



**Proposal for a Directive  
on the right of access to a lawyer in criminal  
proceedings and the right to communicate upon arrest**

**Briefing on the Commission proposal  
for the purposes of the UK opt in decision**

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## Introduction

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.
2. The European Commission has presented a proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest<sup>1</sup> (the Proposal). The proposal forms Measure C on the Roadmap on procedural safeguards in criminal proceedings adopted in 2009 (the Roadmap).<sup>2</sup> JUSTICE and a number of other prominent NGOs issued a '*Joint Position on procedural safeguards*' in July 2009 in support of the Roadmap as a step towards ensuring that procedural rights for suspects in criminal cases are recognised and protected uniformly across all member states of the EU.<sup>3</sup> The EU has finally begun to agree that not only do the member states not give full effect to articles 5 and 6 European Convention on Human Rights (ECHR) and interpretative jurisprudence of the European Court of Human Rights (ECtHR) in all circumstances, but that the ECHR only provides minimum protection.
3. Measure A on the right to interpretation and translation was adopted in October 2010.<sup>4</sup> Measure B on the right to information in criminal proceedings<sup>5</sup> is being debated in the European Parliament.
4. The ECHR was not designed to provide the necessary mechanism to ensure equality of arms in mutual recognition instruments, nor in a Union which has now grounded its existence on respect for human dignity, freedom, democracy, equality, the rule of law and human rights<sup>6</sup> with an aim of promoting its values and the well-being of its

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<sup>1</sup> COM(2011) 326/3 (Brussels)

<sup>2</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 4.12.2009, p. 1

<sup>3</sup> <http://www.justice.org.uk/images/pdfs/Joint%20position%20on%20procedural%20safeguards.pdf>

<sup>4</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings OJ (2010) L 280, p. 1

<sup>5</sup> COM(2010) 392 final (Brussels, 20 July 2010)

<sup>6</sup> Article 2 Treaty on the European Union (TEU)

peoples.<sup>7</sup> The Charter of Fundamental Rights (CFR) was given binding force in the domestic courts and Court of Justice of the European Union when the Lisbon Treaty was ratified. It is incumbent upon the member states to ensure that the EU provides meaningful protection of the rights enshrined in articles 47 and 48 CFR which provide:

*47. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*

*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. **Everyone shall have the possibility of being advised, defended and represented.***

*Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.*

*48. (1) Everyone who has been charged shall be presumed innocent until proved guilty according to law.*

*(2) **Respect for the rights of the defence of anyone who has been charged shall be guaranteed.***

(emphasis added)

5. We welcome the Commission's Proposal which recognises the importance of ensuring an effective defence throughout criminal proceedings. We are encouraged by the attention to the practical consequences for a fair trial that the Commission has included, as explained in the recitals and in the explanatory memorandum to the Proposal with reference to ECtHR case law and other international obligations. We particularly welcome the inclusion of the European arrest warrant as an area in need of dual representation in order to further the aims of mutual recognition. Ensuring that there are consequences for breach of these procedural guarantees is essential and we agree that evidence obtained in breach should be excluded from proceedings. We encourage the Commission in its efforts to enhance legal representation across the EU and we will provide every support to ensure that this measure is adopted.

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<sup>7</sup> Article 3 TEU

6. The UK already affords the majority of the protections offered in the Proposal as a result of existing domestic law or recent amendment to give effect to case law of the ECtHR.<sup>8</sup> As such we consider that the UK should have no difficulty opting in to this measure, to ensure that people in the UK are protected when they travel abroad and are in need of legal advice and representation and where necessary to make improvements in procedure within the UK.
7. We do however consider that in some areas of the Proposal more could be done to ensure rights are practical and effective for all persons who are treated as suspects or accused:
- **Scope should be extended to administrative acts leading to sanctions;**
  - **The right of access to a lawyer should specify *in person*;**
  - **The right should explicitly state representation at any hearing;**
  - **Reference should be given to the directive on the right to information to ensure that the right of access is notified correctly;**
  - **Assistance from an appropriate adult for children should be in person at the police station to facilitate communication about obtaining legal assistance and with the lawyer;**
  - **Vulnerable adults must be afforded the same assistance to facilitate communication;**
  - **The right to consular assistance should include visitation;**
  - **The mechanism by which to check waiver is fully informed needs further clarification;**
  - **Children and vulnerable suspects must be afforded additional assistance to ensure any waiver is intended;**
  - **The right of access to a lawyer must be granted immediately upon a witness status changing to suspect;**
  - **The right to a lawyer in the executing and in the issuing state should apply to all mutual recognition instruments where legal assistance is necessary;**

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<sup>8</sup> Following the case of *Salduz v Turkey* (2008) 49 EHRR 421, the UK Supreme Court accepted in the case of *Cadder v HMA* [2010] UKSC 43 that there should be access to a lawyer in the police station in Scotland as from the first interrogation, otherwise the rights of the defendant will be irretrievably prejudiced where the interview is relied on in evidence by the prosecution at trial. The decision was given effect by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

- **An additional article is necessary to require standards of quality and accreditation in legal professionals**

## **Article 2 Scope**

8. Whilst the Proposal suggests that it applies from the point where a person is suspected or accused of having committed a criminal offence, recital 6 specifically excludes administrative proceedings leading to sanctions. This is a more limited scope than is proposed in the instrument for the European investigation order (EIO).<sup>9</sup> The right to legal advice and assistance must apply in all circumstances where there is a criminal consequence, including investigations as a result of the EIO, and in our view a sanction is encompassed within this framework. In the UK there is increasing resort to out of court disposals prior to the opportunity for a person to seek legal advice. We do not consider that such disposals should take effect unless the option of seeking legal advice is first afforded, except in the most minor of offences. This is particularly so with young and vulnerable suspects who may not fully understand the implications of accepting a caution without independent legal advice. It is not clear whether these types of disposal are considered to be administrative acts or do in fact fall within the scope. Either way, the Proposal should follow the EIO and include administrative acts where there is a sanction.

## **Article 3 Right of access to a lawyer**

9. This article guarantees that questioning of suspects should not take place until suspects are granted access to a lawyer. Nor should any evidence gathering measure where the suspect is required to assist, such as identification parades or sample taking. The provision also identifies distinctly the outset of deprivation of liberty. We agree entirely with the focus of the article. Questioning may take place outside of a detention setting and as such, access to a lawyer must be guaranteed distinctly in this setting. In practical terms it may not be possible to ensure legal representation at any other place where the police seek to ask questions, such as at

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<sup>9</sup> The member state initiative for a directive regarding the European investigation order in criminal matters, 9145/10 (Brussels, 29 April 2010), article 4(b). Directive at note 4 above, article 1(3) states that where following an administrative act it is possible to apply to a court on appeal, the right must be given effect to at that stage,

the roadside. The article should still be honoured through the delay of questioning until an appropriate place for legal representation can be afforded.<sup>10</sup>

10. The distinct requirement of access to a lawyer from the outset of deprivation recognises the recommendation of the European Committee for the Prevention of Torture (CPT) that access to a lawyer is an important safeguard to ensure a suspect's welfare as well as legal advice. The CPT attaches particular importance to three rights for persons detained by the police: the right of the person concerned to have the fact of his detention notified to a third party of his choice (family member, friend, consulate), the right of access to a lawyer, and the right to request a medical examination by a doctor of his choice (in addition to any medical examination carried out by a doctor called by the police authorities).<sup>11</sup>
11. The CPT has repeatedly stressed that, in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs.<sup>12</sup> The ill-treatment referred to does not have to be actual abuse of detained persons; It could be neglect, or failure to observe injury or illness as a result of drink or drugs intake; It could be unnecessary length of detention or failure to appoint an appropriate adult where necessary; It could be an improper use of the power to delay access to a lawyer.
12. The measure could be stronger by specifying that *'member states shall ensure that suspects and accused persons are granted access to a lawyer in person as soon as possible and in any event...'* Many cost savings measures are being presented in the UK to limit the impact of legal aid. In Scotland telephone advice is increasingly being used. The interim Police Station Duty Scheme presented by the Scottish Legal Aid Board envisages telephone advice in every case to then be followed where

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<sup>10</sup> This was the case in *Zaichenko v Russia* [2010] ECHR 39660/02 (18 February 2010) where the ECtHR held that the right to a lawyer had not been breached by asking questions at the roadside because it was a preliminary stage of investigation, but by eliciting answers that supported the prosecution, the police had breached the right against self incrimination and the evidence should have been excluded at trial.

<sup>11</sup> See CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2010, para 36 and Chapter 1 for details of these rights, available here: <http://www.cpt.coe.int/en/documents/eng-standards.pdf>

<sup>12</sup> CPT Standards, para 41.

necessary by advice in person.<sup>13</sup> The Legal Aid, Sentencing and Punishment of Offenders Bill suggests at clause 26 that the duty to provide legal aid may be discharged by telephone or other electronic means. CDS Direct already operates a telephone advice line for certain summary offences such as non-imprisonable offences, minor driving matters and bail breaches. In these cases legal aid is not available for attendance at the police station.<sup>14</sup> In Jersey telephone advice only is routinely given, other than for serious offences such as murder, manslaughter, rape or sexual offences against children where advocates do attend.<sup>15</sup> This would appear to be in breach of *Salduz* unless lawyers do attend for interview. We do not accept that effective legal representation can be offered over the telephone. As we set out above, lawyers provide an important safeguard on welfare, but equally it is very difficult for a lawyer to offer advice in anything but the most minor cases without receiving information about the case, and seeing their client face to face to ensure they fully comprehend their circumstances.

13. The article does not include the right of representation by a lawyer at any hearing before a judicial authority. The Proposal aims to cover all stages of criminal proceedings and must therefore expressly include court hearings as well as pre-trial investigation.
14. It is also important that reference is made to the Directive on the Right to Information in this article for the obligation for member states to notify suspects and accused persons that they have a right of access to a lawyer. The member states must ensure that this right is communicated in a way that can be understood by all persons, including the young and vulnerable.

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<sup>13</sup> Information on the scheme can be found here: <http://www.slab.org.uk/profession/mailshots/documents/PoliceDutyPlans-25May2011.pdf> and update here:

<http://www.slab.org.uk/documents/CriminalMailshotPoliceDuty1July2011FINAL.pdf> The scheme will be reviewed after the first three months, commencing 4<sup>th</sup> July, and each three months thereafter.

<sup>14</sup> Where an interview is intended, the suspect is vulnerable, there is an issue of police maltreatment or communication problems, CDS Direct must pass the case to a duty solicitor, but it is not clear how they can guarantee identifying vulnerability and maltreatment in all cases.

<sup>15</sup> Response of the States of Jersey to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the Bailiwick of Jersey CPT/Inf (2010) 36 (Strasbourg, 19 November 2010), pp 6,7.

#### **Article 4 Content of the right of access to a lawyer**

15. It is very important that the rights are set out practically as this article serves to achieve. The EU is able to build on the ECHR by agreeing ways to make rights effective. This article makes clear that it is a right to 'presence' of a lawyer, as we call to be clarified in article 3 above, in order to meet with the suspect, make representations on their behalf and check their welfare. It must be clear that this is in person, and not intended to include video conferences which have the same limitations as telephone advice.

#### **Article 5 The right to communicate upon arrest**

16. Being able to inform someone that you have been arrested is a very important right. It serves to ensure that a suspect will not be unduly detained and that their affairs can be organised whilst they are in detention. Article 5(2) identifies children as a category which needs additional assistance through a legal representative or other appropriate adult.
17. In our view no child should be treated as a 'suspect', but rather should be diverted from the traditional criminal justice system. The European Court of Human Rights highlighted the problem of treating children as criminals in *T v UK; V v UK* 30 EHRR 121. We set out in *Time for a New Hearing* the international human rights standards which should apply to children.<sup>16</sup> Article 37 of the UN Convention on the Rights of the Child provides that detention of children ought only to be as a last resort and for the shortest period possible.
18. In any event, article 5 of the proposal states that this person need only be *informed* of the deprivation of liberty, not be requested to attend the police station. We do not think that this goes far enough to ensure that the young person is properly safeguarded whilst in custody. They should be entitled to the *presence* of their parent, guardian or appropriate adult to help them understand what is happening. This is a different type of assistance than that of legal representation. It prioritises the needs of the child rather than the legal issues.

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<sup>16</sup> JUSTICE, Police Foundation, Independent Commission on Youth Crime and Anti-social Behaviour: *Time for a New Hearing*, (The Police Foundation, London: 2010) at page 30.



19. Furthermore, the article only identifies children as needing this additional assistance. Other vulnerable groups will need similar assistance with communicating such as physically or mentally disabled persons, or people who cannot speak the language. In *Stanford v UK*, application no. 16757/90 (ECtHR), judgment delivered 23<sup>rd</sup> February 1994, the Court held that the right of an accused to effective participation in his or her trial includes not only the right to be present, but also to hear and follow the proceedings. The UN Convention on the Rights of Persons with Disabilities 2006 has been ratified by the UK and provides a definition of disability, as well as general obligations to ensure equal treatment under article 4 and to provide access to justice under article 13. Equality rights are protected under the Charter on Fundamental Rights. Article 24 applies to children, article 25 to elderly people and article 26 to persons with disabilities. Section 6 of the Equality Act 2010 also applies in relation to disability. These disabilities extend to hearing, speech and sight impairments as well as physical and mental impairment. The nature of the suspected offence may have an impact on the vulnerability of the detained person, e.g. following a multiple public disorder incident, or road traffic accident. Finally, people who are under the influence of drink or drugs are also vulnerable, even though their incapacity may be self induced.
20. The article should impose a duty on member states to ensure medical practitioners, parents/guardians, carers or interpreters (in accordance with the Directive on the right to interpretation and translation) are informed and where necessary are able to attend in order to facilitate communication before any procedure takes place.

#### **Article 6 The right to communicate with consular or diplomatic authorities**

21. The right to consular assistance is essential for foreign nationals. However, suspects should be entitled to communicate *in person* with an official from their consulate and not just have the right to communicate with them, in accordance with article 36(c) of the Vienna Convention on Consular Relations 1963 which specifies a right to 'visit'.

#### **Article 7 Confidentiality**

22. This right is necessary to ensure that effective advice can be given. Whilst in *R v Commr of Police, ex p M and La Rose* [2001] EWHC Admin 553 it was held that receiving advice over a telephone on the custody desk did not breach article 6 ECHR because there was no evidence that anyone had been listening and the suspect only

gave yes or no answers anyway, in our view facilities must be made available for telephone calls to be taken in private. In our view, the right to confidential communication with a lawyer is otherwise ineffective. In *Castravet v Moldova* [2007] ECHR, 23393/05 (Fourth section, 13<sup>th</sup> March 2007), para 51, the ECtHR held:

*The Court considers that an interference with the lawyer-client privilege and, thus, with a detainee's right to defence, does not necessarily require an actual interception or eavesdropping to have taken place. A genuine belief held on reasonable grounds that their discussion was being listened to might be sufficient, in the Court's view, to limit the effectiveness of the assistance which the lawyer could provide. Such a belief would inevitably inhibit a free discussion between lawyer and client and hamper the detained person's right effectively to challenge the lawfulness of his detention.*

### **Article 8 Derogations**

23. Derogations should be very narrow indeed given the fundamental nature of the right. The limited reasons provided for by article 8 and the need for a judicial decision maker should ensure that derogations are not made arbitrarily by the officer investigating the case, or even by a supervising officer. The ECtHR has ruled in recent cases that decisions during *garde à vue* could not be taken by the *procureur* because this is not an independent judicial authority.<sup>17</sup> As such, it will not be sufficient to pass this role on to a prosecutor, but will have to go before a magistrates' bench for decision. The derogation as drafted does not allow for preservation of evidence which may be a legitimate reason in very limited circumstances to delay access to a lawyer before asking questions, so long as they are limited to locating such specific objects and information.

### **Article 9 Waiver**

24. Ensuring waiver is fully informed is a difficult task. The test here largely replicates that set out in *Pishchalnikov v Russia* [2009] ECHR 7025/04 (First Section, 24 September 2009), para 77. We welcome article 9(1)(a) which specifies the need for prior legal advice but we are unclear what is meant by '*otherwise obtained full*

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<sup>17</sup> *Moulin v France*, [2010] ECHR 37104/06 (Fifth Section, 24 November 2010), *Medvedyev and Others v France* [2010] 3394/03 (Grand Chamber, 29 March 2010)

*knowledge of these consequences.*' How might this be achieved? A notice explaining the consequences could be provided by the bar association of the member state and made available in each police station. The information could be included in the letter of rights under the proposal for a directive on the right to information.

25. In *Panovits v Cyprus*, where the suspect was a child, the Court held that effective exercise of the rights of the defence imports a positive obligation upon the prosecuting authorities to furnish a suspect with the necessary information to enable them to access legal representation and to actively ensure that a suspect understands he can access a lawyer, free of charge if necessary.<sup>18</sup> As with article 5(2), it is necessary to specify that children and vulnerable adults must have their right to legal advice explained very carefully and any waiver treated cautiously.<sup>19</sup> We consider it important to state this additional check in article 9(1)(b) when ensuring that the suspect has the capacity to understand the consequences of their waiver.

#### **Article 10 Persons other than suspects**

26. This safeguard is very important in ensuring that the transition between witness and suspect is protected. We believe the article would be stronger if a time period were specified. Recital 19 indicates that *immediately* upon a person becoming suspected or accused of committing a criminal offence, a person is granted access to a lawyer. We believe this should appear in the article itself.

#### **Article 11 The right of access to a lawyer in European arrest warrant proceedings**

27. We welcome the inclusion of this article, particularly articles 11(3) to (5). It recognises the problem that currently exists in EAW cases with being able to mount an effective defence. Where a person does not wish to consent it is almost impossible to base this on circumstances existing in the issuing member state without the defence team being able to contact a lawyer in that country to advise as to the veracity of the

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<sup>18</sup> *Panovits v Cyprus*, App. no. 4268/04 (judgment 11<sup>th</sup> December 2008) (ECtHR), para 72 applying *Padalov v Bulgaria*, App. no. 5478/00 (judgment 10<sup>th</sup> August 2006) (ECtHR), and *Talac Tunc v Turkey*, App. no. 32432/96 (judgment 27<sup>th</sup> March 2007) (ECtHR)

<sup>19</sup> Research reviewing the uptake of advice in England and Wales has found there is a drop in rate at which police station detainees request advice between the ages of 16 and 17, which ties in with the end of the requirement that the police inform an appropriate adult and ask them to attend the police station: Pleasance, Kemp and Balmer, *The Justice Lottery? Police station advice 25 years on from PACE*, [2011] Crim LR, Issue 1, pp 3 - 18

instructions or extent of the concern.<sup>20</sup> For example, if in the issuing state prison conditions may give rise to inhuman or degrading treatment, there is a systemic absence of a fair trial right, or a trial has taken place *in absentia*, this needs empirical evidence to be established to a standard of proof which can be accepted by a court in the executing state. A lawyer in the issuing country is able to investigate these issues.

28. Equally, where a person is requested to serve a sentence for non-payment of a fine, it would be far better for a lawyer in the issuing state to assist with administering the payment. The same is true for any matter which can be resolved without the requested person actually being present in the issuing member state. For example, where it is possible to plead guilty through a lawyer and pay a fine for minor offences. The costs to the member states involved in litigating, returning and incarcerating the person, and in terms of infringement upon the person's article 8 ECHR right to their working and family life in the executing state, are entirely disproportionate in this sort of case if it can be resolved without the need for a person to return at all.
29. However, with so many mutual recognition instruments coming into force, we wonder why the article is limited to European arrest warrant cases? The same need for dual representation will exist once the supervision order and transfer of sentenced persons are implemented, as well as future instruments with respect to evidence gathering. We consider that the article should be widely drafted to cover all mutual recognition instruments where assistance is appropriate.

## **Article 12**

30. It is unfortunate that the Commission has not yet been able to gather sufficient information about the legal aid systems in each member state to propose provisions on the right to legal aid. Often this is the mechanism by which rights become effective in practice. For example, in Scotland there is still a means test on the right to legal assistance in the police station despite assurances from the Scottish Government that this will be reviewed. The Legal Aid Bill at clause 12 even suggests that a merits test might now be applied at the police station stage in England and Wales. In our view it is imperative that full legal aid is available to ensure that at this most critical

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<sup>20</sup> We are conducting a joint, EU Commission funded project with the European Criminal Bar Association and International Commission of Jurists EU sections, on *Best Evidence in EAW Cases* which hopes to report its interim findings in the autumn.

stage of proceedings, proper advice can be given. The Proposal does however remind the member states that the Charter and the Convention demand the provision of legal aid where the interests of justice so require.

### **Article 13**

31. This article is as important as the substantive safeguards provided in the other articles. If the right to a lawyer at any stage of the proceedings is breached there must be an effective remedy, as required by article 13 ECHR and article 47 CFR. As article 13(3) makes clear in order to ensure a fair trial is still possible, the evidence obtained in breach should be excluded.

### **Definition of Lawyer**

32. Unlike the directive on the right to interpretation, the Proposal does not include any measure to ensure the lawyer has appropriate accreditation to effectively represent the suspect or accused person. Article 5 of the interpretation directive requires member states to take concrete measures to ensure that the services provided meet the quality required under the directive. It also states that a register of appropriately qualified interpreters and translators must be established to improve the quality and efficiency of the service. In order to ensure that only accredited lawyers provide representation, a similar quality standard is required in this directive.

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