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cdpc/docs 2018/cdpc (2018) 2

CDPC (2018) 2

# **EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)**

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## **COMMENTS ON THE DRAFT RECOMMENDATION ON RESTORATIVE JUSTICE**

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Document prepared by the CDPC Secretariat  
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## ITALY

**Rule 25:** provides that “before agreeing to restorative justice, the parties should be fully informed of their rights, the nature of the restorative justice process, the possible consequences of their decision to participate, and the details of any grievance procedures”. It is a Rule imposing precise obligations to inform. We suggest considering to insert in this Rule the person responsible for the obligation to inform.

**Rule 26 and 27:** are about the free and informed consent to participate in restorative justice and also of parties who are not capable of understanding the meaning of the process. We suggest considering the aspect of mental pathology: can restorative justice be used by the mentally ill person? Is he/she excluded or uses it through the appointment of a guardian? In particular we refer to a mental illness which is not serious. The topic could be discussed by delegations.

**Rules 33-6 and 49:** Rule 6 provides that Restorative justice can be used at any stage of the criminal justice process. Rule 33 provides that before restorative justice starts, the facilitator should be informed of all relevant facts of the case, by the competent judicial authorities or criminal justice agencies. We wonder how these provisions can be reconciled with the investigative secrecy of the investigation phase (as per rule 30, participation in restorative justice should not be used as evidence of admission of guilt in subsequent legal proceedings). We suggest considering to insert in the Rule that the facilitator is kept to secrecy about how much he/she knows from the judicial authority or from the law enforcement bodies. We also suggest considering if the facilitator takes an oath (and before whom?) when taking over the functions.

Rule 49 is related to the previous ones in that the facilitator should convey information about imminent or serious crimes which may come to light in the course of restorative justice to the competent authorities. We suggest considering the consequences in case of omission.

**Rule 34:** states and reiterates the functioning of the *ne bis in idem* principle in the case in which restorative justice process has a positive outcome. We suggest considering to indicate after the words “in respect of the same facts” **“also otherwise qualified”**. This to avoid that, with the pretext of a different legal qualification the alleged offender can be prosecuted despite the positive outcome of the restorative justice process.

**Rules 40-41-42:** refer to the recruitment of the facilitator, to his/her training (even as ongoing training). We suggest inserting a screening also on the suitability of the aspiring facilitator (or as submission to a test or as participation of a psychologist in the recruitment phase which assesses the reaction to critical issues: on the model already known to such Countries in matter of recruitment of judges and prison and probation staff).

**Rule 53:** states that “judicial authorities and criminal justice agencies should not request that facilitators reveal confidential information” even due to the “confidential” manner in which restorative justice should be performed as per Rule 17. The Rule should be articulated in a more specific and clear way in order to be sure of the consistency with what is provided for by the abovementioned Rule 49.

**Rule 57:** states that it is advisable to raise the awareness of staff and managers from judicial authorities and criminal justice agencies in relation to the principles of restorative justice. We suggest considering, for greater clarity, to explicitly insert to raise awareness of probation staff, closer to these issues.

## **SWEDEN**

In regard to p. 19 we appreciate the changes that were made during the plenary meeting in December.

However, we are concerned about the changes regarding legal basis made in p. 21 and wonder if the changes mean that this has to be regulated in law or if it is sufficient to regulate this on a non-statutory basis.

## UNITED KINGDOM

### General comments

- The Ministry of Justice's definition of restorative justice is: the process that brings those harmed by crime, and those responsible for the harm, into communication, enabling everyone affected by a particular incident to play a part in repairing the harm and finding a positive way forward. This definition is closely aligned with the definition upheld by the Council of Europe for the purpose of the recommendation on restorative justice.
- We are clear that restorative justice should be used alongside formal criminal justice processes, including effective prosecution of offenders, and not as a substitute to a robust criminal justice system response.
- The police may decide, instead of pursuing a charge, to use non-statutory disposal (Community Resolution for example) out of court for less serious crime, where the offender accepts responsibility. Where there is a victim, their views are taken into account to reach an informal agreement, which may involve restorative practice.

### Part III-Definitions and general operating principles (Reference to rule 6 and 9)

- In England and Wales restorative justice is not used as diversion from arrest or prosecution, but rather alongside regular court proceedings. In this jurisdiction:
  - Restorative justice is largely used with young offenders as part of a court order known as a Referral Order. This Order is a unique sentence that has been developed in accordance with the restorative principles of responsibility, reparation and reintegration, involving the local community and victims, of which restorative justice in terms of meeting with the victim forms one part of this. When restorative justice is used with young offenders, it is usually carried out by the Youth Offending Team which is coordinated by the local authority.
  - Adult offenders who partake in restorative justice usually do so through restorative justice companies and services. Currently in England and Wales restorative justice is more widely used amongst young offenders. Ongoing work is being done to ensure greater use amongst adult offenders.

### Part VII-Continuing development of restorative justice (Reference to rule 60,61,64 and 65)

- Rules 60 and 61 state that restorative principles and approaches can be used to manage conflict between criminal justice professionals and to maintain relationships between staff.
  - Although this concept was highlighted as part of the scope of the paper, these two particular rules seem misplaced within this document. They may be better placed within the introductory section of the paper.
  - The rules seek to encourage the use of restorative principles within the criminal justice system with the intention of enabling professionals to understand the principles of restorative justice, and to have it embedded within the culture of criminal justice agencies and judicial authorities.
  - As this paper is based on restorative justice in criminal matters, it should be focussed on that and not the incorporation of restorative principles within professional authorities or agencies, which is a wider issue.
- Within this section member states are encouraged to support one another through sharing information on restorative justice. It may be useful to suggest a mechanism through which member states can share key information enabling them to remain up to date with developments.
  - In England and Wales the Restorative Justice Council is the main body, and has established a well-recognised and widely used set of recommended standards for the use of restorative justice. The Council offers a quality mark for restorative justice services and a quality mark for trainers. As part of this they help to share good practice amongst services and agencies.

- The Ministry of Justice has built good working relationships with leading academics within the field of restorative justice, and created a forum for sharing good practice and information on key developments and training nationally through a regular newsletter sent to Police and Crime Commissioners quarterly. This is also shared with restorative justice services and commissioners.

**Commentary on rules that were amended at last Committee meeting**

- We agree the amendments to Rules 1-24 as proposed by the Committee, and offer the following specific comments:
  - Rule 16: The addition referring to informing all parties of the impact on criminal proceedings is positive, and responds to victim concern that an offender might have a more lenient sentence, and that the offender may only take part believing that also to be the case.
  - Rule 18: It would be useful to have a clear understanding of what is intended behind the phrase 'and in the absence of other considerations'. This could be best explained in the commentary.

**Table 2- Commentary and suggested amendments**

	Commentary	Suggested amendment to rule
<u>Rule 27</u>	It is not clear from the wording of the rule that restorative justice services should be pro-actively ensuring there is inclusion. This is covered within the commentary notes, but it would be useful if it is rather incorporated within the rule itself.	Restorative justice should not proceed with parties who are not capable of understanding the meaning of the process.  Restorative justice services should be as inclusive as possible; a degree of flexibility should be used to enable as many people as possible to participate.
<u>Rule 39</u>	We are aware that there are significant disparities in the method and type of data recorded on restorative justice interventions. It would be useful if this rule makes some suggestions on the minimum level of data required (i.e. recorded data should at least include the type of restorative justice that took place and the reasons why cases did not progress to conference).	Restorative justice services should develop appropriate data recording systems which enable them to collect information on the cases they deliver. As a minimum the type of restorative justice that took place and the reasons for cases not progressing should be recorded.  Anonymised data should be collated nationally by a competent body, and made available for the purpose of research and evaluation.
<u>Rule 59</u>	It may be worth clarifying that the activities described are referred to as restorative practice. Like restorative justice they are also based on restorative justice principles, but are distinct from restorative justice.	Restorative justice is characterised by a dialogue between victims and offender.  There are many other interventions that also adhere to restorative justice principles; including innovative approaches to reparation, victim recovery and offender reintegration. For example, community reparation schemes, reparation boards, victim restitution, victim and witness support schemes, victim support circles, therapeutic communities, victim awareness courses, prisoner education, problem-solving courts, Circles of Support and Accountability, offender reintegration ceremonies, and projects involving offenders

		and their families or other victims of crime. These can all be delivered restoratively, if undertaken in accordance with basic restorative justice principles (see Section III).
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### Summary

The majority of the rules are in line with the restorative justice principles, policies and practice widely used in England and Wales. Across the board, restorative justice services mainly operate within the guidelines and rules that have been established in this paper.

### **RUSSIAN FEDERATION**

1) Restorative justice, in our opinion, should refer not to «any process» (paragraph 1 of the draft), but to a process regulated in particular by law or by agreement of the Parties.

2) In paragraph 6 we propose to clarify whether restorative justice can be used at the stage of the enforcement of the sentence or no.

3) We doubt that private agencies should be included in the list of «restorative justice agencies» (paragraph 12), as in a number of states only judicial authorities can administer criminal justice.

4) We suggest that the statement of the second sentence of the paragraph 30 is rather controversial. According to the explanatory report, the authors distinguish admission of liability from admission of guilt. However, admission of liability implies also admission of guilt; furthermore, the evaluation of such admission must be based only in conjunction with all evidences.

Also we would like to point out that this draft Recommendation actually proposes the implementation of mediation mechanisms into the criminal law sphere. But for this process are required appropriate conditions established by a State and enhancing of the effectiveness of the mechanism of the legal institutions that have been already established.

It is not clear from the text of the draft recommendation to what types of crimes restorative justice can be referred. It would be reasonable to strictly define limits of use of restorative justice and to exclude from it the grave and extremely grave crimes.

## FRANCE

General comment to use the term “auteur” instead of “delinquent” in the French version

General comment reappearing in the text is that RJ is not used in France to replace formal criminal proceedings and has no incidence on the latter.

### **page 1 : Preamble :**

Recognising that restorative justice may increase awareness of the important role of individuals and communities in the mechanism of offenders' desistance from crime, conflict resolution and normalisation of relations preventing and responding to crime and resolving its associated conflicts, thus encouraging more constructive, rather than repressive, criminal justice responses;

**Comment [TI1]:** The adoption of less repressive measures is not an aim of the RJ in France

Recognising that delivering restorative justice requires specific skills and calls for codes of practice and accredited training;

Recognising the growing body of research evidence which indicates the effectiveness of restorative justice on a variety of metrics, including victim recovery, offender desistance and participant satisfaction;

Recognising the possible inconveniences fore damage to individuals and forte societies that of over criminalisation and the overuse of punitive criminal penalties may cause, particularly for vulnerable or socially excluded groups;

Recognising that crime involves a violation of individuals' rights and relationships, the repairing of which cannot be exclusively satisfied by the penal neglected if responses in terms of sanction as well as in terms of reparation to the victim to crime focus exclusively on law breaking and punishment;

**Rule 6:** Restorative justice can be used at any stage of the criminal justice process. For example, it may be associated with diversion from arrest or prosecution, used in conjunction with a police or a judicial disposal, occur parallel to prosecution, take place before or instead of prosecution, in between conviction and sentencing, constitute part of a sentence, or happen after a sentence has been passed or completed.

**Rule 11:** 'Criminal justice agencies' refers to the police and to prison, probation, youth justice, and victim support services and the authorised associations.

**Comment [TI2]:** In France RJ is used by associations like associations for victim assistance, but also by associations for socio-judiciary follow-up, in particular for monitoring of offenders

**Rules 21 – 23** do not apply to France as RJ is not requested by the judicial authorities or carried out within the criminal justice proceedings.

**Rule 30: Comment:** RJ should not depend on formal and complete admission of the facts. The voluntary participation of the offender and the preparatory work done by the facilitator can lead to an interesting discussion which does not block the offender from denying certain facts.

**Rules 31-32 : Comment :** France has excluded these options

**Rule 33: Comment** regarding “competent judicial authorities: The transmission of information should be left to the judicial authority as some data can be confidential. What has to be transmitted are the contact details of the parties and the penal qualifications of the act.

**Rule 34: Comment:** This mechanism is totally excluded in France



**Rule 53: Comment:** The transmission of a report needs to be left to the discretion of the states and should not be systematic or imposed. In France RJ should not influence the penal proceedings but the transmission of a report should not be excluded if the agreement reached between the parties needs to be communicated to the judicial authority.

**Rule 60: Comment:** These examples supporting the use of RJ in parallel to the traditional penal justice are limitative as in France this method will apply in reality to any case of conflict.

#### **Comments regarding the commentary to the rules:**

**Comment to point A, paragraph 1:** In France RJ is developing in parallel to the traditional criminal justice, the Law of 15 August 2014 states the principle of independence between the judicial measures and the RJ measures.

**Comment to point A, paragraph 4:** The distinction between RJ and penal mediation is important in France where penal mediation is a judicial measure whereas RJ is not ordered by the judicial authority.

**Comment to point B, paragraph 1:** regarding the tendency of the traditional criminal justice to neglect the needs of the victim and the harm caused to individuals : this statement is too excessive, taking into consideration the place of the victim and civil parties in the criminal proceedings in France, the numerous rights which are guaranteed to them and in particular regarding requests for taking action or for compensation for damages.

**Comment to point B, paragraph 6:** In France RJ is used in the case of all types of offences.

**Comment to part II, paragraph 2 :** In France instead of facilitator is used the term “independent third party”.

**Comment to part III, paragraph 1 :** It seems useful to mention that this reparation of damages does not necessarily relate only to pecuniary reparation.

**Comment to the explanation of Rule 28:** In France in accordance with the principle of voluntary participation of the parties in a RJ measure, it is totally excluded to refer a case to the RJ services by the judicial authority. This rule is therefore applicable only to countries where a referral to the RJ services is provided, which is not the case of France, which opted for a system of providing information to the parties who freely choose whether to participate or not in RJ process.

**Comment to the explanation of Rule 30:** It does not seem necessary to link the RJ to the formal and total acknowledgement of the facts of the case. The voluntary participation of the offender and the preparatory work done by the facilitator can lead to an interesting discussion which does not block the offender from denying certain facts.

**Comment to the explanation of Rule 33:** The reports related to psychiatric expertise and in particular the establishment of the risk factors will not be communicated by the judicial authority. It is preferable to speak about transmission of necessary information (the contact details, the legal qualification of the offence) and of information which is left to the discretion of the court.

**Comment to the explanation of Rule 34:** This mechanism is totally excluded in France

**Comment to the explanation of Rule 53:** The transmission of a report needs to be left to the discretion of the states and should not be systematic or imposed. In France RJ should not

influence the penal proceedings but the transmission of a report should not be excluded if the agreement reached between the parties needs to be communicated to the judicial authority.

**Rule 60** introduces the idea that restorative principles and approaches can be applied within the criminal justice system, but outside the formal criminal procedure. It notes that restorative principles and approaches can be used to respond to all types of conflicts arising from the commission of an offence and in particular conflicts between criminal justice professionals, between professionals and citizens, and between prisoners.

## FINLAND

### 1. Comments the draft Recommendation

Rule 6: With reference to the expression "...at all stages of the criminal justice process", we would like to emphasise that the pre-trial proceedings are considered to be the first stage of a criminal justice process in Finland as well as in other Nordic countries. It would therefore seem correct to mention explicitly pre-trial proceedings in the rule, as well as the explanatory report, although it might be that this is implied with the phrase "in conjunction with a police disposal".

In order for the Rule to be consistent with Rule 19, we suggest that a new sentence be added to the rule, stating that self-referral to restorative justice services can also take place before criminal proceedings, including police investigation/pre-trial proceedings commence.

Rule 19: As the rule starts with the expression "should", we feel that a conditional tense should be used also in the second sentence, i.e. that "can" be replaced by "could".

Rule 21: While we completely agree with the rule we feel that a legal basis should be provided also for the work of the prosecutor, not only the court. Although this might well be meant in the current rule we feel that the an addition mentioning the prosecutor would clarify the situation.

Rule 28: The expression "systematically" seems very strict and could be misunderstood that referral to restorative justice shall always be suggested, as part of and for the sake of the procedure, even in cases in which the competent authority does not deem restorative justice to be an feasible option. We suggest the expression "systematically" be replaced with "whenever feasible".

Rule 36: It remains somewhat unclear *by whom* the "recognised standards" should be elaborated in order for them to be recognized. Clarifying this seems important especially as a legal basis according to rule 21 only is recommended for criminal proceedings. The recommendation regarding the standard setting seems to need some clarification – at least with a reference to "by competent authorities".

Rule 47: The rule does not in its current version explicitly state – as explained in the explanatory report – that if the requirements of the rule cannot be satisfied, the case should not proceed in restorative justice. We suggest that the rule and the explanatory report be brought in harmony with each other by amending the rule so that it ends with the expression "... and if need be, discontinue restorative justice."

Rule 50: In order to avoid repetition of the requirement of voluntariness, which already appears in rule 14, rule 50 could be shorter, e.g. "Agreements should only contain fair, achievable and proportionate actions to which all parties consent."

### 2 Comments to the draft Explanatory Report

Rule 20: The expression "... or by their composite regions" seems unnecessary as it is self-evident that any sovereign State may co-operate with other States or regions.

Rule 24: The concept of "another competent and appropriate adult" does not currently appear in the rule itself but only in the explanatory report. For purposes of consistency, the expression should either be added to the rule or taken out of the explanatory report.

According to the explanatory report “This rule implies a special *monitoring function*...”. However, this is not immediately obvious when reading the rule. If indeed such a monitoring function is intended, we feel that it should be clearly stated in the rule and not only be implied in the explanatory report.

Rule 25–26: “...should avoid putting pressure on any party...” seems somewhat weak as an expression. They should indeed not only “avoid” but clearly “refrain from” putting pressure and we therefore suggest rephrasing the language accordingly.

Rule 28: The Recital (46) of the EU’s Victims Directive offers valuable guidance with regard to factors to be taken into consideration in referring a case to the restorative justice services. We move that reference be made to this part of the recital.

Rule 31: “The *time limit* specified within this rule...” seems to be a left-over from the version preceding the PC-CP plenary in November 2017 as the expression “time limit” was replaced with the expression “within reasonable time”, consistent with Art. 6(1) ECHR, in that plenary. There is therefore no explicit time limit in the rule and none should be introduced in the explanatory report.

Rule 36: The last sentence regarding allocation of resources does not correspond with the language of the rule itself. We therefore move that the sentence be removed.

Rule 49: Reference is made to a Directive although it is not expressly mentioned that the reference is to the EU’s Victims Directive. A clarification in the form of the correct name of the directive would in this case be helpful.

Finally, a couple of expressions are not entirely clear with regard to their contents. This is true for e.g. “criminal justice professionals” and “criminal justice agencies” (e.g. Rules 42 and 55, but also elsewhere in the rules and explanatory report) and they might be understood differently in the Member States. In order to enhance comprehensibility it would seem prudent to clarify or to define these expressions.

## The Netherlands

In times of budgetary restraints the CDPC should not embark on projects that have not met a broad support from the Member States. The Netherlands would be in favour to abandon this project.

The Netherlands has experimented with restorative justice and has found that the issue is more complicated than thought of at the beginning and more costly.

On the basis of our findings our main objections against the draft recommendations are:

The ambition level of the draft Recommendation is too high and unrealistic.

Far reaching legal and logistic obligations as envisaged should not be part of the Recommendation.

The development of infrastructure for restorative justice requires personnel and financial investments.

The decision on referral of cases for restorative justice should be left to national authorities. An obligation for systematic referral is not acceptable (Rec. 22).

Grievance procedures should not be included (Rec. 23).

Rec. 28 is not acceptable. Systematic referral is a national matter. Also a “presumption in favour of referral” is a concept that should be left to national law. It is for national authorities to decide if a case is suited for restorative justice or not.

Rec. 34. is not acceptable If a suspect doesn't live up to the agreement prosecution should be an option.

Rec. 54. is unacceptable No obligation to provide adequate human and financial resources.