

**Council for Penological Co-operation**

Conseil de Coopération Pénologique  
**(PC-CP)**

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**Restorative justice in prison and probation fields / Justice réparatrice dans le domaine des prisons et de la probation**

**European Forum for Restorative Justice**

**Review of Recommendation No. R (99) 19  
of the Committee of Ministers to member States  
concerning mediation in penal matters**

**Introduction**

Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters was adopted in 1999. Since then there has been a significant expansion in the use of penal mediation in many European countries.<sup>1</sup> The drivers for this expansion include dissatisfaction with the effectiveness of the criminal justice system, a wish to reduce the incarceration of young people, valuing reparation to victims and reconciliation between those in conflict, improving justice systems so that they are more rehabilitative and reintegrative, the growing assertion of victims' rights and needs, the influence of international standards and European harmonisation, countering a lack of trust towards the state after a period of conflict and reducing the cost of the criminal justice system. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA has been a significant stimulus for development for EU member states.

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<sup>1</sup> See the recent review: Dunkel, F., Grzywa-Holten, J., & Horsfield, P. (Eds.). (2015). *Restorative Justice and Mediation in Penal Matters: A stock-taking of legal issues, implementation strategies and outcomes in 36 European countries / Vol. 1 & Vol. 2*. Forum Verlag.

Inevitably the variety of drivers in different countries has generated a range of different restorative processes implemented in differing ways. The most prevalent process is **victim-offender mediation**. This approach has a long history in many European countries. More recently restorative conferencing, which has its origins in English speaking countries, is gaining ground. Countries deliver these processes at different stages of the criminal justice process: diverting people from entering the criminal justice system, diverting people from being prosecuted in court, prior to sentencing in courts, as a court sanction, and in custodial settings. Restorative processes may be offered in some countries only for less serious crimes while in other countries they are available for all offences. In a few countries restorative processes are available throughout the jurisdiction, while in many countries their use is more patchy. Many countries do not collect statistics that accurately measure the scale of restorative justice. It would appear that only a few countries have made an attempt to put restorative justice at the centre of their way of dealing with youth crime.

In spite of this expansion it is clear that:

- there are still too few referrals to mediation services;
- where referrals are made, there are a significant proportion who do not participate in a process;
- of those who agreed to participate, too few are facilitated to have a face to face meeting.

This means that many people who have been harmed and many people responsible for harm are being excluded from the proven benefits of restorative justice throughout Europe.

This situation is partly caused by judicial or professional gatekeepers who are unaware of or unsupportive of restorative justice opportunities. This may be due to the dominance of and competition from other approaches such as retribution in some countries or rehabilitation in others.

The European Forum for Restorative Justice (EFRJ) welcomes this opportunity to offer the Working Group its comments on Recommendation No. R (99) 19 and to share its thinking on the further development of restorative justice within the criminal justice system.

## **Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters**

To prepare for this review the EFRJ consulted a group of experts in the field of restorative justice in Europe. These included academics, managers and practitioners in Belgium, Austria, Hungary, and Norway. In general the experts reported that the Recommendation was still substantially sound. Indeed, some commented that it would be a huge advance if their country reached these standards in practice. There were some suggestions for improvement. Some of these are evidence that people active in the field are expanding their view of penal mediation due to the increasing influence of the principles and practices of restorative justice in Europe.

- Under the Definition (page 2), in many practices the impartial third party may be termed 'facilitator'. We suggest that it is changed to (mediator/facilitator).
- Under General Principles (page 3), Article 1 should change to 'at any time during the mediation process'.
- Under The operation of criminal justice in relation to mediation, Article 15, we suggest that this article should allow for the mediation service to have a role in assessing the appropriateness of a referral for mediation on the basis of meeting the parties. It may be in many cases that prosecutors or judges will not have access to all the information required to assess suitability for mediation. In relation to this Article we would also suggest that the mediation process should not be so prescriptive that many people would be considered unsuitable. It is important that the process is designed to be inclusive of a wide range of individuals of varying maturity, intellectual capacity and cultural background.
- Under The Operation of mediation services, Article 24, we suggest that in addition to training, practitioners need good supervision from a manager or other person who understands the mediation process and the required competences.
- Under Handling of individual cases, Article 27, we suggest that there should be provision for a mediator to decide when the nature of the vulnerability of parties means that a mediation cannot proceed.
- Under Continuing development of mediation, Article 33, we suggest that victim support services (where they are available) should also be included in consultations.



In conclusion the Recommendations requires few amendments in our opinion to continue to be a useful guide to the implementation of penal mediation in Europe.

We will now offer some views to guide your deliberations on whether the Recommendation requires more fundamental amendment to accommodate the wider field of restorative justice.

### **The further development of restorative justice within the criminal justice system**

We believe that there are some key questions to consider:

- Should mediation become more integrated into the primary concerns of criminal justice?
- Should mediation enlarge its range of participants?
- Should there be a wider range of restorative processes available?
- How should mediation be applied at all stages of the criminal justice process?
- What other benefits would the development of restorative justice offer criminal justice?

*Should mediation become more integrated into the primary concerns of criminal justice?*

Mediation tends to be focused upon conflict and directed towards resolution. The mediator is impartial and neutral in relation to the wrong-doing. However, criminal justice is primarily concerned with the harm that crime causes victims and society in general. It directs its efforts towards protecting and supporting victims and towards desistance from offending. Restorative justice frames crime in terms of harm to others and believes that those who cause harm have an obligation to repair the harm that they have caused. In this sense the parties have a different moral relationship to the harm and the process and its facilitation is not morally neutral. We believe that this emphasis on accountability and on addressing the needs of victims enhances the key concerns of criminal justice.

*Should mediation enlarge its range of participants?*

In addition to the specific suggestions in the previous section, our experts made other comments, which suggested that a broadening of the original definition of penal mediation is taking place in Europe. This was evident in references made to the 'community'. Although community is mentioned twice in the Recommendation's

preamble, its meaning is not defined in the Recommendation and the definition of penal mediation includes only three parties, the victim, the offender and the mediator.

Recent thinking and practice in restorative justice recognises that the harm caused by criminal behaviour is not restricted to the direct victim. A crime can have a significant impact upon the family of the victim and the victim's community. The ability of victims to articulate the harm that they have suffered and to recover from it is generally enhanced by having a 'community of support' at the restorative process. Furthermore, offenders are more likely to feel remorse over their offending, to be motivated to desist from harming others and to be reintegrated if people who are significant to them attend the process.

*Should there be a wider range of restorative processes available?*

By adding the concept of community to penal mediation in this way, the criminal justice systems in Europe gain access to an enlarged definition and a more flexible range of processes, which include, in addition to mediation:

- restorative conferences<sup>2</sup>: In which the offender and victim can invite supporters and appropriate professionals can be present;
- restorative circles<sup>3</sup>: In which issues or problems can be addressed by those who are affected by them;
- family group conferences: in which families are supported to generate their own solutions to problems.

*How should mediation be applied at all stages of the criminal justice process?*

The EFRJ has conducted a range of research projects in restorative processes in criminal justice. These include:

- Diversion from prosecution: restorative processes can be used to divert low risk/low harm cases from prosecution yet hold the person responsible for the harm. This can be done more rapidly and at less cost than through the criminal justice process. It also avoids the stigma that can result from a criminal conviction.

<sup>2</sup> EFRJ (2011) Conferencing: A way forward for Restorative Justice in Europe access at <http://www.euforumrj.org/projects/previous-projects/conferencing/>

<sup>3</sup> Foresee (2013) How can Peacemaking Circles be implemented in countries governed by the "principle of legality? Access at <http://www.foresee.hu/en/segedoldalak/news/592/65b5c7d1ea/5/>

**EFRJ resources:**

Restorative Justice and Crime Prevention (2010) access at <http://www.euforumj.org/projects/previous-projects/restorative-justice-and-crime-prevention/>

ALTERNATIVE- Developing alternative understandings of security and justice through restorative justice approaches in intercultural settings within democratic societies (2016) access at <http://www.alternativeproject.eu/publications/public-deliverables/> <http://alternativefilms.euforumj.org/> <https://projectalternative.wordpress.com/> This research examines how restorative processes can prevent intercultural conflict escalating into crime.

- Addressing offending and desistance: There is now considerable evidence (primarily from the English speaking countries) that restorative processes are effective in reducing reoffending and supporting desistance.<sup>4</sup>

**EFRJ resources:**

Restorative Justice in cases of domestic violence: Best practice examples between increasing mutual understanding and awareness of specific protection needs (2016) access at <http://www.verwey-jonker.nl/publicaties/2015/restorative-justice-in-cases-of-domestic-violence->

Desistance and Restorative Justice: Mechanisms for desisting from crime within restorative justice practices (2015) access at <http://www.euforumj.org/projects/previous-projects/desistance-and-restorative-justice/>

Developing integrated responses to sexual violence: An interdisciplinary research project on the potential of restorative justice (2015) access at <https://www.law.kuleuven.be/linc/english/research/researchdaphnesexualviolence.html>

- Prisons and resettlement: restorative practices can be very effective in addressing breaches of rules and interpersonal conflict within prisons. Participation in these processes enable inmates to develop values such as respect, responsibility and good relationships and to learn non-violent conflict resolution and empathy. These values reduce the risk of reoffending and support desistance. Both victims and prisoners often welcome the opportunity to meet during a sentence to address unresolved issues prior to release. Similarly families

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<sup>4</sup> See for example Shapland, J., Robinson, G., & Sorsby, A. (2012). *Restorative Justice in Practice: Evaluating what works for victims and offenders*. Abingdon, Oxon: Routledge. Sherman, L. W., & Strang, H. (2007). *Restorative Justice: the Evidence*. London: The Adam Institute.

can prepare for the release of a family member through a family group conference. This can create a sound basis for reintegration.

**EFRJ resources:**

Mediation and restorative justice in prison settings (2012) access at <http://www.euforumj.org/projects/previous-projects/mediation-and-restorative-justice-in-prison-settings/>

- Victims' needs: restorative processes have demonstrated effectiveness in meeting victims' rights and needs - After a restorative process people who have been harmed say that they are less afraid that the offender would commit further crimes against them. Victims also reported lower levels of post-traumatic stress symptoms and less likely to express feelings of revenge. They are far more likely to forgive their offenders after they heard their story. Personal victims of young and older adult robbers and burglars were much more likely to think any apologies they received were sincere than those whose case had been dealt with in courts.<sup>5</sup> It is important that victims have access to restorative processes at every stage of the criminal justice process.

**EFRJ resources:**

Victims and Restorative Justice: An empirical study of the needs, experiences and position of victims within restorative justice practices (2011-2012) access at [http://www.euforumj.org/wp-content/uploads/2015/05/report\\_victimsandRJ-2.pdf](http://www.euforumj.org/wp-content/uploads/2015/05/report_victimsandRJ-2.pdf)

*What other benefits would the development of restorative justice offer criminal justice?*

There is evidence that:

- Offenders are more likely to comply with requirements if they have made commitments in the presence of the victim and their family;
- Courts are less likely to impose a custodial sentence if the victim is satisfied by the outcome of the restorative process.

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<sup>5</sup> Strang, H. (2002). *Repair or Revenge: Victims and Restorative Justice*. Oxford: Clarendon Press. Angel, C. (2005). *Crime victims meet their offenders: testing the impact of restorative justice conferences on victims' post-traumatic stress symptoms*. Ph.D. Dissertation, University of Pennsylvania, USA, and Strang, H., Sherman, L. W., Mayo-Wilson, E., Woods, D., & Ariel, B. (2013). *Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review*. Campbell Systematic Reviews. Sherman, L. W., & Strang, H. (2007). *Restorative Justice: the Evidence*. London: The Adam Institute. Strang, H. (2002). *Repair or Revenge: Victims and Restorative Justice*. Oxford: Clarendon Press.

## Conclusions

We believe that the Council is faced with the choice between making minor amendments to what remains a sound Recommendation regarding penal mediation or developing a fresh Recommendation regarding the wider field of restorative justice which would involve significant changes in principles, processes, standards of practice and quality assurance, and training. Whatever decision the Council takes, the European Forum for Restorative Justice is available to you as a support.