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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Co-operation
(PC-CP)

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

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Following a long and careful analysis of the 1999 Recommendation, I have concluded that it is well written, concise and includes a wide array of important standards and principles relating to dialogic practices. Any modifications that we make should be careful not to impact negatively upon its existing benefits.

That being said, I think we can make a few small changes, before adding some important new clauses regarding restorative principles, the use of restorative justice in the prison and probation contexts, and innovative approaches to RJ's development in the Council of Europe's member states more broadly.

In writing this document, I have carefully considered the all of the ideas, opinions, options and concerns which were expressed at the Working Group's last meeting, particularly with regard to definitions and to the structure of the document. On this basis, I propose:

- *firstly*, that we maintain the existing title and definition of penal mediation, but that we use the term "restorative justice" instead of "mediation in penal matters". This would be consistent with the broader move across both Continental European and Anglo-American countries towards concepts of 'restorative', 'harm' and 'dialogue', and away from 'mediation' (as per the EU Victim's Directive);
- *secondly*, that we retain most of the existing Recommendation in its current form, with some minor revisions throughout, and a number of additions to the Section VI (on the development of RJ in member states);
- *thirdly*, that we add a new section which relates specifically to the use of restorative justice in the context of prisons and probation services. This section can set specific standards for practices involving communication between victims and offenders in this context. It can also specify that there are such things as restorative principles, and that these principles can underpin a variety of practices which can take place in the prisons and probation context, but which do not involve dialogue between victims and offenders.

This approach would allow us to achieve each of the goals expressed in the meeting, while maintaining the best parts of the existing Recommendation. The new Recommendation would:

- a) use and define the term "restorative justice" in a way which is consistent with the EU Directive, but which is flexible enough to include non-dialogic practices;
- b) explicitly refer to a series of restorative principles, which emphasise safe and participatory approaches to satisfying the needs and interests of stakeholders;
- c) allow us to promote both dialogic and non-dialogic practices, while distinguishing between them for the purpose of setting standards;
- d) retain the best parts of the 1999 Recommendation, including those which are not specific to prisons and probation;
- e) and allow us to insert more information on the prisons/probation context, as well as on restorative principles and how they might underpin a variety of dialogic and non-dialogic practices which prisons, probation services and RJ services can use.

I am aware that many of the specific ideas I have included as potential new clauses may ultimately fall into the category of "nice to have" rather than necessarily "essential". That being said, I believe that the *structure* I am proposing strikes a good balance between each potential combination of options suggested at the previous meeting.

With regard to the format of this document, I have not yet integrated suggestions for new clauses into the Recommendation itself. I felt that it would be overly hasty to do this before the/a new structure was approved. Instead, I have presented the original version of each section of the Recommendation, underneath which I have included my integrated commentary and suggestions.

COUNCIL OF EUROPE
COMMITTEE OF MINISTERS
Recommendation No. R (99) 19

of the Committee of Ministers to member States concerning mediation in penal matters

(Adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Noting the developments in member States in the use of mediation in penal matters as a flexible, comprehensive, problem-solving, participatory option complementary or alternative to traditional criminal proceedings;

Considering the need to enhance active personal participation in criminal proceedings of the victim and the offender and others who may be affected as parties as well as the involvement of the community;

Recognising the legitimate interest of victims to have a stronger voice in dealing with the consequences of their victimisation, to communicate with the offender and to obtain apology and reparation;

Considering the importance of encouraging the offenders' sense of responsibility and offering them practical opportunities to make amends, which may further their reintegration and rehabilitation;

Recognising that mediation may increase awareness of the important role of the individual and the community in preventing and handling crime and resolving its associated conflicts, thus encouraging more constructive and less repressive criminal justice outcomes;

Recognising that mediation requires specific skills and calls for codes of practice and accredited training;

Considering the potentially substantial contribution to be made by non-governmental organisations and local communities in the field of mediation in penal matters and the need to combine and to co-ordinate the efforts of public and private initiatives;

Having regard to the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Bearing in mind the European Convention on the Exercise of Children's Rights as well as Recommendations No. R (85) 11 on the position of the victim in the framework of criminal law and procedure, No. R (87) 18 concerning the simplification of criminal justice, No. R (87) 21 on assistance to victims and the prevention of victimisation, No. R (87) 20 on social reactions to juvenile delinquency, No. R (88) 6 on social reactions to juvenile delinquency among young people coming from migrant families, No. R (92) 16 on the European Rules on community sanctions and measures, No. R (95) 12 on the management of criminal justice and No. R (98) 1 on family mediation;

Recommends that the governments of member States consider the principles set out in the appendix to this Recommendation when developing mediation in penal matters, and give the widest possible circulation to this text.

Comments and suggestions on the title and preamble

Title and structure of the document

My belief is that the title of the document should be some variation on the following:

“... concerning the use/applicability of restorative justice in/to the criminal justice process”

I suggest that we do not include “prisons and probation” in the title. This way, we can retain the best parts of the Recommendation, many of which relate primarily or entirely to other stages of the justice process. We can then add, at the end of the Recommendation, an additional section on prisons and probation. This also avoids a major restructuring of the Recommendation.

Moreover, I suggest using the phrase “restorative justice” rather than “penal mediation”, “victim-offender mediation” or any other such term. I also recommend retaining the existing definition. This will mean that the new Recommendation is consistent with the EU Victims’ Directive, which uses the term “restorative justice”, and which uses the same definition as the 1999 Recommendation. This term and definition are just flexible enough to include practices which do not involve communication between the parties. This means that we can simultaneously promote *and* distinguish between a) restorative principles, b) practices involving dialogue between the parties and c) other practices which do not involve dialogue, but which are underpinned by restorative principles.

In my view, this approach has all of the benefits, and none of the disadvantages, of each of the potential combinations of options that we discussed at the last meeting.

Clause 4: Is it their “interest” or, following the EU Directive, their “right”? This would certainly be a stronger term, and is worth considering.

Clause 5: Instead of using the language of *rehabilitation* we should use the language of *desistance*. ‘Desistance’ is defined as the process through which a person stops committing offences. This has many advantages over ‘rehabilitation’. In recent years, ‘desistance’ is the term most commonly used in the empirical literature to refer to the identification of the factors and practices which contribute to reducing reoffending. It recognises that this is a process, rather than an event. It is a much more specific and holistic approach which recognises the role of both structures and agency in causing offending behaviour. ‘Rehabilitation’, in contrast, is quite vague and is quickly becoming seen as archaic within criminology, as it implies that offending behaviour can be equated with illness or injury.

Thus, Clause 5 should finish: “... further their reintegration and encourage desistance from crime.”

Further clauses

It would also be possible to add further clauses into the preamble. For example:

“Recognising that there is strong evidence to suggest that restorative justice can assist in encouraging desistance from crime and in victim healing”

The purpose of such a clause would be (a) to make specific reference to the empirical evidence (which is something I strongly think we should do), and (b) to make explicit reference to the benefits for victims, which I also think we should do.

Other topics which could be mentioned at this point include the idea that restorative justice should be promoted as a diversion from court or from prison. It could also say that restorative justice sees crime as a violation of relationships, and that social and policy responses to crime could aim to repair relationships.

As noted earlier, I think that we should include one or more clauses which are essentially a short list of restorative principles somewhere in this document. This is necessary in order to support the argument that there are various non-dialogic practices which are underpinned by these principles. This clause could be inserted at this point, or at another point in the document. My suggestions for what this clause could include can be found later in this commentary.

Appendix to Recommendation No. R (99) 19

I. Definition

These guidelines apply to any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator).

II. General principles

1. Mediation in penal matters should only take place if the parties freely consent. The parties should be able to withdraw such consent at any time during the mediation.
2. Discussions in mediation are confidential and may not be used subsequently, except with the agreement of the parties.
3. Mediation in penal matters should be a generally available service.

4. Mediation in penal matters should be available at all stages of the criminal justice process.
5. Mediation services should be given sufficient autonomy within the criminal justice system.

Comments and suggestions on Section II

Clause 2: This might need to be more specific. For example, does this preclude the enforcement of outcomes agreements (e.g. if they include monetary compensation)? What about if the offender wishes to use successful RJ as evidence at a parole hearing? What about for the regulation of RJ services? Many services in England use the term “private” rather than confidential because people will unavoidably wish to talk about it with their family and friends, which means it is nigh-on impossible for facilitators to manage. Plus, as soon as the case’s outcomes are reported back to the criminal justice professionals, it is no longer confidential. I assume this means that, as part of signing up to participate, participants are expected to agree that professionals will be informed about the outcomes?

Clause 5: Autonomy to do what? Contact victims? Identify cases? Obtain participant information? The intention of this clause could probably be made more explicit. Ideally, you would want the service and the justice agencies working together with the same aims, sharing information and co-working where necessary.

III. Legal basis

6. Legislation should facilitate mediation in penal matters.
7. There should be guidelines defining the use of mediation in penal matters. Such guidelines should in particular address the conditions for the referral of cases to the mediation service and the handling of cases following mediation.
8. Fundamental procedural safeguards should be applied to mediation; in particular, the parties should have the right to legal assistance and, where necessary, to translation/interpretation. Minors should, in addition, have the right to parental assistance.

Comments and suggestions on Section III

Clause 7: Does this mean national guidelines?

Clause 8: We could change “parental assistance” to something broader, e.g. “the assistance of a legal guardian or appropriate adult”.

IV. The operation of criminal justice in relation to mediation

9. A decision to refer a criminal case to mediation, as well as the assessment of the outcome of a mediation procedure, should be reserved to the criminal justice authorities.
10. Before agreeing to mediation, the parties should be fully informed of their rights, the nature of the mediation process and the possible consequences of their decision.
11. Neither the victim nor the offender should be induced by unfair means to accept mediation.
12. Special regulations and legal safeguards governing minors' participation in legal proceedings should also be applied to their participation in mediation in penal matters.
13. Mediation should not proceed if any of the main parties involved is not capable of understanding the meaning of the process.
14. The basic facts of a case should normally be acknowledged by both parties as a basis for mediation. Participation in mediation should not be used as evidence of admission of guilt in subsequent legal proceedings.
15. Obvious disparities with respect to factors such as the parties' age, maturity or intellectual capacity should be taken into consideration before a case is referred to mediation.
16. A decision to refer a criminal case to mediation should be accompanied by a reasonable time-limit within which the competent criminal justice authorities should be informed of the state of the mediation procedure.

17. Discharges based on mediated agreements should have the same status as judicial decisions or judgments and should preclude prosecution in respect of the same facts (*ne bis in idem*).

18. When a case is referred back to the criminal justice authorities without an agreement between the parties or after failure to implement such an agreement, the decision as to how to proceed should be taken without delay.

Comments and suggestions on Section IV

Clauses 9 and 16 are good examples of how the Recommendation was not written with probations and prison in mind. That being said, Section IV is strong, and I do think we should keep it and then insert a new section about prisons and probation, rather than rewriting the entire Recommendation so that it applies only to prisons/probation.

Clause 9: I could use some clarity about the meaning and purpose of this. Does this mean that self-referrals are not allowed, or that victims and offenders must work through criminal justice agencies to secure a referral? Does this not take away the power to determine suitability from the RJ specialists – or are these included in “criminal justice authorities”? What does “assessment of the outcome” mean?

Generally speaking, I had some feedback which suggested that certain clauses, including 9 and 16, might be too restrictive, considering the diversity of programs within member states. Regarding Clause 16 in particular, if we are talking post-sentence/serious crime, why must there be a time-limit? Preparation can take a long time in such cases e.g. 6 months-1 year +!

Clause 11: Perhaps “unfair means” should be clarified. There is a good clause in the EU Directive which talks about “informed consent” which could be used/added to here.

Clause 15 is an interesting one. Some RJ service providers say: “We want the barriers to referral to be as low as possible so that justice agencies are not deterred from referring cases to us. Then, we, as RJ specialists, will be the ones who assess the risks and discontinue cases if necessary”. Ultimately, it depends on a) how qualified are referral-makers to judge when disparities/power imbalances are too great and b) how likely it is that barriers to referrals will discourage practitioners from making them. The question is how to ensure that processes are as inclusive as possible, and that people are not excluded from RJ just because of excessive risk-aversion, or because it would be more difficult to include them.

Clause 17: What exactly does “Discharges” mean here? As in, the discontinuation of legal proceedings? Or does it mean that outcomes agreements, such as restitution, are as binding (and enforceable) as court sentences?

Further additions to Section IV might include:

- 1) We could say that justice agencies should be required to share victim and offender contact information and other details with restorative justice services. I am not sure about other countries, but this is a significant problem in England.
- 2) We could specify that restorative justice can be initiated by either the victim or the offender.
- 3) We could include something about the use of RJ in other contexts. Jurisdictions – or justice/public agencies within those jurisdictions – should develop the capacity to use restorative justice in response to various non-crime incidents, such as conflicts in schools and neighbourhood. Distinct policies and processes should be developed to govern and deliver restorative justice in these other contexts.

V. The operation of mediation services

V.1. Standards

19. Mediation services should be governed by recognised standards.

20. Mediation services should have sufficient autonomy in performing their duties. Standards of competence and ethical rules, as well as procedures for the selection, training and assessment of mediators should be developed.

21. Mediation services should be monitored by a competent body.

V.2. Qualifications and training of mediators

22. Mediators should be recruited from all sections of society and should generally possess good understanding of local cultures and communities.
23. Mediators should be able to demonstrate sound judgment and interpersonal skills necessary to mediation.
24. Mediators should receive initial training before taking up mediation duties as well as in-service training. Their training should aim at providing for a high level of competence, taking into account conflict resolution skills, the specific requirements of working with victims and offenders and basic knowledge of the criminal justice system.

V.3. Handling of individual cases

25. Before mediation starts, the mediator should be informed of all relevant facts of the case and be provided with the necessary documents by the competent criminal justice authorities.
26. Mediation should be performed in an impartial manner, based on the facts of the case and on the needs and wishes of the parties. The mediator should always respect the dignity of the parties and ensure that the parties act with respect towards each other.
27. The mediator should be responsible for providing a safe and comfortable environment for the mediation. The mediator should be sensitive to the vulnerability of the parties.
28. Mediation should be carried out efficiently, but at a pace that is manageable for the parties.
29. Mediation should be performed *in camera*.
30. Notwithstanding the principle of confidentiality, the mediator should convey any information about imminent serious crimes, which may come to light in the course of mediation, to the appropriate authorities or to the persons concerned.

V.4. Outcome of mediation

31. Agreements should be arrived at voluntarily by the parties. They should contain only reasonable and proportionate obligations.
32. The mediator should report to the criminal justice authorities on the steps taken and on the outcome of the mediation. The mediator's report should not reveal the contents of mediation sessions, nor express any judgment on the parties' behaviour during mediation.

Comments and suggestions on Section V

One overall comment on this section is that there seems to be an assumption that agreements will include tangible outcomes. It might be worth being explicit (maybe in V.4?) that the dialogue itself might be the purpose of the exercise, particularly with serious offences for which the offender has been sent to prison.

Another clause could be inserted after Clause 21 to the effect of: "Restorative justice services should record enough data on their practices to enable their auditing and evaluation".

There could be a clause which states that those who make referrals should be trained in restorative justice awareness/offering. This is particularly necessary where non-facilitating practitioners are responsible for explaining the meaning and purpose of restorative justice to prospective participants, and for determining suitability before making referrals to specialist services.

There could be a clause which states that training providers should also be monitored and/or regulated by a competent body and/or governed by recognised standards.

We should have a clause which states that specialist training is required for facilitators who deliver RJ in serious or complex cases. This is important where facilitators are specialists, and perhaps even more so where generalist justice practitioners have responsibility for facilitation. Moreover, facilitators – both specialist and generalist – should be given additional thematic training, e.g. in relation to the use of restorative justice

with sexual violence, with domestic violence, with young parties, with parties with mental health or trauma-related issues, with parties with drug problems, etc.

In many places, facilitators are not afforded the time required to deliver RJ to the highest possible standard. We could insert a clause on this. Something like: “Organisations within which facilitators are based – whether these are specialist restorative justice service providers or not – must afford facilitators the time and resources to undertake sufficient preparation, risk assessment and follow-up work with the parties.” This could be linked to Clause 28.

Clause 29: Unless the parties request otherwise?

Clause 30: “Serious” and “imminent” might need to be more clearly defined – otherwise, how will a mediator know when to breach confidentiality? Also, should there be an obligation on facilitators to refer victims to relevant local services if, for example, they have mental health needs?

Clause 31: Who decides what “reasonable” and “proportionate” mean? Whose views are most important when the parties disagree with the facilitator or with the justice agencies i.e. who “wins” when there is a disagreement on this question?

A new clause in V.4 (or, potentially, in the preamble) might read something like: “Outcome agreements should aim to satisfy the needs and interests of all parties with a stake in the outcome of an offence”. The purpose of such a clause would be to suggest that all parties’ needs are of equal importance (or, at least, that offenders’ and indirect stakeholders’ needs must be considered). This is important as restorative justice is increasingly being framed as a service for victims by the EU Directive, and by government strategies and rhetoric on RJ in countries like the UK and the Netherlands.

VI. Continuing development of mediation

33. There should be regular consultation between criminal justice authorities and mediation services to develop common understanding.

34. Member States should promote research on, and evaluation of, mediation in penal matters.

Comments and suggestions on Section VI

This section could have several useful clauses added to in order to encourage specific innovations which are supported by contemporary research. For example:

- Once a jurisdiction has developed its training, delivery and monitoring capacities, it should develop statutory obligations on justice professionals to consider referring cases for restorative justice at various stages of the justice process.
- Justice agencies should provide restorative justice services with access to their facilities when required for the purpose of preparation, delivery or follow-up.
- Co-working[/facilitation] and co-location between restorative service providers and justice agencies should be encouraged.
- Justice agencies should train their HR departments and administrators to use or offer restorative justice in the context of staff-on-staff or staff-on-service user conflicts.
- Proactive restorative practices, particularly circle processes, should be used within justice agencies and other public agencies in order to build relationships and social capital among staff, and for the purpose of organisational decision-making/consultation.
- Justice agencies should assign ‘RJ champion’ or ‘Single point of contact’ for RJ positions to one or more employees who have a clear understanding of the meaning and purpose of restorative justice. This person should be given time within their contact to undertake promotional and staff assistance activities.
- Member states with well-developed restorative justice services should share information and expertise with member states which are in the process of implementation.

- Governments and justice agencies should work towards achieving social support for restorative justice by sharing success stories, undertaking positive and evidence-based public awareness campaigns and involving employees of public and justice agencies in the implementation of restorative justice.
- Resources which are crucial to the development and use of restorative justice should be shared among public agencies within a jurisdiction or region. This includes policies and other documentation, as well as training and delivery capacities. This, and other activities relating to coordination, can be assisted by the development of steering groups, which can operate at the local, regional or national level, depending on the nature of service provision within a jurisdiction.
- Restorative justice services should also share information, policy documents and other materials with service providers in other member states in order to assist with the development of restorative justice across Council of Europe jurisdictions.
- Restorative justice services should collect baseline and ongoing data about the operation and effectiveness of their service. They should work with, and providing these data to, independent researchers in order to improve service provision and develop evidence-based policies and practices which maximise the likelihood of offender desistance and victim recovery.
- Frontline and non-operational staff and managers [i.e. all employees] should be consulted and included in restorative justice implementation within an organisation at all stages of the process. Restorative justice should be implemented carefully and, to the extent possible, in a participatory manner, in order to maximise staff understanding of its principles and practices, and support for its use.
- Training providers should ensure that their materials and training approaches correspond to the most up-to-date evidence-based practice.
- Anyone responsible for supervising or performance managing restorative justice delivery should receive specialist training in case supervision.

Proposal for a new Section VII, entitled: “Restorative justice in the context of prisons and probation services” (or some variation on this)

This section should include, *firstly*, some provisions on the use of dialogic practices in this context:

- Prison and probation authorities should invest in the provision of restorative justice where the capacity to deliver it does not already exist; where this capacity does exist, they should collaborate with existing providers to maximise opportunities for victims and offenders who are in prison or are being supervised in the community to communicate with each other, if they so desire.
- Facilitators and case supervisors who deliver restorative justice in response to serious and complex offences should receive specialist training. The use of restorative justice in response to some types of serious offences, such as sexual offences, may require additional, thematic training for practitioners.
- In the context of probation services, restorative justice can take place prior or concurrently to sentence planning work, allowing outcome agreements to be considered by probation workers when determining sentence plans.

Secondly, this section should include some information on restorative principles, followed by an explicit outline of some non-dialogic practices which are underpinned by these principles. If the principles are outlined earlier in the document (instead of in this section), then this section could simply refer back to those clauses.

A clause on the principles of restorative justice might look something like this:

“Restorative justice aims to enable participatory approaches to satisfying the needs and interests of all those affected by, or responsible for, a crime or conflict. It is focused on addressing and repairing harm to individuals, to relationships and to wider society, and is underpinned by a variety of principles and values, including: voluntariness, stakeholder participation, negotiated agreement and non-domination of the process.”

What exactly this clause would look like depends on how specific you want it to be. However, there are many writers who discuss the principles of RJ, and thus we have many options to choose from in terms of how we phrase these.

Thirdly, we can then say that these principles can be used to underpin other approaches to desistance, to addressing and repairing harm and to victim healing, where these do not meet a narrow definition of restorative justice. Clauses might include:

- After an offender has been sentenced to a term of imprisonment or to supervision in the community, it may not always be possible to bring victims and offenders together. Thus, it is important to support the provision of alternative practices which satisfy some, if perhaps not all, restorative principles.
- For example, Circles of Support and Accountability and other restorative reintegration programmes, victim awareness courses, educational programmes and projects involving surrogate or indirect victims can be used to encourage imprisoned offenders, or offenders being supervised in the community, to consider their impact on victims. Community reparation, moreover, could be offered to offenders in order to enable them to repay their debt to society in a visible, tangible and positive way.
- Similarly, victims who are not able, for whatever reason, to communicate with offenders who are in prison or who are supervised in the community, should be provided with the support they require to cope and recover from the harm done to them.

We could also say something like: "A legitimate aim of a justice agency (e.g. a prison or a national or local probation service) would be to operate according to a restorative culture, that is, a culture which is underpinned by the principles previously describe. This culture would be characterised by those in positions of authority making decisions and deliver services *with* people rather than *to* or *for* them. It would prioritise participatory approaches to building social capital and enacting social discipline."

It would also be possible to include a clause along the following lines: "For the purpose of training, performance management and standard setting, activities involving dialogue between victims and offenders should be recorded and regulated separately to other activities which are underpinned by a restorative framework/ethos or principles, or which aim to create a restorative culture through changes in policies, practices or processes." Such a clause could be made more specific, i.e.: "A restorative prison would..."

Fourthly, I think we should note that restorative (or restorative-style) processes can be used in many other, innovative ways in the context of prisons and probation. For example:

- Offenders can be brought together with their families using circle processes or family group conferences. This can enable them to heal, build or maintain their relationships and to develop a supportive network which can help to prevent further offending;
- Prisons and probation services could offer reintegration ceremonies, allowing or encouraging offenders to put their past behind them once they have repaid their debts to society and/or to their victims;
- Circle processes can be used to discuss issues with (or otherwise engage) prisoners, building relationships between them and between them and staff;
- Circle processes can also be used to structure dialogues between prisoners and local students or community members;
- Restorative justice can be used to respond to disputes and conflicts between prisoners, or between prisoners/probationers and members of staff.