

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Strasbourg, 2 December 2017
PC-CP/docs 2017/PC-CP(2017) 12_E rev 4

PC-CP (2017) 12 rev 4

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Co-operation
(PC-CP)

**Commentary to Recommendation CM/Rec (2018) XX of the Committee
of Ministers to member States concerning restorative justice in
criminal matters**

A. Background to the exercise

In 1999, the Council of Europe adopted Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters (hereinafter: 'the 1999 Recommendation'). Since then, there has been a significant expansion in the use of restorative justice in the context of criminal justice in some European countries. In many countries, however, restorative justice has been introduced into legislation or national policy without this necessarily being accompanied by an expansion in delivery capacity, or by notable growth in its use. In others, there is little evidence that restorative justice has had much influence on either criminal justice policies or practices. Nonetheless, there is a burgeoning evidence-base for restorative justice, suggesting that it can be cost effective, and that it can help to achieve offender desistance, victim recovery and participant satisfaction.¹ These benefits are more or less likely to be realised depending on the quality of its delivery. This means that it is necessary to develop common, evidence-based standards for this field of practice.

In 2007, the European Commission for the Efficiency of Justice (CEPEJ) released Guidelines for a better implementation of the 1999 Recommendation. These Guidelines stated that, within many member States, there was a general lack of awareness of restorative justice, a lack of availability of restorative justice at some stages of the criminal justice process, and a lack of specialised training in its delivery. These and other findings were taken to signify that the 1999 Recommendation had not been fully implemented.

Still, the evaluation of the 1999 Recommendation suggested that it had exercised a clear effect in several European countries. Moreover, it influenced the wording of the 2002 ECOSOC (UN) Resolution and Directive 2012/29/EU of the European Parliament and of the Council, establishing minimum standards on the rights, support and protection of victims of crime (hereinafter: 'the Directive'), which replaced Council Framework Decision 2001/220/JHA. These documents were underpinned by the 1999 Recommendation, although they also reflected a broader transition which was taking place within the field at that time: the use of terminology relating to 'mediation in penal matters' was in decline, while terminology relating to the idea of 'restorative justice' - which encompassed both principles and practices - was gaining ground.

The Directive in particular has stimulated various legislative and policy activities across Europe, requiring European Union (EU) member States to enhance victims' rights and to develop the services made available to victims of crime. It also discusses the use of restorative justice, creating a responsibility for judicial authorities and/or criminal justice agencies to inform victims about the available restorative justice services in their area, and outlining various protections for participating victims. It utilises virtually the same definition as that contained within the 1999 Recommendation, although it does so in reference to the term 'restorative justice' instead of 'mediation in penal matters'. However, the Directive stops short of creating a right of access to restorative justice for victims of crime, and focuses exclusively on victims' rights at the expense of providing protections for offenders. Its focus on victims also means that it does not explicate many of the broader themes and innovations which are apparent in the modern development of restorative justice.

In 2016, the European Committee on Crime Problems (CDPC) entrusted the Council for Penological Co-operation (PC-CP) to revise the 1999 Recommendation. The PC-CP decided to undertake this task with four key aims: firstly, to enhance the awareness, development and use of restorative justice in relation to member States' criminal justice systems; secondly, to elaborate on standards for its use, thereby encouraging safe, effective and evidence-based practice, and outlining a more balanced approach to the conceptualisation and development of restorative justice than is implied by the Directive; thirdly, to integrate a broader understanding of restorative justice and its principles into the (comparatively narrow) 1999 Recommendation; and, fourthly, to elaborate on the use of restorative justice by prison and probation services, the traditional remit of the PC-CP.² This Recommendation goes further than the 1999 Recommendation in calling for a broader shift in criminal justice across Europe towards a more restorative culture and approach within criminal justice systems.

¹ See, for example, Shapland, J., Robinson, G. & Sorsby, A. (2011). *Restorative Justice in Practice: Evaluating What Works for Victims and Offenders*. Oxford: Routledge; Strang, H. et al. (2013). *Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review*, Oslo: The Campbell Collaboration; and Sherman, L. et al. (2015). Twelve experiments in restorative justice: The Jerry Lee program of randomized trials of restorative justice conferences. *Journal of Experimental Criminology*, 11(4), pp. 501-540.

² The elected members of the PC CP Working Group who took part in this work were: Martina Barić (Croatia), Nathalie Boissou (France), Annie Devos (Belgium), Vivian Geiran, Chair (Ireland), Jörg Jesse, Vice-Chair (Germany), Attila Juhász (Hungary), Dominik Lehner (Switzerland), Nikolaos Koulouris (Greece) and Nadya Radkovska (Bulgaria).

This work was delegated to Ian D. Marder, (Ph.D. Researcher, University of Leeds, UK; Founder, Community of Restorative Researchers), and was completed with substantial assistance from staff and members from the European Forum for Restorative Justice (EFRJ). Following the meeting of the PC-CP Working Group in January 2017, both Marder and the EFRJ consulted experts in the field of restorative justice from across and beyond Europe. Respondents to these consultations generally considered that the 1999 Recommendation was substantially sound, and that many European countries were yet to reach the high standards of practice detailed in the original Recommendation. These experts' responses were integrated into two review documents by Marder and the EFRJ, which formed the basis of a discussion with the PC-CP Working Group in their meeting in April 2017. After this meeting, new versions of the Recommendation and its commentary were drafted. This went through several iterations prior to the September 2017 meeting of the PC-CP Working Group. Materials from further consultation responses and from the EFRJ (written by its Chair, Tim Chapman, and its former chair, Prof. Ivo Aertsen) were used in the development of the new Recommendation and commentary, as were materials which were originally produced for the 1999 Recommendation. Following the September 2017 meeting of the PC-CP Working Group and the PC-CP plenary meeting in November 2017, a small number of additional editorial changes and clarifications were made, before the final text was prepared for approval at the CDPC plenary meeting at the end of November 2017.

B. The development of restorative justice

Advocates of restorative justice tend to argue that traditional, Western criminal justice processes act to identify the law that was broken, the person who was responsible for doing so, and the most appropriate form of punishment to be imposed on the offender. In doing so, the professionals and state representatives who administer the process take into account the seriousness of the offence, the aggravating and mitigating circumstances, and the principles and purposes of sentencing which exist within a given jurisdiction's legal frameworks. However, they tend to neglect the needs of the victim and the harm caused to individuals, relationships and wider society. This contrasts with the idea of a 'restorative' response to crime, under which those with a stake in the response to a crime are enabled to participate in its resolution, in order to address the harm that was done, and to identify both the needs that have arisen as a result of that harm and whose obligation it is to meet those needs.

In recent years, there has been significant growth in interest in restorative justice in relation to criminal justice in many member States. Member States, and their criminal justice agencies and judicial authorities, have adopted or assisted in the use of restorative justice at various stages of the criminal justice process. It is now widely agreed that restorative justice is compatible with the criminal justice systems of both continental and common law jurisdictions. Practices have often involved some form of dialogue between victims and offenders and, in some cases, other parties who have been affected by a given crime or conflict. Many member States have also adopted a variety of hybrid restorative-traditional approaches, described as 'restorative', but adhering to restorative principles to different extents. As the terminology of 'restorative justice' proliferates across the globe, there is a strong tendency in many countries to conceive of all new rehabilitative, reparative and treatment- or victim-oriented interventions as being 'restorative' in nature. This necessitates the development and updating of international policies in order to clarify when a given practice reflects the concept of restorative justice.

The drivers for the expansion of restorative justice vary across member States. They include, *inter alia*: dissatisfaction with the effectiveness and legitimacy of the criminal justice system; a wish to reduce the criminalisation and incarceration of young people and vulnerable or low-level offenders; a growing value afforded to reparation, reintegration and mutual understanding; a move towards the adoption of evidence-based policy in criminal justice, especially in relation to an extended period of resource constraints; the growing assertion of victims' rights and needs; the influence of international standards and European legal harmonisation; the pluralisation of criminal justice services; and the desire to counter a lack of trust towards the state after periods of conflict.

Inevitably, variations in the drivers and in the institutional, social and political contexts in different countries, have generated a range of forms and understandings of restorative justice. The most prevalent process is perhaps victim-offender mediation, an approach with a long history of use in many European countries. More recently, restorative conferences and peacemaking circles are gaining ground in many locations.

Countries utilise these practices at different stages of the criminal justice process, including, but not limited to: as a diversion from arrest, from out-of-court disposals (where these exist) or from prosecution in court; alongside the prosecution process; in between conviction and sentencing; as part of a court sentence; and within custodial settings, or otherwise during or following the execution of a court sentence. Countries differ in terms of the offences which are in-scope for restorative justice, with some only using it for young or

first-time offenders and/or low-level offences, and others using it also for persistent or serious offending. Likewise, countries differ in terms of the geographical availability of restorative justice. In some, restorative justice is (mostly) available and used throughout the jurisdiction. In others, its availability and use is much patchier. Many countries do not collect statistics and other data which accurately measure the scale or nature of restorative justice, making comparisons difficult to undertake. Nonetheless, recent research has indicated that the overwhelming majority of European jurisdictions have not successfully put restorative justice or its principles at the centre of their way of dealing with youth or adult offending.³ There is also evidence that jurisdictions which have developed or legislated for restorative justice have done so in a manner which is mainly focused on one of the two key parties - usually the offender - at the expense of the other. Without careful and considered development, restorative justice risks being more offender- or victim-oriented; referral and delivery procedures need to be developed which focus on the needs of both parties equally.

Overall, while it is true to say that there has been a significant expansion in the awareness, development and use of restorative justice in recent years:

- many countries do not have sufficient capacity to afford victims and offenders a right of access to restorative justice services;
- many countries have some capacity to deliver restorative justice services, but do not make the most of this by informing victims and offenders systematically of their ability to engage in restorative justice, or by referring cases systematically to restorative justice services;
- and many victims and/or offenders participate in processes which are described as restorative, but which neither involve dialogue between the parties, nor are delivered in accordance with restorative justice principles.

Consequently, many victims and offenders are being excluded from the well-evidenced benefits of restorative justice. This situation is partly caused by professional gatekeepers who are unaware or unsupportive of restorative justice. In many countries, judicial authorities and criminal justice agencies are under no obligation to inform victims and offenders about their ability to request restorative justice, nor to refer potentially suitable cases to restorative justice services. It also results from low levels of awareness of restorative justice among the populations of member States and, in some countries, from a lack of national policies, funding or coordination of its use. Nonetheless, there remains a role for all policymakers, practitioners and other professionals involved in criminal justice to promote, enable or use restorative justice, or otherwise to develop their work so as to integrate restorative justice principles into European criminal justice systems. Moreover, it is necessary to promote new, innovative approaches and uses of restorative justice, including ways in which restorative justice and its principles can be utilised within the criminal justice system, but externally to the formal criminal procedure.

It is on this basis that the new Recommendation and its commentary are timely additions to the growing number of international instruments which support the use and development of restorative justice.

C. Commentary on the preamble to the Recommendation

The preamble emphasises the benefits of restorative justice and discusses some of its principles, with reference to the limitations of traditional criminal justice approaches. Some additions and changes were made to the 1999 Recommendation in order to update the language and the list of documents and international agreements borne in mind, and to place greater emphasis on restorative justice principles and recent developments in the research evidence.

D. Commentary on the appendix to the Recommendation

Section I: Scope of the Recommendation

Rules 1 and 2 outline the scope of the recommendation, noting its aims and the organisations to which it is addressed. The practices which are defined in this Recommendation as restorative justice are procedurally different from other traditional or innovative criminal justice processes, and raise a unique set of challenges

³ See, for example, F. Dünkel, J. Grzywa-Holten & P. Horsfield, eds. *Restorative Justice and Mediation in Penal Matters: A Stock-taking of Legal Issues, Implementation Strategies and Outcomes in 36 European Countries (Vols. 1 and 2)*. Mönchengladbach: Forum Verlag Godesberg

which require practitioners to receive specialist training and to be governed by specific and explicit standards and performance management criteria. Moreover, there is growing evidence with respect to the ability of restorative justice, under certain conditions, to achieve a number of beneficial outcomes. Thus, the aims of the Recommendation include both the provision of standards for practice, and promoting the development of restorative justice within member States more broadly.

Across European countries, restorative justice is delivered by a variety of organisations, including the judicial authorities and criminal justice agencies, specialist services located within the public sector, and private and non-governmental organisations, mostly within the third and social sectors. Standards on the use of restorative justice apply equally to each such organisation. Similarly, each type of organisation should use this Recommendation, alongside the broader theoretical and empirical literature on restorative justice, to integrate restorative justice principles into their work and their organisational cultures and processes. Thus, the Recommendation does not only apply to national governments and to restorative justice services. Rather, it applies to all judicial authorities, criminal justice agencies, NGOs, regional and local governments, and any other organisation or agency which is involved in criminal justice in any capacity.

Section II: Definitions and general operating principles

This section defines the key terms which are used within the Recommendation, and provides some of the general principles on which later sections of the Recommendation are based. It seeks to blend and reflect the contemporary thinking within the field of restorative justice.

Rule 3 provides a definition of restorative justice. Since the term was first coined in the 1950s, there has been considerable debate over the most appropriate, useful or accurate way to define it. The definition provided in this Recommendation reflects the idea that restorative justice can refer to a range of practices in which those with a stake in the resolution of an offence are enabled to participate in the response to that offence. It uses a similar definition to the 1999 Recommendation and the Directive, albeit with two main differences: like the Directive, but unlike the 1999 Recommendation, it utilises the term ‘restorative justice’ instead of ‘mediation in penal matters’; secondly, unlike both the 1999 Recommendation and the Directive, it refers to the participants in restorative justice as ‘those harmed by crime, and those responsible for that harm’, rather than simply as the ‘victim and offender’. This reflects the fact that crime can have a significant impact on the community (whether defined geographically or socially) and on other parties beyond the direct victim, and that these persons can play a positive role in responding to harm and to offending behaviour. Under certain conditions, the involvement of relevant professionals, supporters of the parties (such as their friends and family) and representatives of affected communities, can have a positive impact on the restorative justice process. Their inclusion has to be handled with care and with an understanding of, and sensitivity to, power imbalances between and within certain persons and communities. However, the inclusion of a broader stakeholder group in restorative justice can help to educate those persons, build social capital, and develop other capacities which may assist in preventing or managing crime and conflict in the future. It is important to note that the use of restorative justice does not require a judicial finding of legal guilt; the definition intentionally uses the term ‘responsibility’ on the basis that an admission of responsibility neither presupposes, nor requires a finding of, legal guilt. ‘Facilitator’ refers to a trained, impartial third party who delivers restorative justice. The facilitator can be drawn from judicial authorities, criminal justice or restorative justice agencies, or other appropriate agencies or authorities.

The argument for a more inclusive process is consolidated in **Rule 4**, which outlines some of the persons aside from the victim and the offender who may have an interest in participating in restorative justice. It also makes the point that restorative justice is typically said to involve some form of dialogue (i.e. two-way communication) between the victim and offender (and, in some cases, one or more of the aforementioned additional parties). **Rule 5** explains that practices involving dialogue are referred to using different terminology, depending on the country in which they are being used and the way in which they are administered and structured; this list is not exhaustive.

Rule 6 explains that restorative justice can be used at any stage of the criminal justice process. It does not have to be used as a diversion from court or from other formal proceedings. Indeed, it can be used alongside or following court proceedings, and at various other stages of the process. Victims and offenders should be able to access restorative justice at any time which is suitable for them. More generally, the aims and outcomes of restorative justice may differ depending on the exact circumstances of the case and the stage of the process at which it takes place. For example, the family of a murder victim may wish to meet the offender once they are incarcerated in order to establish the exact circumstances of their family member’s death. In contrast, a victim of criminal damage may wish to meet the offender as a diversion from formal procedures, in order to obtain reparation and assurances of future behaviour. The exact needs and wishes of victims, offenders and other participants are unique to the circumstances of their case, and can be established only

through preparation with the facilitator, and through dialogue with each other. The facilitator can be a specialist, a volunteer, a criminal justice professional, or any other person sufficiently trained, skilled and qualified to deliver restorative justice in accordance with its principles, with the standards outlined in this Recommendation, and with any standards developed by member States.

Traditional criminal justice processes and restorative justice can complement each other. As **Rule 7** points out, however, the need for judicial oversight of the process may be greater if its outcome may result in the discontinuation of court proceedings, or in an agreement being put to the court as a recommended sentence.

Rule 8 introduces the idea that practices which do not involve dialogue between the victim and offender can be delivered in accordance with basic restorative justice principles, while restorative principles and approaches can also be used by judicial authorities and criminal justice agencies in situations which lie beyond the formal criminal procedure. This is returned to in more detail in Section VII.

Rule 9 explains that restorative justice services can include independent, specialist agencies, traditional judicial authorities and criminal justice agencies, and other organisations who deliver restorative justice. **Rules 10, 11 and 12** provide the final organisational definitions necessary for the Recommendation.

Section III: Basic principles of restorative justice

Section III describes the normative and practical principles relating to the development and use of restorative justice in the context of criminal justice. Similar principles and processes can be applied in other contexts, including educational institutions and workplaces; these contexts are not covered by this Recommendation, although the principles it outlines may be used to inform the use of restorative justice in other contexts. **Rule 13** explains the two most commonly accepted general principles of restorative justice, namely that victims, offenders and other parties should be enabled to participate actively in the process, and that the focus of the process should be on repairing harm. Within the theoretical literature, these principles are said to differentiate the concept of restorative justice from traditional criminal justice. In practice, they reflect the fact that restorative justice entails participatory mechanisms which aim to satisfy the needs and interests of participants. **Rule 14** then outlines some of the additional principles of restorative justice which act as safeguards for participants, and which help to ensure the effectiveness of the process. It also notes that these principles can be applied more broadly to criminal justice reform. Equal concern for all the parties' needs and interests does not necessarily mean that the parties will benefit equally as a result of the restorative justice process. Procedural safeguards of all parties should not suffer in any event in this respect.

Rules 15 and 16 expand on two of these principles. The former states that restorative justice must be designed with an equal focus on the rights of participants. This recognises that the strength of restorative justice lies in its ability to move beyond a focus on blame and the idea of a zero-sum justice process, and towards a situation in which victims, offenders and communities are encouraged and supported to express their needs and expectations. The latter explains the requirement that restorative justice must only take place if the parties give their free and informed consent. This relates to the principle of voluntariness, the importance and dimensions of which are elaborated on in detail in the theoretical and empirical literature, and in Article 12 of the Directive. The facilitator is responsible for fully explaining the process to the parties in terms that they can understand. It must be made clear to the parties that they are not required to participate, and that they can withdraw from the process at any time.

Rule 17 emphasises the need for discussions which take place as part of restorative justice to be kept confidential by the facilitator and to be conducted in private; the details of discussions and agreed outcome in individual cases are not made available to the public. This is a prerequisite for a fruitful, open and honest exchange, and creates an environment where the parties can safely describe their past actions and feelings to a greater degree than might be advisable in traditional court proceedings. This is the basis on which the parties can develop an understanding of each other's backgrounds, motivations and needs, and enables them to determine collectively what should happen in order for their needs and interests to be satisfied. Confidentiality also protects the privacy of the parties and prevents the discussions from being used in future legal proceedings. That being said, there are certain situations where the parties may agree to participate in non-private or non-confidential restorative justice, such as for the purpose of research or quality assurance, or if a policymaker or other interested party is invited to observe what restorative justice looks like in practice. This also does not prevent the use of restorative justice approaches which include a broader group of interested parties, as long as the free and informed consent of the victim and the offender is sought and obtained by the facilitator. A further exception to the principle of confidentiality is explained in Rule 49.

Rules 18 and 19 ask member States to develop the capacity to deliver restorative justice in all geographical areas in their jurisdictions, with respect to all offences, and at all stages of their criminal justice processes.

Parties should not be excluded from restorative justice solely on the basis of their location or the type of offence in question. In some member States, it is currently used exclusively or primarily with young offenders, with low-level offences, or at the diversionary stage of the process. However, each member State should have the capacity to deliver restorative justice safely and effectively across their jurisdictions and criminal justice systems. Notwithstanding the need for facilitators to assess cases and prospective participants in advance of restorative justice, victims and offenders should, in general, have the right to access restorative justice. The introduction of a presumption in favour of access would represent one of the most significant changes that a member State could introduce. This would require most member States to develop a much more substantial delivery capacity than they currently possess, and to offer restorative justice much more often than is currently the case. In particular, member States should consider the potential role of restorative justice as a diversion from formal processing by the criminal justice system, allowing for the decriminalisation and depenalisation of young and low-level offenders, while simultaneously enabling victims to participate in the response to offending and to have their needs met.

Rule 20 requires member States to afford restorative justice services sufficient autonomy. Restorative justice services must be enabled to act flexibly and responsively towards the parties, and to deliver restorative justice in accordance with restorative justice principles. Notwithstanding this need, there may be benefits from partnership-working between restorative justice agencies, judicial authorities and criminal justice agencies, particularly in jurisdictions where restorative justice services lie outside of the state (see Section VII for more information). The appropriate balance may depend on the context within each member State, requiring the boundaries of autonomy, confidentiality and information sharing to be negotiated and clarified in each jurisdiction.

Section IV: Legal basis for restorative justice within the formal criminal procedure

With a view to avoiding placing excessive restrictions on restorative justice, and considering the varying approaches to its use in member States, **Rules 21 and 22** do not require restorative justice programmes to be detailed in law. It is suggested, however, that legislation could be used to make restorative justice possible and to facilitate its use. This may be particularly necessary where its use relates to, and may impact upon, court processes (or, although it is not mentioned in the Recommendation, where its use may impact on conditional release from prison), but can also be useful at other stages of the criminal justice process. Legislation can help to encourage judicial authorities and criminal justice agencies to see restorative justice as a mainstream option. It could also be used to create an obligation on justice ministries to fund restorative justice, or to create an obligation on judicial authorities or criminal justice agencies to inform victims and offenders about restorative justice, or to refer cases for restorative justice. More detailed guidance on the use of restorative justice can be developed on a non-statutory basis by member States or by their composite regions. This should include obligations on judicial authorities and/or criminal justice agencies to make referrals systematically to restorative justice services, as well as outlining the procedures by which these referrals should be made.

Rule 23 states that restorative justice, like other criminal justice processes, must be subject to fundamental procedural safeguards. These include, but are not limited to, the safeguards outlined in Article 6 of the European Convention on Human Rights (ECHR), and must include access to grievance procedures. This Rule has been retained from Rule 8 of Recommendation n° R(99)19 on mediation in penal matters because of its importance in ensuring that fundamental rights are upheld in cases where restorative justice interacts or overlaps with criminal procedure.

Rule 24 explains that children must be afforded special rights, including the presence of their parents, legal guardians or another competent and appropriate adult whose role it is to ensure that their rights are upheld. Special domestic regulations and legal safeguards that apply to children in traditional criminal justice proceedings shall also apply to the process by which a case is referred to restorative justice, and to the restorative justice process itself. This rule implies a special monitoring function by the judicial authorities or criminal justice agencies over the restorative justice procedure where children are involved. The involvement of children in restorative justice should be enabled and administered in accordance with the United Nations Convention of the Rights of the Child and the European Convention on the Exercise of Children's Rights.

Section V: The operation of criminal justice in relation to restorative justice

Rules 25 and 26 provide more detail on the need for restorative justice to be voluntary and for the parties to be fully informed when they decide whether or not to request restorative justice or to participate. Before making the decision to participate, the parties must be told how the process will be delivered and by whom, what their rights are with regard to the process, the possible implications of their participation, and the availability and detail of grievance procedures. In order that the parties are not induced to participate by

unfair means, this information – including the fact that they are not obliged to participate – must be explained to them carefully, objectively and thoroughly. The facilitator is responsible for ensuring that all parties understand this information before they are asked to provide consent, and that the parties are not unfairly induced to do so. Judicial authorities, criminal justice and restorative justice agencies should avoid putting pressure on any party to participate, and to avoid creating the perception that pressure is being exerted on them to do so.

Rule 27 explains that, while the need for consent to be informed extends to the requirement that no party is subjected to a process which they cannot understand, restorative justice services should ensure that their practices are flexible and responsive enough to enable as many people as possible to participate. This includes those who are young, or who have a physical disability, mental health issues or learning difficulties. Care should be taken to facilitate the inclusion of any social, ethnic or other minority groups who are often denied full access to justice.

Rule 28 discusses the best mechanisms to support and promote restorative justice, that is, so that criminal justice authorities and criminal justice agencies make systematic referrals to restorative justice services, and to ensure that the conditions, procedures and infrastructure are in place to enable this. It complements this discussion by suggesting that those who are in a position to make referrals should confer with restorative justice services when they are unsure about whether it is appropriate to refer a case to restorative justice on these or other grounds. Criminal justice professionals could also be asked to record their reasoning for not referring a case to restorative justice in order to enable this option to be considered in every case. It should be the facilitator's responsibility to initiate communication to the prospective participants in relation to the offer to participate in the restorative justice process.

Rule 29 requires facilitators to be afforded the time and other resources required to undertake preparation with the parties, to conduct full risk assessments and to engage in appropriate levels of follow-up after any process. In this context, resources include the information technology and system access required to obtain information about the parties, the information and resources required to make and sustain communication with the parties, the transport infrastructure necessary to enable the parties to communicate, and the physical infrastructure needed to enable this (that is, a convenient location for the parties to meet, if they so desire, and for the restorative justice services to conduct their work as a whole). Each of these aspects of the restorative justice process are crucial to ensuring that it is undertaken as safely and effectively as possible. Irrespective of who is providing the service, the facilitator should be afforded enough autonomy within their agency to enable them to focus on meeting the needs of the parties, and to create a space which is not governed by, or under pressure from, the rationales of the criminal justice system.

Rule 30 relates to the common requirement that the victim and the accused both accept the main facts of the case. Without such an understanding, the possibility of reaching an agreement is reduced and the risk of secondary victimisation is increased. It is not necessary that the accused accept legal guilt; judicial authorities may not pre-judge the question of guilt among participating offenders so as not to infringe upon the principle of the presumption of innocence (Article 6.2, ECHR). It is sufficient that the accused acknowledges some responsibility for what happened. Furthermore, it is emphasised that neither participation in restorative justice, nor statements given in the course of restorative justice, can be used against the accused if the case is referred back to the courts. This information also cannot be used as evidence in any subsequent criminal proceedings on the same matter.

Rule 31 reflects the fact that the phenomenon of lengthy criminal proceedings is acknowledged to be a problem in many member States. Nonetheless, restorative justice has to be conducted at a pace which is comfortable for the parties and which allows facilitators to undertake sufficient preparation, risk assessment and follow-up. The time limit specified within this rule should ensure that the judicial authorities receive the necessary feedback to make decisions within a reasonable time-frame, particularly with regard to the discontinuation of criminal proceedings - a decision which, when restorative justice is referred by judicial authorities, is reserved to those bodies (**Rule 32**). This does not provide for judicial involvement in assessing the outcomes of restorative justice when a referral to restorative justice is included as part of a sentence. If restorative justice has not been completed within the time allocated to it, the judicial authorities can consider whether or not to resume normal criminal proceedings in conformity with the principle of minimising delay in rendering justice, or whether to allow the restorative justice service more time to conduct the process. Even if criminal proceedings are restarted at that point, this does not preclude the parties from participating in restorative justice at a later stage.

Rule 33 reflects the need for facilitators to have an adequate picture of the factual circumstances of the case. This information must be provided by the judicial authorities or criminal justice agencies because it is necessary to define precisely the offence to which the practice is related, and to assist the facilitator in

assessing whether the case is suitable for restorative justice. The information must include risk information and contact details for all of the prospective participants, enabling the facilitator to contact the parties promptly and directly. Additional information concerning the parties which is held by the judicial authorities or criminal justice agencies, where it is relevant to decisions on restorative justice, should be provided in accordance with domestic legislation on information sharing.

Rule 34 applies when a case has successfully been through restorative justice, the judicial authorities accept the result and, as a consequence, the criminal proceedings are brought to an end. Such decisions made by the judicial authorities should make it impossible that the case (in respect of the same facts) be brought up again (*ne bis in idem*), provided that the restorative justice agreement is implemented. In such cases, the decision acquires legal force. This does not mean that restorative justice cannot take place alongside or following criminal justice proceedings, without impacting upon them. This also does not mean that the decision to discontinue a case cannot be made conditional on the completion of agreed outcomes; in such cases, the discontinuation of the case, following the completion of agreed outcomes, is the decision which precludes prosecution in respect of the same facts. This Rule was also retained from Rule 17 of Recommendation n° R(99)19 on mediation in penal matters because of its role in ensuring that fundamental rights are upheld in cases where restorative justice interacts or overlaps with criminal procedure.

Rule 35 refers to cases where restorative justice is unsuccessful in bringing about an agreement between the parties, or where an agreement is reached, but not complied with. If, in such cases, the judicial authorities have the option to proceed with a prosecution or court proceeding, delays in making this decision should be avoided.

Section VI: Operating restorative justice services

The Recommendation reflects the view that restorative justice should be regulated only to the extent necessary and that restorative justice services should be given independence and autonomy in performing their duties, thereby allowing them to undertake flexible and innovative approaches to service provision. However, considering that it is recommended that restorative justice should be a generally available service, there is a need for some standard-setting concerning the operation of restorative justice. As implied by **Rule 36**, such standards should preferably be recognised by the justice ministry, judicial authorities, criminal justice agencies and/or another body with responsibility for the administration or coordination of criminal or restorative justice. It is not necessary that these standards be statutory. Resources should also be allocated to the support of those who deliver restorative justice.

Rule 37 recommends that both restorative justice services and training providers be monitored, accredited, or otherwise overseen or supported in some way by a body with the required competences. This task could be undertaken by a professional body or by another legitimate and relevant public or private organisation. The exact nature of restorative justice services' monitoring should be negotiated within each member State, and will depend on many factors, including the homogeneity, size and duties of each service. **Rule 38** allocates the primary, day-to-day monitoring responsibilities to restorative justice services, which must ensure that their facilitators' performance adheres to recognised standards. Restorative justice services should also develop mechanisms to respond to individual cases in which standards are not adhered to. **Rule 39** states that restorative justice services should also collect data on the cases they deliver, and make this available for the purpose of study and national collation. This is essential for transparency and for the creation and sharing of knowledge with respect to the use of restorative justice in the context of criminal justice.

Rules 40 and 41 refer to the personal characteristics and competences of facilitators. Facilitators, whether professionals or volunteers, should, as far as possible, represent all sections of the societies in which they work. In particular, they should be recruited from all social groups, including ethnic and other minority groups. Men and women should also be represented as equally as possible. They should have a deep understanding of the social and political context in which they work, and be capable of delivering restorative justice in the context of intercultural conflict, which requires specific skills and knowledge.

Facilitators should possess a good, all-round knowledge concerning the required skills and the local environment in which they are active. The content of their training should include, at minimum, that which is listed in Rule 20 of the Guidelines for better implementation of the existing recommendation concerning mediation in penal matters (Doc. CEPEJ (2007) 13E) of the European Commission for the Efficiency of Justice. This Recommendation makes no reference to the minimum age of facilitators, although provisions to that effect may be appropriate at the national level. As to the personal skills of facilitators, the Recommendation mentions 'sound judgement', which would normally be related to a high level of emotional and intellectual maturity, and the ability to manage one's biases. The 'interpersonal skills' necessary for

facilitation would include, for example, an open attitude towards people from different backgrounds, the ability to listen and to communicate clearly and non-judgementally, and the ability to remain and to act impartial. Such abilities should be reflected in facilitator selection processes, and honed through training procedures. These abilities, and not necessarily education and qualifications, are the most important elements in selecting facilitators.

Rules 42 and 43 refer to minimum levels of facilitation training, and member States are expected to develop more extensive standards in this regard. All facilitators require a minimum level of initial training, and professional development should be ongoing throughout the course of their work, including for those who facilitate on a voluntary basis. The contents of facilitation training should be linked to the standards and operations of the restorative justice service. It should aim to develop the specific skills and techniques needed to maximise the likelihood of success in restorative justice, and should provide a good understanding of conflict and its resolution, the general problems of victimisation, the problems relating to offending, the social conditions which contribute to offending behaviour, and the operation of the criminal justice system and other relevant social services within a jurisdiction. It should also provide practical information with respect to performance management, recording requirements and the operations of any information technology systems which facilitators will be required to use. High standards should be expected from both trainers and facilitators. Certain types of sensitive, serious or complex cases, such as long-running conflicts and cases of sexual or domestic violence, require advanced training and should only be delivered by experienced facilitators, ideally with specific training in both advanced facilitation skills and in the impact of serious offences. Rule 42 also notes that criminal justice professionals who are not responsible for facilitation, but who are responsible for referring cases to restorative justice should be provided with appropriate training in relation to the purpose and nature of restorative justice. Those who make referrals to restorative justice must be able to understand their purpose and operation, and to communicate this to prospective participants, to their colleagues, and to members of the general public, accurately and objectively.

Rule 44 reflects the fact that facilitators' supervisors and performance managers may not always be facilitators or trained in restorative justice themselves, and should be given specialist case supervision and service management training to enable them to understand restorative justice fully, and to supervise and manage facilitators appropriately. **Rule 45** then reflects on the fast-developing nature of research into best practice with regard to restorative justice, and suggests that training providers should revisit and revise their training programs in accordance with the production of new research in this area.

Rule 46 describes the practical application of some of the most important principles of restorative justice. It states that facilitators must not take sides in a given case, but rather that they should seek to help the parties to participate fully and to derive maximum benefit from their participation in restorative justice. Impartiality also implies that the facilitator does not have personal links with one of the parties or previous involvement in the case, nor must they give the appearance of partiality to the parties in any other way. Accordingly, a person should not be appointed facilitator in a given case if s/he has personal links with the parties, or if s/he is personally involved in the case. This emphasis on impartiality does not exclude criminal justice professionals from performing restorative justice. However, they should ideally not deliver restorative justice in relation to their own caseloads; for example, a probation officer in charge of supervising an offender should not act as a facilitator in the same case. The requirement of impartiality does not imply that the facilitator should be indifferent to the fact that offence has been committed and to the wrongdoing of the offender. Parties to restorative justice are usually initially unequal, with the main obligations typically resting on the offender's side. However, not all cases are clear-cut, in that responsibility for harm may be shared or diffuse. In relation to the presumption of innocence, the facilitator must take no position on the question of guilt. This Rule also relates to two key restorative principles, namely that all parties' needs should be afforded equal concern, and that no party, including the facilitator, should be allowed to dominate the proceedings or decision-making processes, to the detriment of other participants.

Rule 47 implies that the facilitator and their organisation are responsible for ensuring that the place of restorative justice is chosen in the interests of the parties, that is, normally a neutral location. The meeting should be controlled in such a way that the parties remain respectful of each other and are able to feel safe and comfortable throughout. Any vulnerabilities shown by the parties or identified by the facilitator should be carefully considered in that context. If the requirements of this Rule cannot be satisfied, then the case should not proceed.

Rule 48 describes how restorative justice should be carried out efficiently and without unnecessary delay. As one of the arguments for introducing restorative justice is to increase the efficiency of the criminal justice system, it should proceed with all due speed, albeit within the limits set by the capacities and wishes of the parties. Notwithstanding the need for efficiency, serious cases and cases with one or more vulnerable or

traumatised participants may require lengthy preparation and follow-up. Thus, efficiency and speed are not synonymous. One or both parties may need to access additional support and assistance either before, during or following the process, and the facilitator should have the knowledge and ability to make referrals to other services when appropriate.

Rule 49 notes that, in cases where the facilitator is made aware of imminent, serious crimes, a balance must be struck between the need for confidentiality previously described, and the need to prevent serious harm or damage. Therefore, the principle of confidentiality does not extend as far as imminent or serious crimes that may be revealed during restorative justice. The test for disclosures of this kind is essentially one of public interest. In such a case, the facilitator should inform the proper authorities, which will often, although not always, be the judicial authorities or criminal justice agencies. In some cases, it may also be advisable to inform any other person(s) concerned. Like other citizens, the facilitator has an obligation to comply with the requirements of domestic law pertaining to the reporting and prevention of crime, which may exceed the provisions in this Recommendation. Clear rules should be developed regarding when disclosure is necessary, and the parties must be explicitly informed of these rules as part of the process by which informed consent for their participation is obtained. The Directive also outlines that there may be a need for such disclosures, where these are in the public interest. Recital 46 of the Directive states:

Restorative justice processes should, in principle, be confidential, unless agreed otherwise by the parties, or as required by national law due to an overriding public interest. Factors such as threat made or any forms of violence committed during the process may be considered as requiring disclosure in the public interest.

Rules 50, 51 and 52 discuss the agreements reached through restorative justice. There are four main requirements for such agreements: they should be fair, proportionate, achievable and voluntary. The requirement that agreements should be accepted voluntarily is absolute. This distinguishes restorative justice from adjudication and arbitration, where agreements are imposed by a third party. Furthermore, the facilitator is not excluded from playing an active role in helping the parties to reach an agreement, if necessary and if their assistance is requested by the parties. However, the agreement should, as far as possible, consist of outcomes which the parties suggest themselves. Facilitators may decide to intervene in outcome decisions in order to prevent outcomes which are unfair, unrealistic or disproportionate, but the reasoning behind this decision should be explained to the parties and recorded. Ideally, the decision to block an agreement (or any part thereof) should be made in further consultation with the parties, with the facilitators' supervisors and/or with other relevant persons. Facilitators may make suggestions, but this should be limited as far as possible to cases where they are asked to do so by the parties, and they should avoid putting pressure (or being seen to put pressure) on the parties to accept suggestions which they make. If the parties do not arrive at any tangible outcomes by themselves, it is not incumbent on the facilitator to suggest tangible outcomes; in many cases, it may be that the dialogue sufficiently satisfies the needs and interests of the parties, particularly if an apology is given and accepted, if assurances of future behaviours are provided, if questions are asked and answered, and/or if mutual understanding is achieved. No undue harm should be caused to any party as a result of the implementation of a restorative justice agreement.

Rule 53 states that, after the restorative justice process is concluded, the facilitator should report to the relevant judicial authorities or criminal justice agencies on the procedural steps taken during the facilitation and on the outcome(s) to which the parties have agreed. In the case of an unsuccessful process, the report should, if possible, briefly indicate the reasons. However, according to the principle of confidentiality, the report should not reveal the contents of the statements and behaviour of the parties during restorative justice. The report should preferably be in a written form, ideally following a standard formula.

Section VII: Continuing development of restorative justice

This section outlines some recent innovations in the field of restorative justice, and suggests ways in which member States may normalise its practices, principles and approaches within their criminal justice systems. **Rule 54** reflects the responsibility of member States to support restorative justice services by providing sufficient resources for their development, and to ensure that they create and sustain the capacity to deliver restorative justice according to the standards set out in this Recommendation, and in accordance with demand for restorative justice. This can be assisted through the creation of national and/or local structures to ensure that restorative justice is supported and coordinated within a member State. These structures might also assist with the coordination of restorative justice services, develop cooperation with criminal justice agencies, judicial authorities and civil society organisations (such as offender- and victim-support organisations), develop and deliver training and accreditation, undertake monitoring and research activities and promote the use of restorative justice among the public. National structures can be located within a justice ministry or another relevant public body, or could be a professional body or an organised network of restorative justice services with public funding.

Rule 55 relates to the fact that restorative justice is still a recent concept in many European countries, and is still relatively unknown among the populations of countries where it is used with some degree of regularity. In each member State, the concept needs to be widely understood and accepted by society at large, and by the government and governmental agencies, in order for it to flourish. Common understanding and mutual respect between criminal justice agencies, judicial authorities, restorative justice agencies and stakeholder groups are of the utmost importance. In particular, there is a need to demonstrate that restorative justice brings additional qualities to the criminal justice procedure, and restorative justice services must be able to demonstrate a high level of competence. In order to achieve this, there should be regular contact and consultation between restorative justice services, other parts of the criminal justice system and relevant government departments. There is also a need for these organisations to take into account the varying and developing needs of victims, offenders and communities with regard to restorative justice, and with regard to the administration of criminal justice more broadly. Therefore, these contacts and consultations should include representatives of those groups. Accordingly, **Rule 56** indicates an additional responsibility on the relevant authorities and services to engage with local communities in order to legitimise the use of restorative justice and include citizens in the process where possible.

Rule 57 recognises that the skills and knowledge which one might gain or develop from restorative justice training can be applied to other interventions and aspects of criminal justice work, and that they can be of use to criminal justice professionals and managers in their day-to-day activities. If a member State wishes to reform their criminal justice system or to change the cultures of their judicial authorities or criminal justice agencies so that they are more restorative in nature - for example, that they enhance their focus on problem-solving, repairing harm, satisfying the needs and interests of stakeholders, and creating the conditions which enable stakeholder participation in criminal justice - this can be assisted and encouraged by training criminal justice professionals and managers in basic restorative justice principles. However, only those who are fully trained in facilitation, in accordance with the standards outlined in this Recommendation, should deliver formal restorative justice processes. University courses which pertain to criminology or to the administration of the criminal justice system should include restorative justice.

Rule 58 relates to the use of restorative justice in cases where offenders are sentenced to supervision by probation. In some areas, a referral for restorative justice can form a part of a community sentence or suspended sentence, or some other form of sentence where the offender is subjected to supervision by probation for a pre-determined period of time. In such cases, it is not necessary to wait until the sentence plan is completed for restorative justice to take place. Rather, sentence planning work can benefit greatly from any information derived from restorative justice, which happens in advance or concurrently, particularly if the process reveals further information regarding the needs, interests, desires or capabilities of the victim, offender or another relevant stakeholder. This would enable the restorative justice agreement to constitute or form part of the sentence plan, thereby increasing the likelihood that the sentence plan would satisfy the needs and interests of the parties. It might also increase the perceived legitimacy of the plan in the eyes of the offender, who would have played an active and voluntary role in helping to determine the outcomes of the restorative justice process. Offenders may be more likely to comply with outcomes agreed through a decision-making process which they experienced as fair, voluntary and participatory. It must be remembered that offenders cannot be compelled to participate in restorative justice. However, a referral can be mandated, enabling a trained facilitator to explore, in collaboration with the parties, whether the case is suitable for restorative justice, and whether the parties wish to participate in such a process.

Rule 59 details some of the other criminal justice interventions to which restorative principles could be applied. For example, community reparation could be undertaken restoratively if it were voluntary, if the victim, offender and/or community participated in determining what form the reparation might take, and if the reparation activity helped to address and/or repair the harm caused by crime. Several other interventions, if voluntary, participatory and focused on addressing and repairing harm, or aimed at achieving reintegration, could also be undertaken restoratively. This includes various forms of victim and offender support, and other constructive or pro-social activities, including, but not limited to, those stated in the Recommendation. However, these practices should be recorded separately and described differently to practices which involve dialogue between victims and offenders.

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 conflicts between criminal justice professionals, between professionals and citizens, and between prisoners. For example, restorative justice can be offered in cases of public complaints against the police, or in other cases where victims, offenders or members of the public accuse criminal justice professionals of abusing their powers or causing them some other form of harm. Restorative justice can also be used within judicial authorities and criminal justice agencies where staff are in conflict with each other, and it can be offered in prisons in many cases where prisoners often are in conflict with each other, or

with staff. In essence, these principles and approaches can be applied in relation to any conflict or harmful incident. The application of restorative principles can also contribute to good professional relationships between staff and prisoners, which are an essential element of dynamic security (ref. commentary to Rule 64.2, EPR).

Rule 61 states that restorative principles and approaches could be used to guide other aspects of the work of judicial authorities and criminal justice agencies. For example, circle processes, in their various forms, can be used proactively in order to build social capital and enable participatory decision-making within any workplace (including judicial authorities and criminal justice agencies), thereby assisting in building a restorative organisational culture. Circle processes vary in their structure and approach, and can be used as an informal, simple and flexible way of applying restorative justice principles proactively in any situation where there is an issue to be discussed or a question to be asked. They, and other restorative approaches, could also be used to ensure that frontline staff, non-operational staff and managers are consulted and included in any efforts to implement restorative justice (or, indeed, any other policy or project) within a criminal justice agency, judicial authority or other relevant public or private organisation. This would help to maximise understanding of restorative principles and practices among criminal justice professionals, and to ensure support for their use. The prison setting is also an ideal location in which to apply restorative justice principles proactively via the use of circle processes. These can be used for a variety of purposes, including building a sense of belonging within the prison community, tackling difficult issues relating to offending and exclusion, enhancing relationships among prisoners and staff, reintegration, and devising standards for the prison community. Those who facilitate circle processes should access some training on their use in advance of doing so.

Rule 62 explains that the normalisation of restorative justice can also be assisted by partnership working between relevant organisations and stakeholder groups. For example, steering groups and multi-agency partnerships can be formed with representatives from relevant organisations and stakeholder groups, in order to establish clear and simple referral procedures, scrutinise local policies and practices, coordinate each organisation's involvement in restorative justice and ensure transparency in practice. This can build trust and understanding among relevant organisations, which is needed to ensure that restorative justice is seen as a mainstream and legitimate criminal justice option, both as an alternative to the formal criminal justice procedure, and alongside it. Other partnership activities might include joint meetings and events, joint promotional or public awareness strategies, information sharing agreements, joint practitioner training, collaborative promotional events, capacity and resource sharing, secondments, co-working and co-location, where these are appropriate and where they do not put the principle of restorative justice service autonomy at risk.

Rule 63 suggests that judicial authorities and criminal justice agencies who wish to utilise, normalise or develop restorative justice should consider officially designating a staff role in order to promote, coordinate, implement, support and drive these activities. This should be someone who understands and supports restorative justice and its principles, and ideally would be someone with experience of using or implementing restorative justice. The existence of such a position will allow those within the organisation who do not understand how to apply restorative justice practices and principles within their work to ask for information or assistance from this 'single point of contact'. It would also help to maximise the use of restorative justice, if the appointed person was enabled to assist their colleagues in identifying or delivering cases which may be suitable, to advocate for the greater use of restorative justice, and to take active steps towards its implementation. Ideally, these persons should be formally allocated time within their contracts to allow them to perform their duties relating to restorative justice.

Rule 64 notes that member States, regions and organisations with long running restorative justice services, should make any useful information they hold available to other member States, regions or organisations which wish to implement similar programs. Policies, guidelines, risk assessment materials, recording frameworks, training and evaluation materials, research findings and other relevant information and materials, could be shared in order to allow member States to conserve resources and to build on existing good practice (i.e. to avoid having to 'reinvent the wheel'). Similarly, when determining the scope and nature of legislation which a member State wishes to bring forward or revise, they should look to other countries in order to obtain knowledge regarding the optimal nature and likely impact of any such changes. Member States which have legislation pertaining to restorative justice should share any useful information they hold on its detail and impact, if requested or needed by another member State. This is important because of the vital lessons which can be learned from the experiences of other jurisdictions. For example, an analysis of recent developments in New Zealand demonstrates that the introduction of a legislative obligation to refer cases to restorative justice, must be preceded by the assessment and building of the delivery capacity within a jurisdiction in order to cope with the additional demand. The Council of Europe and other relevant international organisations should consider in what manner they can assist in creating and sustaining the

structures which would allow for information sharing and for member States to collaborate with respect to restorative justice.

Rule 65 states that governments and relevant organisations should work towards achieving social support for restorative justice. This could involve sharing success stories across various forms of media, undertaking positive, evidence-based public awareness campaigns, and involving stakeholder groups in its implementation. A growing awareness of restorative justice might result in higher levels of demand for the service, and thus it is necessary for member States to ensure that their restorative justice services have the capacity necessary to satisfy any increase in demand.

Rule 66 notes that it is necessary to conduct research on the development and use of restorative justice. Restorative justice services should be evaluated in order to establish their safety and effectiveness, and with a view to identifying how they can be improved and how any risks can be mitigated. Research is essential for gaining knowledge on the function and impact of restorative justice, and for assessing the effects of any efforts to integrate restorative justice principles and processes into criminal justice systems. Without research of this kind, there is no reliable basis on which to make such an assessment. Research is integral to the development of restorative justice, and the evaluation of existing and innovative models of delivery is essential. Restorative justice services should enable independent research to take place.

Finally, **Rule 67** reflects the fact that this is a fast-changing and fast-growing arena. There may be significant developments in the use of restorative justice in member States' criminal justice systems, which require this Recommendation to be assessed regularly and, if necessary, revised.