



# European Probation Rules

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## Foreword

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HMI Probation is committed to reviewing, developing and promoting the evidence-base for high-quality probation and youth offending services. *Academic Insights* are aimed at all those with an interest in the evidence-base. We commission leading academics to present their views on specific topics, assisting with informed debate and aiding understanding of what helps and what hinders probation and youth offending services.

This report was kindly produced by Professor Rob Canton and focuses upon the European Probation Rules, which were a key reference for the Inspectorate in developing standards for inspecting probation services. It can be argued that the Rules are worthy of greater recognition. Furthermore, with all the recent and continuing changes to probation service delivery in England and Wales, they can be seen as more relevant than ever. Crucially, the Rules require an ethical foundation for all probation work, and have the potential to guide policy and practice in ways that protect and advance the rights of all.

The Rules can be accessed here, alongside other key conventions and recommendations: <https://www.coe.int/en/web/prison/conventions-recommendations>.



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### Author Profile

Rob Canton is Professor in Community and Criminal Justice at De Montfort University, Leicester. Before joining De Montfort, he worked for the Nottinghamshire Probation Service for some 20 years in a number of different roles. He has contributed to probation development and general penal reform in more than ten different countries, mainly in Eastern Europe. He was co-opted to the Council of Penological Cooperation in the Council of Europe to develop the *European Probation Rules* (2007 – 2010) and again in 2015 – 2016 to revise the *European Rules on Community Sanctions and Measures*. He also acted as a Specialist Adviser to the House of Commons Justice Select Committee in its Inquiry into the Role of the Probation Service (2010 – 2011). His publications include *The Dictionary of Probation and Offender Management* (edited with David Hancock, 2009), *Why Punish?* (2017) and *Probation* (second edition with Jane Dominey, 2017).

**The views expressed in this publication do not necessarily reflect the policy position of HMI Probation.**

# 1. Introduction

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The European Probation Rules (EPR) set out basic principles for probation agencies and services, drawing out the implications for organisation, policy and practice. This report argues that the Rules have particular value in requiring an ethical foundation for all probation work.

In the quest to find out 'what works?', it is essential that the moral values at the heart of probation are kept in clear sight and that they are realised in policy and in practice. Probation has never been simply a technical process, to be appraised solely in terms of efficiency or even effectiveness, but is fundamentally concerned with how society is to respond to people who have committed crimes. This includes not only principled attempts to reduce their reoffending and thereby to protect the public, but also recognises the duties of society to encourage and support them in their endeavours to change and to give them fair access to those resources of civil society on which they, like everybody else, depend to live a law-abiding life.

The moral worth of probation is established not only through outcomes (rehabilitation, public safety), but also through its processes and day-to-day practices. One plain example is probation's commitment to opposing unfair discrimination. Measuring outcomes alone cannot demonstrate probation's moral performance on this dimension, especially when statistical aggregates might conceal differential experiences of service. And if anti-discriminatory practice is that which delivers the best to everyone, there is a need for a clearer appreciation of the rights and obligations that are associated with probation's work – to determine what 'the best' is and what is properly due to service users.

This report argues that human rights should be the basis on which these debates are conducted. The EPR highlights the importance of respecting the rights/needs of victims and the human rights of offenders. The concept of 'the rights of offenders' is politically controversial and even provocative. However, rhetorical oppositions such as offenders vs. victims and rights vs. obligations are usually a bad start to considered discussion. The rights of offenders and those of victims are not often in conflict – most aspects of community supervision have no direct bearing on victims – and when they are the matter must be settled by principled consideration.

The obligations of offenders are mostly the same duties that everyone has, with the additional responsibility to comply with the lawfully imposed requirements of their supervision. Some rights may be compromised or even suspended, but most rights – and all the most fundamental ones – are retained by people subject to community supervision. But the rights of people convicted of criminal offences are vulnerable and this is a prominent reason why these matters need detailed attention.

The report argues that the authoritative text of the EPR establishes a platform for ethical practice and represents a secure foundation for probation work. The background to the Rules will be set out briefly and some of their Basic Principles discussed. It will be argued that the Rules deserve to be more widely known in England and Wales and have the potential to guide policy and practice in ways that protect and advance human rights. With all the recent and continuing changes to probation service delivery, the Rules can be seen as more relevant than ever.

## 2. The European Probation Rules

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### 2.1 Background to the EPR

The EPR are grounded in the *European Convention on Human Rights* which unites the member states of the Council of Europe. The Council is quite separate from (and older than) the European Union: while the EU is first and foremost an economic association, the Council is founded on the shared commitment of its members to the set of common basic values set out in the *Convention*.

The Articles and Protocols of the Convention are necessarily framed in a very general way. For example, Article 3 (Prohibition of torture) states 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' While in the abstract this principle would command near unanimous support, its precise implications are less clear. Imprisonment, most obviously, can involve hardships, pains, humiliations and privations, and the point at which these amount to a violation of Article 3 is not self-evident. More detail is needed if rights are to guide policy and the Convention is truly to be a 'living instrument'.

The European Court of Human Rights can develop the precise implications of the Convention by establishing case law, but can only rule on applications received, most commonly associated with violations, infringements, oppressions and loss of liberties. At times, too, the Court has been overwhelmed by the amount of its business, leading to significant delays. Consequently, if the determination of what some rights amount to in practice is restricted to Court rulings, we are going to be waiting for a long time.

It is here that the work of the Council of Europe can be invaluable. The Council for Penological Co-operation (PC-CP), an advisory body to the European Committee on Crime Problems (CDPC) within the Council, deliberates on the implications of Convention rights for penal practice and draws up Rules. This committee is made up of members elected in their individual capacity from the 47 member states, usually people with extensive experience of penal affairs, while experts are usually appointed to bring specialist advice to specific projects. The Committee's experience – for example, of the practical challenges of managing a prison or a probation agency – not only gives authority to their opinions, but also ensures that hard, specific questions are properly addressed. The Rules that emerge from the Committee's deliberations are thus both realistic and principled. After further scrutiny and revision, the Rules are adopted by the Committee of Ministers (the Council's decision-making body).

Probably the best known and most influential text is the European Prison Rules. Yet there is a need too for considered attention to the position of people under community supervision. To reaffirm the standing of community sanctions and measures in general and specifically those administered by probation agencies, the Council accordingly developed the EPR. The process by which the Rules are devised and adopted gives them a weighty authority. While they are not legally binding, the European Prison Rules have been cited by the European Court of Human Rights in support of their rulings. In principle, the Probation Rules could have a similar influence and effect for those subject to community sanctions and measures.

## 2.2 Contents of the EPR

The text of the EPR (Council of Europe, 2010a) is divided into parts:

- Part I: Scope, application, definitions and basic principles
- Part II: Organisation and staff
- Part III: Accountability and relations with other agencies
- Parts IV - VI: Probation work (the several tasks and responsibilities of the probation agency), the processes of supervision, work with victims of crime
- Part VII: Complaint procedures, inspection and monitoring
- Part VIII: Research, evaluation, work with the media and the public

A Glossary is appended to the main text. The Rules are also accompanied by a Commentary or Explanatory Memorandum (Council of Europe, 2010b). This Commentary is not formally adopted and accordingly carries less authority than the Rules themselves, but it attempts to set out the rationale for each rule and how the rule is to be understood (for further detail on the origins and significance of the EPR, see Canton, 2010).

In its work on the EPR, the Committee immediately encountered some terminological difficulties. To refer to 'probation services' already introduces ambiguities. Firstly, it could naturally be taken to refer either to organisations or to the 'services' that these organisations deliver. The Rules therefore use the term *probation agencies* to refer to organisations like the National Probation Service (NPS) in England and Wales and *services* to the activities they and others undertake.

Secondly, the Rules are intended to apply to any organisation that delivers some or all of these services. In some countries, for example, this is not a 'probation service', but a local authority or some other agency. This is especially important when countries (including England Wales) are seeking to involve other organisations, whether the independent or the 'for profit' sector. The Committee was very clear that the Rules must apply to any organisation involved: the state may not abdicate its responsibilities to respect human rights by devolving this work to an organisation that claims independence and tries to argue that its work is not covered. This is clarified in Part I of the Rules.

A central challenge was to construct a set of Rules that can be 'owned' by the member states, with their different traditions and legal and organisational frameworks. The Rules should guide policy and practice, but, unless they are bland or vacuous, they are highly likely to call some national practices into question. This is one manifestation of a wider problem of international regulation: national traditions must be respected, but at the same time some practices may need to change to conform to the ethical standards of the international community. There is always the risk with the Rules that if they require changes that some countries are unwilling to countenance, they could simply be ignored.

## 2.3 Basic principles

Part I includes a set of 'Basic Principles', most of which are then elaborated and specified in later parts and sections, with further discussion and explanation in the Commentary. All have a bearing on probation's work, but some are highlighted here due to their particular contemporary relevance to England and Wales.

Rule 10 states that "Probation agencies shall be accorded an appropriate standing and recognition and shall be adequately resourced." There will always be debates about the

adequacy of resourcing, but the matter is especially salient when changes are being made to current levels of funding for Community Rehabilitation Companies (CRCs) and contracts are to be ended sooner than envisaged. The matter of the standing of probation may also have implications not only for the agencies, but for politicians who, arguably, are challenged by this Rule to be 'champions' of probation and bolder in affirming the value of its work.

Rule 12 requires that "Probation agencies shall work in partnership with other public or private organisations and local communities to promote the social inclusion of offenders." The *Transforming Rehabilitation* agenda expected the active participation of a diverse range of agencies, but this has yet to be fully realised. In some areas, options are few and, even where potential providers can be identified, they may be reluctant to become fully involved. Since the Rule goes on to insist that "Co-ordinated and complementary inter-agency and inter-disciplinary work is necessary to meet the often complex needs of offenders and to enhance community safety", this Rule is a challenge to address any such shortcomings.

Rule 15 ("Probation agencies shall be subject to regular government inspection and/or independent monitoring.") has already had its effect in England and Wales. HMI Probation paid close attention to EPR in developing their new inspection standards – the desire was for these standards to be grounded in evidence, learning and experience, exemplifying what good probation work looks like. The Inspectorate considered the 'Basic Principles' and the rules (and accompanying commentary) in the later sections – those at both the organisational level and individual case level. (See also Memorandum of Understanding for the Arrangements for the Oversight of Probation Services in England and Wales (Ministry of Justice/HMPPS/HMI Probation, 2018))

Rule 16 ("The competent authorities shall enhance the effectiveness of probation work by encouraging research, which shall be used to guide probation policies and practices.") urges countries to promote research into the effects of their work. It is not easy to know the extent to which providers are investing in research themselves. It may also be noted that some may be discouraged from sharing their findings when this may entail a loss of commercial advantage. Nor should research be restricted to measurement of targets: there must also be attention to other effects, including those that were unforeseen, and to 'softer', qualitative approaches. Service user perspectives are plainly an important component of a rounded understanding of probation's work.

Rule 17 ("The competent authorities and the probation agencies shall inform the media and the general public about the work of probation agencies in order to encourage a better understanding of their role and value in society.") sets out a challenge that is familiar to many countries. A common finding in many parts of the world is that the public has limited confidence in probation, even though respondents are willing to admit that they know very little about its work. The earlier remark about the need for political champions bears repeating here. The Ministry of Justice consultation on probation services, initiated in July 2018, declares "we will seek to raise the profile of probation work so that the public recognises the demanding and valuable job that probation staff do day in, day out." (Ministry of Justice, 2018: paragraph 76). But it is fair to say that this is an aspiration with a long history of disappointment, and doing better here calls not only for imagination and political courage, but for a much deeper understanding of the reasons why the public may have its doubts and misgivings.

## 2.4 Application and effect

Countries will be challenged by the Rules in different ways. The involvement of profit-making companies has not (yet?) been experienced by many of the member states. The idea of personal relationships and social inclusion as ways of supporting desistance are unfamiliar and politically controversial in some jurisdictions. To try to gauge the effects of the EPR, an inquiry took place during 2012-2014<sup>1</sup>. Taking care to distinguish between compliance (which may simply reflect the fact that the country was already practising in these ways) and impact (changes in practice due to the EPR), the project found that the Rules were making no discernible difference at all in some countries – mainly those countries with well-established probation systems. But most countries had found one or more of the following positive effects:

- Influence on legislation
- Informing National Standards for practice
- Use for benchmarking
- Criteria for inspection

The EPR were also recognised as 'a significant reference point', a topic for research, a component of professional training, and valuable in support of implementing the Framework Decisions of the European Union<sup>2</sup>. Some countries with newer probation agencies had used the Rules extensively to develop their organisation, policies and practice.

Of particular interest were those countries who had used the Rules to audit their own work. Here there were broadly three outcomes:

1. Practices conformed to the EPR;
2. Practices did not conform in certain respects and needed to be changed accordingly;
3. Practices did not match the EPR and challenged the Rules: current practice was felt to be of a higher standard than the EPR.

This third outcome is of particular interest. The litmus test for Rules is their real-world effect and, for all the wisdom and diligence of the Committee, this can only be discovered in practice. Ideally, the experience of using the Rules will inform a revision in time.

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<sup>1</sup> STREAM: Strategic Targeting of Recidivism through Evaluation And Monitoring (JUST/2011/JPEN/AG/2892). See <http://stream-probation.eu/pricing/>. The project only covered the members of the EU.

<sup>2</sup> See <https://www.coe.int/en/web/prison/eu-framework-decisions>



### 3. Conclusion

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This report argues that the ethics of probation should be at the forefront of its evaluation and its development. It is, to be sure, no easier to decide the right thing to do than to establish 'what works', but the matter is every bit as important. Indeed, it can be argued that an ethical foundation for probation may turn out to be more effective than a direct pursuit of probation's objectives of enforcement, rehabilitation and public protection (Canton, 2013). Yet doing the right thing is its own justification and does not depend upon contingent achievements.

The report has further argued that the discourse of human rights, as represented in the authoritative text of the Convention and then applied by the EPR, is the best way of exploring the ethical parameters and priorities of probation. To speak about rights brings at least three advantages. First, rights are justiciable – they can be decided on in court – so that they can be made real and more than moral aspirations. Second, they are a well-known and familiar way of debating legal and ethical entitlements. Third, they are international. The accountability of states to an international community is an indispensable check on immoderate policy; Coyle and van Zyl Smit observing that "... an international dimension allows one to recognise abuses that might otherwise go unnoticed" (2000: 262). Furthermore, some key human rights concepts are inherently comparative, e.g. how is it to be determined whether a sanction is proportionate without reference to the practices of other countries?

The Rules are not as well-known as they should be in England and Wales. At the time of the STREAM inquiry (2012-2014), respondents were confident that practice in this country conformed well with the requirements of the EPR. However, there have since been considerable changes to probation service delivery through the *Transforming Rehabilitation* agenda, with further changes planned. The Rules can thus be seen as more relevant now than ever. As shown in this report, there are basic principles covering the need for adequate resourcing, partnership working, regular inspection/monitoring, continuing research, and an increased understanding of probation work.

Among the potential uses of the Rules in England and Wales might be an audit of current practice, in NPS and CRCs, to assess conformity. Monitoring processes at local and national level could use the criteria of the EPR as part of an evaluation strategy. Proposed innovations could be checked in the same way, similar to how equality impact assessments are now required. Consideration could also be given to including EPR compliance in the criteria used for commissioning and awarding contracts.

More generally, an influential paper published by the British Academy argued that penal policy "should support and uphold rather than undermine a set of fundamental social and political values – liberty, autonomy, solidarity, dignity, inclusion and security" (Allen *et al.*, 2014: 17). Crucially, as David Garland puts it, "... the pursuit of values such as justice, tolerance, decency, humanity and civility should be part of any penal institution's self-consciousness – an intrinsic and constitutive aspect of its role – rather than a diversion from its "real" goals or an inhibition on its capacity to be "effective"" (Garland, 1990: 292). The EPR aspire to ensuring that human rights become the foundation and inspiration of policy and practice.

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