



PROPOSAL FOR A DIRECTIVE ESTABLISHING MINIMUM STANDARDS ON THE RIGHTS, SUPPORT AND PROTECTION OF VICTIMS OF CRIME – COM(2011) 275/2, REPLACING FRAMEWORK DECISION 2001/220/JHA ON THE STANDING OF VICTIMS IN CRIMINAL PROCEEDINGS

Comments by the European Forum for Restorative Justice

1. Introduction

In November, 2010, the European Forum for Restorative Justice has submitted a proposal to Commissioner Viviane Reding which aims at improving the existing regulations on penal mediation as provided in article 10 of the current Framework Decision 2001/220/JHA. In that policy paper¹ we provided a short overview on the current state of international research about the impact and potential value of restorative justice, with particular regard to the perspective of victims of crime. Based on these findings we proposed a comprehensive regulation which includes, as a minimum, five significant aspects:

- (1.) the availability of penal mediation and/or other restorative justice practices for the widest possible range of offences,
- (2.) equal access to such services for victims of crime,

¹ A full version is available at www.euforumrj.org/readingroom/Proposal%20framework%20decision.pdf.

- (3.) issues of information in order to enable free and informed choice by the victims,
- (4.) voluntariness, safeguards and standards,
- (5.) implementation of agreements and consideration of the victims' interests when deciding about the penal consequences of participation for the offender.

2. Critiques and Proposals

Unfortunately the draft directive published by the Commission on 18 May, 2011, does not adequately reflect the impact of restorative justice for victims of crime. From a restorative justice perspective it would, to some extent, even be a step backwards from the current Framework Decision 2001/220/JHA.

2.1. General Assessment of Restorative Justice

Restorative justice is presented in the draft as something to be wary and cautious of. This is an unfair representation that could be improved by placing stronger emphasis on the benefits in recital no. 16. In its current version, the explanations of possible dangers dominate whereas the added value of restorative justice practices for victims as a complementary procedure or even a substitute to regular criminal proceedings is not adequately referred to, neither in terms of procedural justice nor of justice in outcome. In addition, it appears unclear why reference is made to a danger of "further victimisation" through restorative justice practices. There exists no evidence whatsoever that victims who participate in such exercises face a particular risk of victimisation, aside from the general danger of secondary victimisation which generally exists throughout all post-crime procedures, including the regular criminal trial. Concerns might be better addressed by making reference to best practices in the context of mediation and other restorative justice services.

It is furthermore regrettable that the draft does not make any reference to other international legal texts with focus on the victim that explicitly promote restorative justice as an approach from which victims can take advantage. These instruments, in particular Council of Europe Recommendations (1985)¹¹ and (2006)⁸ and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, should be referenced in recital no. 16.

2.2. Definition

The definition as it stands in article 2, paragraph e) excludes the possibility of indirect contact between victims and offenders within a restorative justice context. However, practice in several member states has shown that indirect settlements can be as successful as face-to-face meetings. In addition, they can be attractive particularly for victims who have concerns to face risks such as those referred to in the current recital no. 16.

2.3. Access

The draft text does not provide for any regulation with regard to access to restorative justice services. Provided that restorative justice offers a variety of benefits to victims of crime, there is a need for a regulation that explicitly entitles victims to have at least a chance to profit from such

benefits. It is questionable why an instrument, that establishes explicit rights such as the right of access to victim support (article 7), the right to be heard (article 9), the right to have non-prosecution decisions reviewed (article 10) or the rights to reimbursement of expenses, return of property, and compensation (articles 13 to 15) should not have an equal, and an equally strong, position towards an inclusive service such as restorative justice. Ironically, the current text explicitly considers the exit option (which is not in dispute at all), but ignores the entry scenario.

The draft text could be improved

- either by extending the right to access to victim assistance as provided by article 7 to restorative justice services as well,
- or by amending the headline of article 11 and changing it into "Right to access and safeguards in the context of mediation and other restorative justice services".

In addition, the substance of article 11 should in any case be amended by providing some regulation on the issue of access. Ideally, the provision should consider both, the aspect of the types of crime (victimisations) addressed as well as the aspect of an – ideally – universal personal availability, as provided in our original proposal. For exemplary formulations from this proposal, see appendix. These address all issues of relevance for victims, including the necessary safeguards against probable concerns.

2.4. Promotion

The obligation to promote restorative justice as provided in article 10 of the current Framework Decision 2001/220/JHA is omitted.

2.5. Implementation

In addition, the Directive needs to make clear that effective and substantial support for member states will be made available to implement and expand restorative justice. Training of and support to judicial authorities, victim support workers and restorative justice providers is of utmost importance in order to develop a well-balanced criminal justice system that through recognition and active involvement of those affected promotes social peace under the rule of law effectively.

3. Conclusion

Anticipating the possible benefits of restorative justice, not only for victims of crime, we hold the view that the related regulations in the draft directive have to be revised in order to maintain the momentum in favour of restorative justice throughout the European Union. Our fear is that restorative justice could be marginalised under the new directive, or even disappear.

Leuven, 17 November 2011

The European Forum for Restorative Justice

Appendix: Concrete wording for an adequate regulation as suggested in our 2010 proposal

"Article 10

Mediation and other Restorative Justice Practices in Criminal Matters

1. Each Member State shall ensure the availability of restorative justice practices such as for example victim-offender mediation, family group conferencing, etc., for the widest possible range of offences.
2. Each Member State shall ensure that all victims have equal access to competent restorative justice practices.
3. Each Member State shall ensure that all victims are well informed about the offer and nature of restorative justice practices so that victims are in a position to make informed choice and to give informed consent throughout the process.
4. Participation in restorative justice processes should be totally voluntary from the side of the victim, which includes the possibility of withdrawing at any time. Appropriate support for the victim should be offered before, during and after the restorative justice process. Therefore, Member States should ensure that there are clear practice standards including appropriate training regarding the needs of victims so that the interests of the victims are fully considered throughout the process. Member States should further ensure that the services have access to sufficient funding.
5. Each Member State shall ensure that any agreement reached in the course of restorative justice practices can be taken into account in the criminal proceedings in ways that coincide with national provisions on prosecution, sentencing and the execution of sentences. During this process, the interests of the victim shall be considered with respect and upheld."

Secretariat of the European Forum for Restorative Justice

Secretariat of the European Forum for Restorative Justice

Hooverplein 10

3000 Leuven

Belgium

Tel. +32 16 32 54 29

Fax +32 16 32 54 74

E-mail: info@euforumrj.org

Website: www.euforumrj.org