

# Legislative Proposal to Introduce Provisions Governing Restorative Justice Services into the Dutch Code of Criminal Procedure and Explanatory Memorandum

Version 2.0

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Final Version of 10 May 2018

Presented to the Minister of Legal Protection, *drs* S. Dekker

Presented to the Permanent Commission for Justice and Security  
of the Lower Chamber

Drafted by the Initiator Group composed of:

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In collaboration with the Think Tank

‘The Implementation of Restorative Justice Services  
in the (new) Code of Criminal Procedure’

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Translation: Louise Rayar

ISBN: 978-94-6240-487-8

e-book: 978-94-6240-492-2

## **Published by:**

Wolf Legal Publishers  
P.O. Box 313  
5060 AH Oisterwijk

E-Mail: [info@wolfpublishers.nl](mailto:info@wolfpublishers.nl)  
[www.wolfpublishers.com](http://www.wolfpublishers.com)

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## Authors' Note

This publication contains the second version of our legislative draft as presented to the Permanent Commission for Security and Justice of the Dutch Lower Chamber on 21 February 2017. It was subsequently discussed with the new Commission for Justice and Security on 8 June 2017. Like the original version, this revised version (2.0) was drafted by and at the initiative of citizens. We, the members of the Initiator Group, took the initiative for this a Legislative Proposal and its Explanatory Memorandum in light of the impending implementation of the new Dutch Code of Criminal Procedure (Sv). As has been the case with the previous version, in drafting this second version the Initiator Group, whose members are working at Maastricht University and Restorative Justice Nederland, have collaborated with a think tank made up of experts in the field of criminal law and restorative justice.

After the publication of the first version, the Initiator Group deemed it wise to bring the legislative draft to the attention of legal scholars and legal practitioners, so they organised several lectures and released publications. Simultaneously, by holding 'reality-check' meetings, they investigated the extent to which their Legislative Proposal was aligned with the existing and steadily evolving restorative practices within and in connection with the Dutch criminal justice system. Last year, the Initiator Group held reality-check meetings with mediators and others offering restorative justice services, the Police, the Public Prosecutor's Office, the Courts, the Prison System, the Probation Service, Victim Support, Child Care and Protection Boards and (legal) scholars. Basing themselves in part on the yield and the outcome of these reality-check meetings, the Initiator Group redrafted its Legislative Proposal. On 29 March 2018, the draft version of the revised Legislative Proposal was presented during a think tank meeting held in Den Bosch, the Netherlands. Building on the input produced by the meeting, the drafters further developed it into the revised version herein presented. The goal of the Initiator



Group was to forge a link between legal theory and legal practice and have the one reinforce the other. This has been achieved, in our view.

Codified rules on restorative justice are indispensable to render the character of the criminal justice system more restorative, as advocated by the Initiator Group. Without such rules, considerable differences between the various court districts will very likely continue to exist in practice. This would mean that on one occasion a bold disputing party, legal counsellor, police officer, public prosecutor or court would refer the case to a restorative justice service, i.e. facilitated conflict resolution, mediation or group conference, where this would not be the case on other occasions or at other locations. Nothing in the current criminal justice system has stood in the way, incidentally, of developing a more restorative approach. Such development continues to be in full swing. Since 2001, European law in particular has served as a wake-up call for the Netherlands to make more use of restorative justice services within and in connection with the Dutch criminal justice system.<sup>1</sup> Ten years on, it led to the introduction of Article 51h Sv, which was slightly amended and extended in 2017. After the article was introduced, a proper start was made with mediation experiments in criminal cases, although considerable experience had already been gained with employing restorative justice services in pilot projects and clinics before the article's introduction. Since 2007, for example, facilitated conflict resolution and face-to-face meetings between victims and offenders have taken place concurrent with and after criminal proceedings.

It goes without saying that mediation in criminal cases, which contains an element of enforcement as well as an element of compulsion, takes place in a specific, public context. For this reason, quality standards have been set for this form of restorative justice and for the person of the mediator; the same applies to group conferences. Mediation in criminal cases meshes with efforts to more firmly embed

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1 001/220/JHA: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings and Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

restorative practices in the community and afford citizens more responsibility in these. Subjecting the mediation process and the person of the mediator to quality standards is an essential part thereof. Equally so is setting quality standards for professionals in the field of criminal law and for those making the referrals, so that awareness of the added value of mediation and of the opportunities it offers in criminal cases is raised and its added value is recognised and acknowledged, as is the importance of providing appropriate information about it to those directly involved.

Only solid statutory embedding, albeit it in a measured and proportionate form, can lead, in our view, to the emergence of a uniform, yet multifaceted, national restorative justice practice - from Amsterdam to Maastricht and from Middelburg to Groningen - within the criminal justice system and in connection with it. 'Law in the books' does not, after all, automatically translate into 'law in action'. It is the authors' view that 'law in action' needs to be backed up by 'law in the books'.

Building on the above-mentioned reality-check meetings and think-tank meeting, the Initiator Group went to work on composing this revised version of its Legislative Proposal to incorporate provisions governing restorative justice services into the (new) Dutch Code of Criminal Procedure. This revised legislative draft, initiated by citizens exerting their democratic rights in the general interest, was presented to the Minister for Legal Protection, *drs* S. Dekker, and to the members of the Permanent Commission for Justice and Security of the Dutch Lower Chamber on 27 June 2018. Our Legislative Proposal has laid the groundwork for a formal legislative process, which can now truly commence. We will follow this process closely. The possibility of dealing with criminal matters in a more restorative way is, after all, a necessity rather than a luxury.

Lastly, we would like to thank Britt van der Plas, who was awarded a Master's Degree in criminal law by Utrecht University and a Master's Degree in conflict management, justice and mediation by the VU Amsterdam, the Netherlands. She assisted the Initiator Group during the reality checks and in processing their results in this revised version. Her contribution made it possible for us to complete this Legislative Proposal.

Maastricht/Amsterdam, June 2018

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# **Outline of Dutch Substantive and Procedural Criminal Law Related to the Legislative Proposal**

The objective of the Legislative Proposal is the introduction into the Dutch Code of Criminal Procedure of (mainly) procedural rules on restorative justice services, consisting of, in any case, facilitated conflict resolution, mediation and group conferencing. More specifically, it represents an elaboration of the current Article 51h of the Dutch Code of Criminal Procedure, which for the time being serves as a catch-all clause. Inasmuch as these rules governing restorative justice services are to be implemented within the framework of the Dutch criminal justice system, it seems obvious that its context must be taken into account. The Initiator Group feel that the core of the Legislative Proposal may have relevance in other (European) countries as well, especially those rooted in the Civil-Law tradition, as is the Netherlands. For this reason, they consider it necessary to inform the non-Dutch reader about the features of Dutch substantive and procedural criminal law that are most relevant to this Legislative Proposal.

It is important to note that in the Netherlands the Police have the power, under the responsibility of the Public Prosecutor's Office, to dismiss cases. This is referred to as 'police dismissal'. If mediation takes place after a person has lodged an accusation with the Police and the mediation turns out to be successful, the Police may decide not to forward the accusation or the case-file to the Public Prosecutor's Office. Of relevance also is that under the principle that public prosecutors have the discretionary power to decide, based on considerations pertaining to the general interest, whether to prosecute or not, it may waive prosecution, even if based on the evidence prosecution is deemed technically possible. A successful mediation can therefore cause the Public Prosecutor's Office to dismiss the case, because it deems prosecution no longer opportune. At the level of the Court, it must be pointed out that, after the accused has been summoned by the Public Prosecutor's

Office and the case has been called, the Court is obliged to pass final judgment in conformity with Articles 348 through 352 of the Dutch Code of Criminal Procedure (Sv). Providing the summons is valid; the Court is competent to take cognizance of the case; there are no statutory impediments barring the Public Prosecutor's Office from prosecuting; and no other reasons exist to suspend prosecution, the Court will consider, on the basis of the charge contained in the summons and its own investigation, whether it can declare the alleged act proven; whether the act constitutes a criminal offence; whether the accused is criminally liable; and, finally, whether to impose a sanction on the accused and, if so, the kind of punishment or measure it will impose. If the Court declares the act not proven, it will acquit the accused. If it declares the act proven, but the act does not constitute a criminal offence, or the accused is held not criminally liable, the Court will grant the accused a full discharge. In either case, no punishment is imposed. If there is proof of the act; if what has been declared proven constitutes a criminal offence; and if the accused is held criminally liable, the Court may impose a punitive sanction as provided for by the criminal law. Dutch Courts are not, however, obliged to impose punishment. By virtue of Article 9a Sr, the Court may find the accused guilty, but not impose punishment. The Court must stay within the boundaries of this system and adhere to the provisions laid down in Articles 348 through 352 Sv. In the Legislative Proposal before you, however, the Court has been afforded the power to declare the case closed, either conditionally or unconditionally, after a successful outcome of mediation. This implies that the current system is opened up. For the remainder, the Legislative Proposal is aligned, as much as possible, with the current statutory system. It remains within its boundaries, except that the Legislative Proposal extends the right to invoke professional privilege, afforded by Article 218 Sv, for specific professional groups, such as lawyers, doctors and civil-law notaries, to mediators.

Also meriting attention is the fact that at the preliminary judicial investigation stage Dutch criminal proceedings have a highly inquisitorial character, whereas the investigation by the Court is of a more accusatory nature (equality of arms). All in all, the Dutch criminal justice system may be characterised as moderately inquisitorial. It is a rather vertical system, a legal battle between the authorities, i.e. the Public Prosecutor and the Court, on one side, and the citizen who has been accused of an offence, on the other. The victim is not a proper party to the pro-

ceedings, but he can participate in the proceedings in one of the following capacities:

- a. *accuser or complainant*: in the case of serious offenses only subject to prosecution upon complaint, the complainant must expressly state, at the time of his lodging the complaint, that he wishes the Public Prosecutor's Office to institute criminal proceedings;
- b. *objector*: in cases, in which the Public Prosecutor's Office waives prosecution, the victim is entitled to lodge an objection against the decision not to prosecute with the Court of Appeal. This Court will subject the case to a full review and may subsequently decide that the Public Prosecutor's Office must as yet institute criminal proceedings;
- c. *injured party*: the victim is entitled to join the criminal proceedings in order to claim damages against the accused;
- d. *person entitled to be heard*: the victim is entitled to give a victim impact statement during the investigation by the Court. He also has the right to present his views on the evidence, the punishability of the act, the criminal liability of the accused and on sentencing;
- e. *witness*: the victim is generally viewed as the principal witness in criminal proceedings. This is not a right, but rather an obligation.

The introduction of provisions governing restorative justice services into the Dutch Code of Criminal Procedure does not only imply that victims will be assigned a new role within a restorative justice setting, namely that of equal party to the accused. It also means that, where use is made of restorative justice services, criminal proceedings will gain a more horizontal character. The vertical relation with the authorities will not be lost, however, as the Public Prosecutor's Office and the Courts will continue to have control in the sense that they may function as the authorities that issue referrals to restorative justice services. They also consider *how* a successful outcome of a mediation is to be taken into account with regard to closing a criminal case and/or sentencing the offender.

## Legislative Proposal to Introduce Restorative Justice Provisions into the Dutch Code of Criminal Procedure and Explanatory Memorandum

This publication contains the revised version of a legislative proposal, drafted by and at the initiative of citizens, to introduce restorative justice provisions into the Dutch Code of Criminal Procedure. The initiative to this Legislative Proposal and its Explanatory Memorandum was taken within the framework of the impending introduction of the new Dutch Code of Criminal Procedure. It was drafted by an Initiator Group consisting of persons working for Maastricht University and the Dutch Restorative Justice Foundation in collaboration with a think tank made up of professionals from the fields of criminal law and restorative justice. This legislative draft was presented to the Minister of Legal Protection, *drs* S. Dekker, and to the members of the Permanent Commission for Justice and Security of the Lower Chamber on 27 June 2018. The authors feel that the official legislative process can begin in earnest, now that a revised version of the Legislative Proposal has been completed. Being able to deal with criminal matters in a more restorative manner is after all not a luxury, but a necessity.

*“This initiative has generated an incentive and a standardisation that are of value to an evolving justice practice. The role which this revised version has assigned to the Mediation Offices is in tune with the way in which mediation in criminal cases is organised in the work processes of Public Prosecutors’ Offices and the Courts.”*

*Judith Uitermark - judge and national coordinator mediation in criminal cases.*



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