



**PROPOSAL REGARDING THE UPDATE AND AMENDMENT OF THE E.U. FRAMEWORK
DECISION 2001/220/JHA ON THE STANDING OF VICTIMS IN CRIMINAL
PROCEEDINGS**

Submitted by the European Forum for Restorative Justice

1. General Remarks

Restorative justice is making headway in Europe. Almost all E.U. Member States have passed legislation in this field and practice is growing. However, much remains to be done to allow restorative justice to grow to its full potential.

The existing Council Framework Decision 2001/220/JHA is the first piece of binding E.U. legislation which promotes the implementation of restorative justice in penal matters in the Member States. Due to a variety of different reasons that have been discussed in many commentaries and articles, both from the political and the research communities, the related article 10 of the existing

framework decision is neither clear in its content and scope nor effective in its impact on Member States which so far have been rather restrictive in implementing sufficient options for restorative justice practices.

Victim-offender mediation and other restorative justice practices are an option that can be of great benefit in particular for victims of crime. Restorative justice is a response to crime in which victims have an opportunity to express their needs and concerns and to actively participate in the proceedings. Restorative justice aims to repair, in so far as possible, the harm suffered and to bring offenders to understand the consequences of their behaviour and accept responsibility. Addressing the harm caused to crime victims is a primary concern of restorative justice; the acknowledgment by the offender of the harm caused by the crime and an agreement on making amends is a major part of the process at the heart of restorative justice approach¹.

In a recent research report delivered to the E.U. Commission,² the European Forum for Restorative Justice came to the conclusion that victim rights are one of the major points of reference for a Union-wide implementation of restorative justice. It can contribute to the political goal of achieving the common European area of freedom, justice and security. The promotion of a balanced justice that considers the needs of victims and the rights of offenders can also contribute to crime prevention.

With regard to the aim of restorative justice, i.e., the restoration of the harm suffered from crime, all victims of crime in the European Union should have the possibility to profit from the potential benefits of restorative justice. It is this particular aspect that requires explicit provisions on restorative justice in the context of this victim-related Framework Decision.

The European Forum for Restorative Justice is the only Europe-wide NGO which promotes restorative justice from a joint perspective which integrates the professional experience of restorative justice practitioners and services, policy makers, legal practitioners, and researchers. Besides its criminal political activities, exchange of information, knowledge and experience, consultation and discussion concerning victim-offender mediation in the framework of a restorative approach of criminal justice are the Forum's core activities. Its services are offered to individuals, non-governmental and governmental organisations in Europe. Other European and international organisations working in the field of victim assistance and offender care are considered to be important partners in realising the Forum's objectives. Therefore, the Forum cooperates and exchanges information with, e.g., Victim Support Europe, the Conférence Permanente Européenne de la Probation, the American Victim Offender Mediation Association and Prison Fellowship International. Various national organisations are corporate members of the Forum which also has consultative status with the Council of Europe's Committee on Crime Problems.

¹ Cf. I. Aertsen, R. Mackay, J. Willemsens & M. Wright, *Rebuilding community connections – mediation and restorative justice in Europe*. Council of Europe Publishing, Strasbourg 2004.

² J. Willemsens, *Restorative Justice: An Agenda for Europe. The Role of the European Union in the Further Development of Restorative Justice*. Final Report of the AGIS project JLS/2006/AGIS/147. European Forum for Restorative Justice 2008.

In the light of its experience, the European Forum for Restorative Justice wishes to comment only on those elements of the Framework Decision that relate to restorative justice. Our comments reflect the development in theory and practice of restorative justice in general and victim-offender mediation in particular.

Points of departure and reference of our comments are the following articles of the existing Framework Decision 2001/220/JHA:

“Article 1
Definitions

(e) ‘mediation in criminal cases’ shall be understood as the search, prior to or during criminal proceedings, for a negotiated solution between the victim and the author of the offence, mediated by a competent person.

Article 10

Penal mediation in the course of criminal proceedings

1. Each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure.
2. Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account.”

2. Proposals and Comments

2.1. Regarding Article 1 para e) above, we propose the following wording:

"(e) ‘Mediation and other restorative justice practices’ shall be understood as the search, prior to or during all stages of proceedings, for a voluntary agreement between the victim, the offender and eventually others involved regarding how the harm arising from the offence can be addressed, facilitated by a competent person with specific training for this task."

Commentary:

The existing definition "mediation in criminal cases" does not correspond with the terminology used in other international documents such as, in particular, the Council of Europe Recommendation (99)19 on Mediation in Penal Matters and the Guidelines for a Better Implementation of the Existing Recommendation Concerning Mediation in Penal Matters, as well as the U.N. resolutions relevant in this field which refer to 'criminal matters'. All documents avoid reference to 'cases'.

Furthermore, the proposed formulation (see article 10: Restorative justice and mediation in criminal matters) would be consistent with the terms used in the E.U. Directive 2008/52/EC on [...] Mediation in Civil and Commercial Matters. However, in deviating from the standards developed in civil and commercial law, mediation is only one of the models that should be referred to in the criminal sector. Here, additional instruments such as, e.g. family group conferencing, circle sentencing, and

others, have proved to be important equivalents or supplements to victim-offender mediation. Moreover, the theoretical approach of restorative justice is significantly different from the other fields of mediation.

The new Framework Decision should reflect this international development. Today, mediation is one of a variety of restorative justice practices in criminal matters. In light of the fact that mediation continues to be the most frequently applied model throughout Europe, it should nevertheless be explicitly referred to in the text, i.e., in addition to restorative justice as the general term.

2.2. Regarding Article 10, we recommend that it be amended as follows:

"Article 10

Restorative justice and mediation in criminal matters

- 1. Each Member State shall ensure the availability of mediation and/or other restorative justice practices for the widest possible range of offences.**
- 2. Each Member State shall ensure that all victims have equal access to mediation and other restorative justice practices.**
- 3. Each Member State shall ensure that all victims are well informed about the offer and nature of mediation and other restorative practices so that victims are in a position to make informed choice and to give informed consent throughout the process.**
- 4. Participation in the mediation or restorative justice process 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 mediation or 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 mediation or other restorative justice practices can be taken into account in the criminal proceedings in ways that coincide with national provisions on prosecution and sentencing. During this process, the interests of the victim shall be considered with respect and upheld."**

Commentary:

Ad 1.

Although still not so widely used in many E.U. Member States, there is strong evidence that restorative justice can be applied successfully at all stages of the criminal justice process. Research and practice further indicate that it can be applied in a wide range of offences. Also victims of the most serious types of offences – who have often the most persistent questions towards the offender – can benefit from at least some sort of restorative justice practice such as, e.g., post conviction programmes. Empirical evidence consistently suggests that victims benefit from face-to-face restorative justice conferences, by reducing post-traumatic stress symptoms. Furthermore, meta-

analysis shows that restorative justice seems to reduce crime more effectively with more, rather than less, serious crimes.³

Comparative analyses of national legislation show that several Member States have made restorative justice available without providing any restriction regarding the nature or gravity of the criminal act. This is in line with the contents of Council of Europe Recommendation R(99)19 on mediation in penal matters.⁴

Ad 2.

In light of the potential benefits of restorative justice for victims of crime, it is a *conditio sine qua non* that all victims who wish to participate in such a process must have the opportunity to do so. With regard to the basic right of equal treatment it is essential that victims have equal access to all mediation and other restorative justice services offered in their country. This right to access has to be seen independently from the question whether, and to what extent, a successfully completed mediation or other restorative justice process should be considered by the criminal justice authorities in respect to the further treatment of the offender (see below, 5.)

Ad 3.

Informed consent from the side of the victim, without experiencing any form of pressure or obligation, is crucial in restorative justice processes. Victims and other interested persons should not only be informed about the existence of restorative justice services, but also of the nature, the characteristics, possible benefits and risks of participation in mediation and other restorative justice practices. Thus, informing victims requires well conceived methods of doing so, and criminal justice authorities and other public bodies should ensure that this information is given in an appropriate way to all victims.

Ad 4.

Restorative justice practices entail a highly skilled intervention and require specific training. It is essential that the risks of secondary victimisation and other victimological issues are an integral part of the training of the mediators or other facilitators. Likewise they have to be reflected in the practice standards. It is highly recommended that restorative justice practices and standards are developed in the framework of an ongoing cooperation with victim support organisations.

Ad 5.

National legal provision should make it possible that agreements reached in the course of restorative justice practices are taken into account in further decision making in relation to criminal

³ I. Staiger, A. Pemberton, K. Ammerlaan and R. Letschert, *Victims of Terrorism: Towards European Standards for Assistance*, Leuven, European Forum for Restorative Justice, 2008; L.W. Sherman and H. Strang, *Restorative Justice: the evidence*, London, The Smith Institute, 2007.

⁴ Cf., e.g., the country report on Germany and the comparative analysis in: D. Miers & I. Aertsen (eds.): *Regulating Restorative Justice. A comparative study of legislative provision in European Countries*, Frankfurt Verlag für Polizeiwissenschaft, 2008 (forthcoming).

proceedings. This should be done in such a way that it protects and, where appropriate, reinforces the interests of the victims.

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