Effective Criminal Defence in Europe

Executive Summary and Recommendations

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EFFECTIVE CRIMINAL DEFENCE IN EUROPE
EXECUTIVE SUMMARY AND RECOMMENDATIONS

1. Introduction

This executive summary provides an overview of the results of a research project 'Effective defence rights in the EU and access to justice: investigating and promoting best practice', which was conducted over a three year period commencing in September 2007. The project partners are Maastricht University, JUSTICE, the University of the West of England and the Open Society Justice Initiative. The project was funded by the European Community and the Open Society Institute. The complete results of the research project and a full account of the analysis and conclusions are published in a book, E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe*, Antwerpen-Oxford: Intersentia, 2010.

Every year, millions of people across Europe – innocent and guilty – are arrested and detained by the police. For some, their cases go no further than the police station, but many others eventually appear before a court. Many will spend time in custody both before and following trial. Initial attempts by the European Union (EU) to establish minimum procedural rights for suspects and defendants failed in 2007 in the face of opposition by a number of member states who argued that the ECHR rendered EU regulation unnecessary. In this context the aim of the research project was to explore and compare access to effective defence in criminal proceedings across nine European jurisdictions. The project team also set out to contribute to implementation of the right of suspects and defendants to a real and effective defence, especially for those who lack the means to pay for legal assistance themselves. The jurisdictions examined were Belgium, England & Wales, Finland, France, Germany, Hungary, Italy, Poland and Turkey. The reason for choosing these jurisdictions was that they constitute examples of the three major legal traditions in Europe – inquisitorial, adversarial and post-state socialist.

The European Convention on Human Rights (ECHR) protects defence rights principally through article 5 (right to liberty) and article 6 (the right to a fair trial). In addition to the general fair trial rights, such as the presumption of innocence, the right to silence, equality of arms, and the (conditional) right to release pending trial, the rights protected include: the right to information; the right of an arrested person to defend themselves in person or through a lawyer of their choice, to be paid for by the state if they cannot afford to pay for legal assistance where this is in the interests

of justice; and a number of procedural rights such as the right to adequate time and facilities to prepare a defence, participation rights, the right to free interpretation and translation, and the right to reasoned decisions and to appeal. The study includes an analysis of the baseline requirements that, according to European Court of Human Rights (ECtHR) case law, have an impact on the position of the accused and also an analysis of how the rights inter-relate.

The project examines not only how the rights are framed in domestic legislation, and whether standards set by the ECHR are met, but also how these rights are implemented in practice and whether or not structures and systems exist to enable individuals to effectively exercise these rights. For instance, domestic legislation may provide for the right to a lawyer immediately on arrest but if there is no system by which a lawyer can be contacted on a 24 hour basis then the arrested person may not be in position to exercise their right to counsel effectively. In addition, the project explores legal and professional cultures since they also have an impact on effective criminal defence. For instance, the law may provide for a right to cross-examine witnesses or to call evidence, but without lawyers who actively use these rights on behalf of defendants, they will not be available in practice.

In order to conduct the research and to come to meaningful conclusions the project team initially defined the scope of the right to effective defence in order to create a basis for data collection and analysis. A set of monitoring indicators was developed to assess how the rights are implemented in practice. A desk review of available data and research was conducted in each of the nine countries supplemented, for most jurisdictions, by interviews with various criminal justice actors. Country reports were produced for each jurisdiction from this research, complemented by other studies. All of the data and conclusions were reviewed by highly respected experts in each jurisdiction.

The executive summary provides:

- a short guide to the main issues concerning criminal defence rights for each jurisdiction in the study
- in light of these findings, recommendations designed to improve access to effective criminal defence in practice for each jurisdiction
- overall conclusions, and recommendations for EU legislation and other supportive measures.

2. Issues and recommendations concerning individual jurisdictions

2.1. Belgium

Major issues

The Belgian criminal justice system has undergone a number of changes in the last ten years which have helped further defence rights, but there remain significant impediments to effective criminal defence.

One of the major concerns is the rights of suspects before trial. There is currently a distinction between persons officially accused and those who are merely

the target of investigations. The latter do not have to be informed of the nature of the allegations against them until they are formally indicted. There is, in any event, no obligation to inform suspects of their procedural rights in writing, including the right to remain silent. Although lawyers for accused persons have a right of access the file at the end of the investigation, the content of the file has to be copied in writing at the court building.

Anyone involved in criminal proceedings is entitled to legal aid if they cannot afford a lawyer. However, there is no obligation to inform suspects of this right. In addition, it does not include the right to be represented during interrogation by an investigative judge or the police. There is no right of access to a lawyer in the 24 hours between arrest and remand in pre-trial custody by a judge. There are no quality control mechanisms for lawyers providing legally-aided criminal defence and there is no requirement that they be specialised in this field. Remuneration is low for legal aid work, and payment is often delayed by up to a year and a half. Generally, in practice there are different standards of representation for those who can afford to pay private lawyers compared to that for indigent defendants who have to rely on legal aid lawyers.

The right to interpretation and translation is not fully recognised. There are three official languages in Belgium and anyone who understands one of those languages is entitled to a translation of case documents into one of the other official languages. However, anyone whose first language is not one of the three official languages is not entitled to a translation of the documents into one of the three official languages or into his own native language. Legally-aided suspects in pre-trial detention are only entitled to free access to an interpreter for a maximum of three hours. Evidence suggests that the quality of interpreters and translators is often low, there being no selection criteria or quality control mechanisms.

Recommendations

1. Ensure that all people who are made aware by the authorities that their situation may be substantially affected by criminal proceedings (and no later than when they are deprived of their liberty) receive a letter of rights and information about the nature of the allegations against them, whether or not they are formally accused.
2. Give effect to the right to legal assistance by allowing access to a lawyer as soon as a person is deprived of their liberty, including during the first 24 hours of detention, and establish an emergency police station scheme to ensure that anyone who is arrested can effectively exercise that right.
3. Introduce a clear right to interpretation and translation for suspects and accused persons at all stages of the criminal process, accompanied by an appropriate quality assurance mechanism.

2.2. *England and Wales*

Major issues

The legislative framework of England and Wales is comprehensive and guarantees most fair trial rights, apart from translation and interpretation. There are, however, a number of substantive and policy factors that curtail those rights in practice.

Whilst legal regulation of the investigative stage commands widespread respect and the right to legal advice at the investigative stage is well established, suspects' rights are restricted during this stage of the criminal process in a number of ways. Suspects have no right to information about the nature of the allegations against them, beyond the grounds for arrest, before police interviews. This, combined with the fact that 'silence' during a police interview may be taken as indicative of guilt at the trial stage, can lead to violation of the procedural rights of the accused. Suspects have no right to require the police to follow lines of inquiry or interview particular witnesses. Although there is no legal impediment to suspects making their own enquiries, in practice this is limited particularly for those reliant on legal aid.

A number of changes to evidential and procedural rules have eroded the adversarial nature of the criminal justice system and the presumption of innocence. For instance, defendants are effectively required to disclose the nature of their defence both at the investigative stage and before trial. In addition, defendants' previous misconduct, whether or not resulting in a criminal conviction, can be used at trial to show their propensity to commit offences and to undermine their credibility as witnesses.

Although expenditure on legal aid is very high in comparison to other countries, a series of attempts has been made by the government to cap spending and reduce eligibility and remuneration. For instance, fixed fees for police station and court work restrict the amount of work that defence lawyers can do, which has an adverse impact on equality of arms. In addition, appeal rights are limited in practice by legal aid restrictions, and this is particularly important in more serious cases.

Finally, a significant proportion of defendants who are kept in custody pending the outcome of their trial or sentence are eventually acquitted or given non-custodial sentences, raising the question whether defendants are unnecessarily refused bail.

Recommendations

1. Introduce greater participation rights for suspects and defendants, and their lawyers, require fuller disclosure by the police and prosecution at the investigative stage and before plea is taken, and introduce more effective judicial oversight of arrest and bail decisions.
2. Ensure that access to effective defence is not compromised by reductions in legal aid eligibility and remuneration, and increase the availability of legal aid for appeals.

3. Review the disclosure obligations of suspects and defendants to ensure that either adversarial rights are not undermined or, to the extent that they are compromised, are adequately compensated for by appropriate protective mechanisms that ensure equality of arms and respect for the presumption of innocence.

2.3. Finland

Major issues

Finland's current legal framework has many safeguards to guarantee the right to a fair trial, although recent law reforms has clawed back some of these safeguards.

On arrest, there is no obligation to provide suspects with a letter of rights, including information on the right to silence. In recent years, police investigative powers have continued to expand at the expense of rights of suspects. The increased use of covert methods of investigation, such as surveillance, and the use of private informants and undercover police officers, raises serious concerns about the use of illegally obtained evidence at trial, as it is not automatically deemed inadmissible by the court.

Defendants can be tried in absentia, and without a lawyer, if their presence is deemed unnecessary because they have previously confessed to the crime, or because their case is considered routine. Defendants do not need to agree to be tried in their absence, and the court is not required to determine why the defendant did not appear. Defendants tried in their absence may be sentenced to up to three months imprisonment and have no right to a retrial 30 days after conviction. Twenty per cent of all cases are dealt with in this way.

In addition, significant numbers of defendants waive their right to trial without the advice of a lawyer. In 2008, approximately 30 % of defendants pled guilty and agreed to have their case judged through a written procedure, rather than in a full hearing. Although judges are required to obtain the consent of the accused to proceed with a written procedure, it is unclear that defendants' consent is fully informed, given that they are rarely represented by a lawyer.

Lawyers who act for defendants are not required to have any criminal defence experience or undergo any specific training. As a result, the quality of defence work, including in legal aid cases, varies considerably. The position is exacerbated by the fact that lawyers are not required to be members of the Finnish Bar Association, and those who are not members are not subject to the supervision or discipline of the bar association.

Evidence suggests that lawyers are generally reluctant to take an active role during the pre-trial stages of criminal proceedings. Lawyers rarely independently investigate the facts of cases, or interview any witnesses, relying on the police to carry out all the investigation that is necessary. This puts the defence at a severe disadvantage, since they will seldom be in a position to meaningfully challenge evidence at trial.

Recommendations

1. Introduce a letter of rights for suspects detained at police stations.
2. Promote access to lawyers by establishing an emergency legal aid scheme to facilitate the provision of advice and assistance at police stations 24 hours a day.
3. Encourage a more pro-active role for lawyers at the investigative stage, and establish effective quality control mechanisms and monitoring for lawyers providing criminal defence services.

2.4. France

Major issues

In the last twenty years, criminal procedure and defence rights have undergone a number of changes in response to both condemnations by the ECtHR and perceived threats to security. There remain a number of shortcomings which prevent the effective exercise of defence rights.

The *Garde à Vue* procedure (used when someone is arrested and detained by the police) is still not compliant with ECHR standards. Most notably, access to a lawyer is not guaranteed on arrest and is limited to a 30 minute consultation. Lawyers can be excluded from the interrogation and are not given access to the case file. The police at this stage are not required to inform suspects of their right to remain silent.

Investigations are conducted by the police either under the supervision of a prosecutor or of an investigation judge. However, in most cases, the police are not adequately supervised by either, and are free to conduct the investigation as they see fit. Prosecutors and judges often simply check the case file to ensure that 'on paper' the police have complied with all their duties. Since defence lawyers are often not involved at this stage, this is likely to have a negative impact on the outcome of the case for suspects because prosecutors and judges rely heavily on the police file at court. If suspects have not been able to put their case forward, or to request that information favourable to them be obtained, this information will not form part of the file. As expedited trial procedures are increasingly routinely used, there is often no time for the defence to put forward alternative evidence, and no judicial evaluation of the facts.

French legal culture creates a professional divide between prosecutors and judges, who are members of the *Magistrature*, and defence lawyers. Prosecutors and judges share a common training and view their role as dominant and necessary to protect the public interest. Defence lawyers are viewed with suspicion. The legal tradition does not recognise a role for strong, pro-active, defence lawyers. Instead, the defence lawyer's role is premised on dialogue and compromise, which discourages lawyers from engaging in active and zealous defence. Furthermore, most legally-aided criminal defence work is carried out by young lawyers as part of their training, who are unlikely to have the confidence or skills to stand up to a corps of more experienced judges and prosecutors, raising concerns about equality of arms.

Recommendations

1. Review Garde à Vue procedures to ensure that suspects are provided with a letter of rights on detention, and with prompt access to lawyers prior to and during any interrogation, irrespective of the offence under investigation.
2. Ensure that prosecutors and judges adequately supervise investigative acts conducted by police officers.
3. Introduce measures designed to improve the status and quality of criminal defence lawyers, and to ensure adequate time, resources and facilities for preparation of the defence in all cases.

2.5. *Germany*

Major issues

Although Germany's existing legal framework guarantees, to a large extent, the right to a fair trial a number of problems remain.

During the investigative phase, the investigation authority has the power to classify persons as either 'suspects' or 'accused'. Suspects do not have the same rights as accused persons, such as the right to legal assistance or the right to information. Although accused persons have the right to legal advice prior to interrogation, there is no systematic mechanism to enable accused persons to consult with a lawyer, and police officers sometimes try to persuade accused persons that it is not necessary for them to do so. As a result, accused persons are routinely interrogated and held in custody for long periods without receiving the assistance of a lawyer. Lawyers are often denied access to an accused person's case file during the pre-trial investigation and unrepresented accused are only given excerpts from the case file and only then if, in the view of the investigating authority, the interests of the investigation or of witnesses are not jeopardised.

Legal aid is available in limited circumstances, based on the seriousness of the offence and the vulnerability of the accused, and not on financial need. The defendant's indigence is only relevant in determining whether or not they must reimburse the costs of their representation. The process by which indigence is determined is complicated and places undue burden on the accused. Funding for legal aid is inadequate, especially during the pre-trial phase. Many services, such as the costs of investigation by the defence, are not covered, discouraging lawyers from engaging in these activities. Further, payments to lawyers are not promptly made. Appointed counsel are not required to have any criminal defence experience; there are few specific practice standards, and lawyers often disregard continuing professional training requirements. As a result, the quality of defence work in legal aid cases varies considerably.

An active defence culture is not encouraged by the various criminal justice actors. Defence lawyers are sometimes not seen as independent as some rely on the courts for regular appointments. Judges and prosecutors tend to be critical, sceptical, and distrustful of the results of defence investigations, assuming witnesses were unduly influenced by the defence. As a result, defence lawyers

rarely engage in independent investigations of their clients' cases. Evidence suggests that judges, moved by considerations of efficiency, often deny defence motions to gather, produce, and introduce evidence, regarding them as uncooperative acts intended to delay proceedings. It appears that this perception has influenced the behaviour of defence lawyers, who hesitate to stand up to the court and file such motions.

Recommendations

1. Ensure that all people who are made aware by the authorities that their situation may be substantially affected by criminal proceedings (and no later than when they are deprived of their liberty), whether or not they are formally designated as a 'suspect' or 'accused', are afforded the same rights, are clearly informed of those rights, and that those rights may be exercised in a practical and effective way.
2. Introduce a simple means and merits test for legal aid to facilitate access to legal aid for all indigent defendants at all stages of the criminal process.
3. In order to raise the standards of criminal defence lawyers, develop effective training requirements and quality assurance mechanisms for them, and ensure adequate remuneration for legal aid work, particularly at the pre-trial stage, which is paid in a timely manner.

2.6. Hungary

Major issues

The legal framework which guarantees defence rights is well-established, but implementation poses a number of problems in practice.

Evidence suggests that the police routinely circumvent the right to silence during the investigation, informally hearing prospective suspects as witnesses, or questioning them during administrative short-term arrest without informing them of their procedural rights, including the right to remain silent. Whilst statements made in such circumstances cannot be introduced as direct evidence at trial, they may remain part of the case file and may be referred to in court. In addition, official suspects have very limited access to the case file during pre-trial investigations.

Although access to legal assistance at the investigative stage is guaranteed by law, for a variety of reasons suspects rarely, in practice, have access to a lawyer. There is no duty lawyer scheme, and even if the police notify defence lawyers, they do not have to wait for the lawyer to arrive before interrogating suspects. Even in mandatory defence cases, lawyers do not normally attend police interrogations. Where lawyers do attend the police station they are unlikely to be allowed more than 30 minutes for consultation with their clients before the interrogation. Furthermore, the state is not bound to provide, or fund, an interpreter for lawyer-client consultations, putting indigent suspects who do not speak Hungarian at a particular disadvantage.

In principle, legal aid is available for all indigent defendants at all stages of the criminal process, and in certain mandatory defence cases. There is, however, no

institution with responsibility for managing legal aid services or monitoring quality. Responsibility for appointing legal aid lawyers and paying them rests with the relevant investigating authority. This raises obvious concerns about the independence of lawyers providing these services. Evidence suggests that the quality of work done by such lawyers is often inadequate, that they are often absent from hearings, and are passive when they do attend. Appointed counsel are not required to have experience or training in criminal defence. Legal aid remuneration is considered to be inadequate.

The overuse of pre-trial detention is widespread, and can last for up to three years. From 2003 to 2007 alternatives to pre-trial detention were only used in two per cent of cases. Defendants are not given access to the material that forms the basis for detention, thereby breaching the equality of arms principle and preventing them from meaningfully contesting their detention. In light of the potential length of pre-trial detention, research has shown that the threat of pre-trial detention is often used to induce confessions.

Recommendations

1. Ensure that all people who are made aware by the authorities that their situation may be substantially affected by criminal proceedings (and no later than when they are deprived of their liberty), are provided with adequate time and facilities to meet with their lawyers, and with interpreters, funded by the state where necessary.
2. Give practical effect to the right to legal assistance by establishing a national authority to administer legal aid and monitor the quality of services provided by legal aid lawyers, including the creation of a scheme to ensure prompt appointment of lawyers that does not rely on the investigating authority, and by introducing adequate remuneration for legal aid work.
3. Introduce measures to encourage the use of alternatives to pre-trial detention, and allow defendants access to the material that forms the basis for their detention prior to trial.

2.7. Italy

Major issues

Whilst Italian law generally guarantees those rights essential to a fair trial, there remain obstacles that prevent defendants and suspects from exercising their right to an effective defence.

There are insufficient procedural safeguards in place to ensure that the accused can exercise their defence rights. Although suspects are given a letter of rights that includes the legal definition of the crime alleged, there is no requirement that suspects be informed of any modification to the crime charged in the indictment. The right to counsel following arrest can be delayed for up to 48 hours on the authority of a prosecutor and five days on the authority of a judge. This denies suspects the opportunity to consult with counsel prior to their interrogation.

Additionally, prosecutors can deny suspects access to the case file during the investigative stage. Suspects and defendants who do not understand Italian face additional challenges, since those who have even limited knowledge of Italian are often denied an interpreter, or are provided with an interpreter who do not speak their native language.

Systemic deficiencies in Italy's legal aid system result in a high proportion of poor defendants being denied competent legal services. Whilst all accused persons must be represented by counsel, the low threshold for legal aid eligibility requires many poor defendants to go into debt to pay for their lawyer. Those who do qualify for legal aid are often unaware that they can apply. In 2006, only just over six per cent of defendants – not including juveniles – received legal aid. The lack of adequate funding for legal aid services results in remuneration that is so low that many lawyers refuse appointment. Often, those who do accept appointment provide the accused with inadequate representation as they lack the funds to conduct even the most basic investigation of the case.

Finally, the overuse of pre-trial detention, and the unreasonable length of proceedings, limit the accused's access to a fair trial. Whilst the law provides that pre-trial detention should be a measure of last resort, more than half of Italy's prison population is in pre-trial detention or awaiting final sentence. The average length of a criminal case is over four years.

Recommendations

1. To promote access to legal assistance, raise the eligibility threshold to allow more suspects and defendants access to legal aid, and ensure that remuneration is sufficient to encourage and facilitate competent legal assistance.
2. Ensure that pre-trial detention is, in practice, used as a measure of last resort by establishing practical alternatives to pre-trial detention, and introduce measures to speed up the criminal process.
3. Introduce measures to ensure that all suspects and defendants who do not have a sufficient understanding of the Italian language have access to competent interpretation and translation.

2.8. Poland

Major issues

Although the Polish criminal justice system has undergone a positive transformation since the end of communism, a number of problems remain that inhibit access by defendants and suspects to effective criminal defence.

At the investigative stage, a distinction is made between 'suspected persons', who have not yet been officially charged, and 'suspects', who have been officially charged. Suspected persons are not entitled to the same protections as suspects and yet can be detained for up to 48 hours. Suspected persons do not have to be given a letter of rights or be informed of their right to remain silent. Although suspected persons may not be interrogated until they are formally charged, in practice the

police inform them that they have the right to make a statement. Such a statement forms part of the arrest record and whilst not formally amounting to evidence, in practice police officers may give evidence of its contents to the court.

The rights of those who are formally treated as suspects are frequently not effective in practice. For instance, the rights specified in the letter of rights are often not understood by suspects, and the letter of rights does not explain how the rights, such as the right to consult a lawyer, are to be exercised. The right to information is also not absolute and prosecutors can deny access to the file during the investigative stage. Furthermore, in certain cases prosecutors can supervise the consultation between a lawyer and a suspect during the first 14 days of detention. There is no judicial review of a prosecutor's decision either to deny access to the file or to supervise lawyer-client consultations. The lack of procedural rights, combined with a culture which does not encourage an active defence during the pre-trial stage, means that defence rights at this stage are largely theoretical.

Despite the fact that accused persons are entitled to a lawyer at all stages of criminal proceedings, in practice legal aid is generally not available at the investigative stage or at early hearings such as those at which a decision is made regarding pre-trial detention. The decision to grant legal aid is made by judges, who must pay for it out of their individual court budget. In addition, there is no clear means or merits test and judges, therefore, have a wide discretion to deny legal aid except in certain mandatory cases. Legal aid remuneration rates are relatively low and there is evidence that the quality of representation is often poor.

Recommendations

1. Ensure that all people who are made aware by the authorities that their situation may be substantially affected by criminal proceedings (and no later than when they are deprived of their liberty) are afforded the same rights, whether or not they are formally designated as a 'suspect' or a 'suspected person', are clearly informed of those rights, and ensure that those rights may be exercised in a practical and effective way.
2. Ensure the effective implementation of the right to legal assistance by creating an independent agency to administer the criminal legal aid system, with responsibility for ensuring the provision of advice and representation at all stages of the criminal process without regard to local court budgets, and subject to clear criteria regarding means and merits.
3. Introduce measures designed to improve the status and quality of criminal defence lawyers, in particular, to ensure that they act in a more pro-active manner including by being present to advise and assist at the early stages of the criminal process.

2.9. Turkey

Major issues

The legal framework for the protection of suspects' and defendants' rights in Turkey is extensive. However, in practice, these legal safeguards are often not applied, leading to violations of defence rights.

Substantive rights at the police station and during the investigative phase are often not respected. Although the right to information is recognised, in practice people are often apprehended or summonsed by the police without being given reasons. Similarly, there is a requirement that a letter of rights be provided to suspects before the first interrogation, but this is more of a formality than an opportunity for suspects to effectively exercise their rights. Suspects have the right to request that certain evidence be gathered at the investigative stage. However, prosecutors can issue secrecy decisions on very broad grounds which prevent suspects or their lawyers from accessing any information about the investigation. This in turn prevents suspects from knowing the grounds on which they are held and from being able to meaningfully challenge their status as suspects. The number of people in custody has increased since the introduction of the new criminal code. Pre-trial release is not commonly used, but a majority of defendants detained pending trial are either acquitted or given a non-custodial sentence.

In theory, anyone may be represented free of charge under the criminal legal aid system, both at the police station and during any phase of the trial. However, the police and other justice system actors often fail to inform suspects of this right in a manner understandable to them or discourage them from requesting a lawyer. Overall, the number of people who are able to exercise their right to free legal assistance is strikingly low. There is no central independent agency responsible for assessing the need for legal aid or for managing and monitoring the delivery of legal aid. These functions have been delegated to local bar associations. There are no quality control mechanisms for the provision of legal assistance in criminal cases.

Legal and professional cultures have an adverse impact on equality of arms and the right to an adversarial trial process. Defence lawyers are often passive both during the investigative phase and at trial. This is partly due to inadequate remuneration for defence work, and to the lack of quality assurance mechanisms concerning the work of defence lawyers. In addition, prosecutors and judges often share a common training, making judges more receptive to prosecution arguments. Judges are also resistant to pro-active defence lawyers, often preventing them from speaking in court or from cross-examining witnesses, or denying their requests for the production of evidence.

Recommendations

1. Ensure that the legal rights of pre-trial detainees are respected, including an effective right to challenge the grounds of detention, and by giving them access to information concerning the allegations against them. Introduce a letter of rights that enables suspects and accused persons to understand their defence rights.

2. Improve the current legal aid system to ensure that the right to legal assistance is available in practice by creating an independent agency to administer criminal legal aid, with responsibility for ensuring the provision of advice and representation at all stages of the criminal process, and for assuring the quality of defence lawyers.
3. Foster mutual respect between all criminal justice actors to ensure mutual understanding of roles, and in order to facilitate a pro-active role for criminal defence lawyers.

3. Overall conclusions and recommendations

Effective criminal defence is an essential component of the right to fair trial. Whether, in any particular jurisdiction, a person who is suspected or accused of having committed a crime has access to effective criminal defence does not simply depend upon whether they have access to the assistance of a lawyer. Competent legal assistance, whilst necessary, is not sufficient. For criminal defence to be effective there must exist a constitutional and legislative structure that provides for the rights set out in the ECHR, institutions and processes that enable them to be practical and effective, and legal and professional cultures that facilitate them.

The ECHR, and the case law of the ECtHR, play a critical role in establishing standards in respect of effective criminal defence. However, there are both practical and systemic limitations on their ability to provide detailed standards for, and to ensure full compliance with, all of the essential components of effective criminal defence. Our research demonstrates that whilst, of course, there is significant variation across the nine jurisdictions in the study, there are important limitations on access to effective criminal defence in all countries that we have examined. In addition to the consequences for the individuals caught up in criminal justice processes, this has significant implications for the European Union (EU) policy of mutual trust and recognition.

Responsibility for compliance with ECHR standards principally rests on the governments of member states. We have made specific recommendations concerning each jurisdiction that in our view, if followed, would significantly improve compliance and the prospects of citizens having access to effective criminal defence. The EU also has responsibility, particularly because it has set itself the objective of maintaining and developing an area of freedom, security and justice and, since ratification of the Lisbon Treaty, the ECHR has become an integral part of EU law. Furthermore, article 82 § 2 of the Treaty of the European Union provides for the establishment of minimum rules in respect of, *inter alia*, the rights of individuals in criminal matters. The EU has commenced this process with the adoption of the Stockholm Programme and the accompanying Roadmap for fostering protection of suspected and accused persons in criminal proceedings. However, responsibility does not end there. Our research and analysis shows that criminal justice professionals, including lawyers who advise and assist suspects and defendants, do not always respect the rights of those suspected or accused of crime, and there is much to be done, beyond the reach of legislation and procedural rules, to realise a real commitment to effective criminal defence rights as an essential element of the right to fair trial.

The EU programme of action in respect of the rights of individuals in criminal proceedings has already begun with the publication of a draft Directive on translation and interpretation. This is to be followed by legislative proposals on: information on rights and on charges; legal advice and legal aid; communication with relatives, employers and consular authorities; and special safeguards for vulnerable suspects and accused persons. The programme also includes plans for a Green Paper on whether other minimum procedural rights need to be addressed. We hope that our findings, analysis and conclusions will contribute to the effective realisation of this programme of action, and we make recommendations for consideration in this process below.

3.1. General recommendations

We make the following general recommendations for action by the EU, national governments, and criminal justice professionals.

- The EU should include in its legislative programme all of the specific areas for action that we identify below in order to establish minimum requirements that would contribute to, and enhance access to, effective criminal defence in all member states. Such legislation should include mechanisms for monitoring implementation to ensure that, over time, member states meet those minimum requirements.

- Working with member states and professional organisations, the EU should establish mechanisms for identifying and disseminating good practices which contribute to enhancing access to effective criminal defence including, specifically, a 'whole cost' approach to criminal justice policies.

- Working with member states, the EU should encourage and support the routine collection and publication of statistical evidence, and relevant research, in order to render criminal procedures and practices transparent, and to enhance accountability.

- Working with relevant professional organisations, the EU and member states should encourage and support suitable training for criminal justice professionals (the judiciary, prosecutors, police, lawyers, and interpreters and translators) to assist in entrenching practices and attitudes directed to facilitating effective criminal defence.

- The EU should encourage and support bar associations to articulate standards of good practice, and to take responsibility for disseminating and enforcing such standards, in order to improve both the status and professional standards of criminal defence lawyers, including those who are funded by the state.

- The EU should encourage member states to develop organised, systematic and purposeful responses to the need to provide free and effective legal

assistance to all indigent criminal defendants, including by the establishment of independent executive agencies to administer legal aid. Such agencies would be responsible for formulating and implementing the government's legal aid policy and budget, monitoring its performance, determining legal aid needs and finding cost-effective solutions for legal aid delivery

3.2. Specific proposals

We make the following specific recommendations for legislation by the EU, although we recommend that the governments of member states take appropriate action as soon as is practicable.

3.2.1. Information on rights and charges

A Directive should include –

With regard to information rights –

- A requirement that a Letter of Rights be given to a person when they are made aware by the authorities that their situation may be substantially affected by criminal proceedings (and in any event no later than the when they are factually deprived of their liberty).

- An obligation to takes steps to ensure that a person served with a Letter of Rights understands it, including the provision of a translation of the Letter of Rights where the recipient does not understand the relevant language or is unable to read or comprehend it.

- Minimum requirements as to the rights to be referred to in the Letter of Rights, including legal assistance, legal aid, the right to silence, the right to information as to the grounds for arrest or detention, and additional rights for vulnerable suspects and defendants.

- An obligation to establish effective enforcement mechanisms designed to ensure that the Letter of Rights requirements are complied with, including an obligation to obtain written confirmation of receipt from the suspect or accused, and appropriate evidential mechanisms.

With regard to information as to detention and the suspected offence –

- An obligation to inform the person concerned of their status in a criminal investigation and, in particular, whether they are a suspect or a witness.

- An obligation to inform a person who has been arrested or detained of the grounds for their arrest or detention.

- An obligation to provide, before the first interrogation by police or a prosecutor, information as to the material on which the suspicion or accusation is based or, if such information is not provided, a prohibition on any adverse consequences resulting from failure or refusal to answer questions, or failure or refusal to provide information that may subsequently be relied upon in the person's defence.

3.2.2. Legal assistance and legal aid

A Directive should include –

- A requirement that a right to legal assistance arises no later than the point when a person is made aware by the authorities that their situation may be substantially affected by criminal proceedings (and in any event no later than the when they are deprived of their liberty), and which applies throughout the criminal proceedings.

- An obligation on the investigative or prosecution authorities to bring the right to legal assistance, and to legal aid, to the attention of the person concerned in a form that they can understand, both in writing by means of a letter of rights, and orally, and an obligation on the judiciary at the first available opportunity to verify that the accused understands the implications of not being legally represented.

- An obligation to establish mechanisms that ensure that legal assistance is available without delay at all stages of the criminal process, including for those who cannot afford to pay for legal assistance themselves.

- An obligation to establish effective enforcement mechanisms that apply where access to legal assistance is delayed or denied, which may include prohibition on conducting procedural actions, the exclusion of evidence, and/or judicial review.

- Minimum requirements regarding eligibility for legal aid, including a merits test that ensures that vulnerable suspects and defendants and those who are at risk of a custodial sentence are eligible, and a means test that ensures that those who cannot afford to pay for legal assistance are eligible. Further, there should be a requirement that procedures for determining eligibility do not interfere with access to legal assistance at the time that it is required.

- Requiring that member states, in cooperation with the respective bar associations, develop and implement minimum quality criteria for criminal legal aid and quality assurance mechanisms, and establish minimum requirements regarding remuneration for lawyers providing legal assistance paid for by the state that ensure that sufficient competent lawyers are willing and able to provide legal assistance when it is required.

3.2.3. Interpretation and translation

- A draft directive has been published by the EU (*Proposal for a Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings*, Brussels, 9.3.2010 COM (2010) 83 final). The need for such a directive has been established by this research.

- The draft directive does not prescribe a procedure by which the need for interpretation or translation is required, but we note that it does require that an accused person be given the right to challenge a decision that there is no need for interpretation or translation. Our research supports the need for such a requirement.

- The draft directive prescribes in wide terms the circumstances in which interpretation is to be provided. Our research supports the need for such prescription. We recommend that consideration be given to requiring either that interpretation of lawyer-client consultations be provided by a different interpreter than an interpreter appointed for conversations where the police or prosecutor are present, or that interpretation of lawyer-client consultations be covered by the equivalent of legal professional privilege.

- The draft directive provides for translation of 'all essential documents', which falls short of a requirement that all prosecution material be translated. We note, however, that a suspect or accused must be permitted to make a reasoned request for translation of further documents, and that they be given the right to challenge a decision that translation is not necessary. We recommend that authorities be required to consider such requests, or such challenges, by reference to the right to fair trial and not by reference to the potential cost.

- The draft directive requires that interpretation and translation be of 'a sufficient quality to safeguard the fairness of the criminal proceedings'. We recommend that this be extended to include an obligation that it be provided in such a way that is sufficiently independent of the appointing authority and that, where possible, it be provided by an interpreter or translator who is a member of a professional body that has responsibilities for quality and professional discipline.

3.2.4. Access to the case-file, and time and facilities to prepare the defence

We recommend that there should be a Directive concerning access to the case file, and time and facilities for preparation of the defence that includes, or that one of the other proposed directives should include –

- An obligation to provide the accused with access to the case file, or prosecution material, in such a form and at such a time that is sufficient to

enable a suspect or accused person to effectively prepare their defence, and to enable them to prepare for any particular hearing.

- A requirement that the obligation normally be satisfied by making available copies of original documents (or electronic versions thereof) unless this is contrary to the interests of justice, the safety of witnesses, or security.

- An obligation to provide for a procedure during the pre-trial phase that enables an accused person be given the right to challenge a decision not to provide access to the (complete) case file.

- An obligation to provide such information free of charge to the accused.

- An obligation to establish mechanisms enabling suspects or accused persons to make application for witnesses to be interviewed or material to be gathered, with the possibility of judicial review where an application is refused by the investigative or prosecution authorities.

3.2.5. Pre-trial detention

The green paper should include consideration of –

- A requirement that an accused person has a prima facie right to pre-trial release, which may only be displaced where there are substantial grounds for believing that the accused will abscond, commit further imprisonable offences, or interfere with the course of the investigation or justice, or where it is in the accused's own interests to be kept in pre-trial detention.

- A requirement that if unconditional pre-trial release is not appropriate for the reasons listed above, then the suitability of conditional release must be considered, and that conditions may only be imposed for the purposes of ensuring that the accused will attend court, will not re-offend, or will not interfere with the course of justice, or for their own protection. Also, a requirement that any money bail condition be set at a level that takes into account the financial circumstances of the accused and is proportionate to the specified risk.

- A requirement that member states ensure that alternatives to pre-trial detention are available together with practical mechanisms facilitating their use, and that suitable facilities are available for accused persons in particular circumstances, for example, bail hostels, drug units, etc.

- A requirement that pre-trial detention hearings observe, as far as possible, the same adversarial principles as apply to trials, and that accused persons are given access to material on which an application for pre-trial detention

is based in sufficient time to enable them to make an effective application for pre-trial release.

- A requirement that pre-trial detention may only be ordered by a judicial authority, that the determining authority should be required to give written reasons for their decision, that detention be reviewed at established regular intervals in order to determine whether it continues to be necessary, that decisions be subject to review by a higher court.

Maastricht, May 2010

BIOGRAPHIES

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Ed Cape is Professor Criminal Law and Practice at the University of the West of England, Bristol, UK, where he is Director of the Centre for Legal Research. A former criminal defence lawyer, he has a special interest in criminal justice, criminal procedure, police powers, defence lawyers and access to justice. He is the author of a leading practitioner text, *Defending Suspects at Police Stations* (5th edition, 2006), and is a contributing author of the standard practitioner text, *Blackstone's Criminal Practice* (2010, published annually). He has conducted research both in the UK and elsewhere, and his research publications include *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (2005), *Evaluation of the Public Defender Service in England and Wales* (2007), and *Suspects in Europe: Procedural rights at the Investigative Stage of the Criminal Process in the European Union* (2007). He is also the co-editor of *Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future* (2008).

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He has published extensively on various aspects of International Law and has been invited to present conference papers and keynote speeches in Australia, Austria, Belgium, Bulgaria, Canada, China, Denmark, France, Germany, India, Italy, Japan, The Netherlands, New Zealand, Singapore, Spain, Sweden, Turkey, United Kingdom and United States.

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