. What is more, parties that come into contact with the courts and tribunals more often are also more likely to be aware of the mediation option.

As regards those within the Legal Counters who make referrals, the key motives for doing so are that ‘mediation leads more quickly to a solution’ and that ‘parties have to deal with each other in the future’. In the case of parties referred via the Legal Counters, the most important motives for opting for mediation are ‘mediation is better for the future relationship with the other party’, ‘mediation offers a better solution than a legal approach’ and ‘maintaining control over the solution’. The most important motives for the courts to refer people to a mediator are ‘the future relationship between the parties’ and ‘a legal judgement cannot solve the real problem’. As regards the parties referred by the courts and tribunals the most important motives for opting for mediation are ‘the future relationship’, ‘the court’s advice’ and ‘the fact that mediation provides a more satisfactory and faster solution’.

Almost three-quarters (73%) of the cases referred to a mediator via the Legal Counters and more than half (54%) the cases referred via the courts and tribunals ended in complete agreement. A number of factors increase the chance of agreement. As regards cases referred via the Legal Counters, the chance of agreement is increased by the parties being more motivated to choose mediation due to the costs. In cases referred to a mediator via the courts and tribunals, the chance of agreement increases the more mediation meetings are organised, although it decreases again after an estimated 5 meetings. The chance of agreement is greater in cases involving sums of money of up to €45,000 than when the amount is higher or unknown. The chance of agreement also increased in cases in which neither party incurred any mediation costs. The freedom and willingness to negotiate can also
enhance the chance of agreement. Moreover, the results produced via the courts and tribunals show that the chance of agreement is greater in administrative law cases than civil law cases.

The period of time devoted to mediation is measured using three variables: lead time (the time between the first and last mediation meeting), the number of mediation meetings and the number of contact hours. The average lead time for mediations referred by the Legal Counters is 64 days and 60 days in the case of mediations referred by the courts and tribunals. In the case of courts and tribunals, administrative law cases last for less time than civil law cases (on average 38 rather than 67 days). It is striking that the number of contact hours for tax-related mediation referred by the courts and tribunals is 2.4 hours. As a result, these mediations are, on average, completed within the incentive contribution term. An incentive contribution was issued in 82% of the tax-related mediations. In addition it is clear that, both in the case of the Legal Counters and the courts and tribunals, mediations without agreement take the least amount of time, followed by mediations which result in complete agreement. Mediations which end in partial agreement last longest.

On average the parties are (very) satisfied with both the mediation and the mediator. Whether a party is satisfied depends largely on the result achieved by the mediation. The parties that failed to reach (a partial) agreement are less satisfied than the parties that achieved complete agreement. It is also clear that the parties that achieved complete agreement also indicated more often that they would opt again for mediation in the future if they were to become involved in a comparable conflict.

We also examined compliance with the agreements after divorce-related mediations referred by the courts and tribunals. In general, the parties indicated that they complied fully with the agreements (98 of the 151 parties). The parties also reported that opposing parties complied in full with the agreement less often (36 of the 151 parties).

**General conclusions**

- The referral provisions have now been fully implemented at the Legal Counters and the courts and tribunals.
- Mediation still plays a minor role in comparison to all other legal provisions.
- There has been an increase in the number of referrals to mediation via the Legal Counters and the courts and tribunals and in the actual use of mediation.
- Mediations take on average 60 days with on average 3 to 4 mediations meetings of approximately 2 hours.
- More than half of the mediations result in complete or partial agreement
- Most parties and lawyers are highly satisfied with the mediation and the mediators