Coroners and Justice Bill

Briefing and suggested amendments for Report Stage House of Lords

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Introduction and summary

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. This briefing deals with our main concerns regarding the Coroners and Justice Bill at House of Lords Report stage, with the exception of two matters. The admissibility of intercept evidence and the relationship between inquests and public inquiries are the subject of joint suggested amendments from JUSTICE, Liberty and INQUEST which have been circulated separately to Peers. We have also produced a joint briefing with Aegis and Redress regarding strengthening UK laws on genocide, crimes against humanity and war crimes. This will be circulated separately to Peers.

3. JUSTICE has previously commented on many of the proposals in the Bill during their development in consultation papers and previous Bills and in our Parliamentary briefings for earlier stages. The Coroners and Justice Bill is a large 'portmanteu' Bill and contains extremely important changes to the law in several of its Parts. Where we have not commented upon a certain provision in the Bill here, that should not be taken as an endorsement of its contents. Due to the brevity of Report stage we have chosen to focus on the following issues in this briefing:

- **the implementation of new partial defences to murder in the absence of wholesale reform of the law of homicide;**
- **the failure of the reformed law of diminished responsibility to deal with the situation of young children whose developmental immaturity substantially impairs their responsibility for killing;**
- **overbroad criteria for the use of anonymous witnesses in criminal trials;**
- **the availability of special measures in cases where they would not maximise the quality of the witness's evidence;**
- **the use of intermediaries for mentally vulnerable defendants who are in fact unable to participate effectively in their trial;**

- **amendments to bail legislation in murder cases which are on their face incompatible with Article 5 European Convention on Human Rights (ECHR).**
- **The implementation of an EU Council Framework Decision which requires convictions from across the EU to be considered in criminal proceedings along with domestic convictions, but does not propose any mechanism by which to do so.**

4. For reasons of brevity we have not suggested amendments to Northern Ireland provisions here but where they mirror the England and Wales provisions in which we have suggested amendments we would suggest that similar amendments be made to them. Consequential amendments may also be needed if our suggested amendments are adopted.

Part 2: Criminal Offences

Amendments

New clause

Murder: extenuating circumstances

(1) In a trial for murder the trial judge may in the course of his summing up direct the jury that if they are satisfied that the defendant is guilty of murder, but are of the opinion that there were extenuating circumstances, they may on returning their verdict add a rider to that effect.

(2) The judge may not give such a direction unless there is evidence on which a reasonable jury might so find.

(3) Where the jury has so found, the judge shall not be obliged to pass a sentence of life imprisonment but may pass such other sentence as he considers appropriate having regard to any extenuating circumstances found by the jury.

(4) If the judge passes a sentence other than a sentence of life imprisonment, he shall be obliged to state his reasons.

(5) If it appears to the Attorney General that the sentence so passed is unduly lenient he may refer it to the Court of Appeal under section 36 of the Criminal Justice Act 1988 (c.33) (reviews of sentencing).

Briefing

We are generally concerned at the government's decision to enact in this Bill reforms to the partial defences to homicide without acknowledging the need for *wholesale* reform in this area of the law. While the Law Commission's review, which preceded the government's proposals, embraced most aspects of the law of homicide (with the notable exception of the mandatory life sentence for murder, which they were not permitted to consider), the government have merely selected aspects of this review, taken them out of context, altered them, and then put them into a large Bill dealing with many other important issues of law.[1] The Law Commission devised reforms to the partial defences to murder, on which these

[1] A two-stage review of the law of murder took place firstly with a consultation exercise and report from the Law Commission (the report is *Murder, Manslaughter and Infanticide*, 29 November 2006) and secondly a government consultation which selected some but not all of the Law Commission's proposals and made alterations to them (cf Ministry of Justice, *Murder, Manslaughter and Infanticide: proposals for reform of the law*, 28 July 2008 and *Summary of responses and government position*, 14 January 2009).

suggested amendments are based, in the context of a new three-tier structure of homicide offences that they proposed - that is, first degree and second degree murder and manslaughter, not only murder and manslaughter.

We are also concerned that these provisions have appeared in such a large Bill containing so many important legal reforms, meaning that there has been insufficient time for the debate that the issues deserve. In our view, enactment of these provisions could result in considerable confusion in the criminal courts: it took years for the law of provocation, for example, to become settled in *AG v Holley* [2005] UKPC 23 and *R v James; R v Karimi* [2006] EWCA Crim 14 and this process may be triggered once more by the complexities of these provisions.

Our key objection to the government's approach, however, remains that it has chosen to tinker at the margins of the law of homicide without addressing the fundamental problems that remain in the current structure of offences: in particular the breadth of the offence of murder (which requires no intention to kill and which can embrace both targeted assassinations and consensual mercy killings), and the continued existence of the mandatory life sentence, which the Law Commission was forbidden to examine.

We therefore support the amendment above, which has been tabled by Lord Lloyd of Berwick and Lord Goodhart (and which is currently numbered amendment 56 in the marshalled list of amendments as at 19 October 2009). This amendment would mean that where a jury found extenuating circumstances – for example the consensual mercy killing of a beloved relative, or a killing with no intent to kill by a 10 year old who did not appreciate that his actions could result in death – the defendant would remain convicted of murder but a sentence more suitable to the case could be passed. The Attorney General could refer inappropriate sentences under this provision to the Court of Appeal.

Clauses 46 and 47 – Persons suffering from diminished responsibility

Amendments

Clause **46**, page **27**, leave out clause

OR

Page **27**, line **28** [*Clause 46*], at end insert

( ) A person ("D") who kills or is party to the killing of another is not to be convicted of murder if D was under the age of eighteen and his developmental immaturity -
(a) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
(b) provides an explanation for D's acts and omissions in doing or being a party to the killing.

Page **27**, line **33** [*Clause 46*], after "(1)(c)" insert "and subsection ( )(b)"

Page **27**, line **34** [*Clause 46*], after "functioning" insert "or D's developmental immaturity"

[Similar amendments are suggested for Clause 47]

Briefing

These amendments address the government's amendments to the law of diminished responsibility. We are concerned that the government's amendments deal unfairly with defendants under 18 years of age since, particularly in relation to younger children (who could be as young as 10), their developmental immaturity may substantially impair their ability to understand the nature of their conduct, form a rational judgment or exercise self-control at the time of the killing, even though they are not suffering from a 'recognised medical condition'. The second set of amendments above would reinstate the Law Commission's recommendation that the diminished responsibility partial defence be available to a child or young person under 18 in these circumstances. They would be guilty of manslaughter rather than murder and therefore the judge would have a full range of sentencing options. We are more generally concerned that other deserving cases may not be able to make out diminished responsibility under the government's reforms (for example, consensual mercy killers of beloved partners/relatives and victims of domestic abuse who

turn on their abuser). The vagueness of the current law, while not ideal, at least allows deserving cases to be absorbed into this partial defence to avoid a murder conviction and mandatory life sentence. We have therefore suggested a stand part amendment.

Clauses 48-50 – Partial defence to murder: loss of control

Amendments

Clause **48**, page **28**, leave out clause
Clause **49**, page **29**, leave out clause
Clause **50**, page **29**, leave out clause

OR

Clause **48**, page **29**, leave out paragraph (6)

Briefing

Although we support some aspects of the partial defences proposed in these clauses by the government, we are suggesting stand part amendments as we do not believe their full impact has been sufficiently considered, particularly in terms of causing confusion in the law. Further, we are concerned that some cases where a murder conviction is not justified may remain, legally, murder under the government's proposals.

In relation to the partial defence of fear of serious violence, this is due to the retention of the 'loss of self-control' requirement. For example, where an armed police officer, or a person whose house is broken into, responds with fatal force in good faith (and perhaps intending only to injure the victim) to protect himself or others from a person who appears to be armed and dangerous, but the jury conclude that that degree of force was unreasonable in the circumstances, we believe that a manslaughter conviction should be available. This is particularly pertinent since the government have failed to adopt the Law Commission's recommendations to divide the offence of murder into two categories; murder resulting in the mandatory life sentence will now still include cases where there was no intention to kill nor even foresight on the defendant's part that death could result from his actions.

We are also concerned that the requirement of 'loss of self-control' in 'fear of serious violence' cases may continue to prejudice victims of domestic abuse (in particular, women who are more likely to suffer a 'slow-burn' reaction to violence and abuse) who kill abusive husbands or partners due to ongoing abuse and fear.

Further, in relation to 'words and conduct' cases the government fails to deal with the circumstances where the defendant does not have a justifiable sense of being seriously wronged, but was extremely emotionally disturbed and – crucially – acted to cause serious harm *but not to kill the victim*. For example, where an exhausted parent 'snaps' and assaults a crying child intending to cause serious harm but with no intention to kill, a manslaughter verdict would not be available under the Bill's provisions.[2] We emphasise that we do not seek to condone such conduct, which would rightly remain a serious criminal offence. However, there may be circumstances outside the 'words and conduct' element of the government's clause 48 where a manslaughter conviction, and discretion in sentencing, should be available.

If these provisions do become law, we suggest that our alternative amendment be adopted: this amendment would remove the Bill's provision that the jury may only consider 'loss of control' as a partial defence to murder if evidence is adduced on which in the judge's opinion a jury, properly directed, could conclude that the defence might apply. We are concerned that this may cause problems where a defence of self-defence is put forward to a murder charge. In some circumstances where this is rejected, the jury should also go on to consider whether the defendant acted in fear of serious violence in order to satisfy clause 48 so that the correct verdict is one of manslaughter. We are concerned that they may not be able to do this if sub-clause (6) remains in place.

[2] Cf *R v Doughty* (Stephen Clifford) (1986) 83 Cr App R 319; (1986) Crim LR 625

Part 3: Criminal Evidence, Investigations and Procedure

Clause 69 – Conditions for making order

Amendments

Page **40**, line **39** [*Clause 69*], leave out paragraph (4).

Page **41**, line **4** [*Clause 69*], leave out paragraph (b).

Page **41**, line **6** [*Clause 69*], leave out "has reasonable grounds for fearing" and insert "fears, on reasonable grounds,".

Page **41**, line **6** [*Clause 69*], after "harm" insert "to himself or another person"

Page **41**, line **15** [*Clause 69*], at end insert –

"and

(c) would be unwilling or unable to provide such information if the order were not made."

Briefing

This amendment would remove the requirement that the alleged perpetrator is between the ages of 11 and 30, and the requirement that the criminal group of which he was likely to have been a member is mostly made up of people within that age range. Investigation anonymity orders would therefore apply to qualifying offences committed by members of criminal groups of any age.

We are concerned that this legislation appears to be targeting groups of children and young people with measures that would not be available in relation to criminal groups – including organised criminal networks – dominated by older offenders. The fear of giving information to police is likely to be felt by potential witnesses in relation to organised crime, whatever the age of the perpetrator or the criminal group members. We therefore question the legitimacy of this age-related restriction.

These amendments also seek to tighten up the criteria to be satisfied before an order can be made. In particular, clause 69 nowhere requires that the subject of the order be in fear of intimidation or harm or that there are even reasonable grounds to believe this. Further, we think it illogical that such fear should not extend to harm or intimidation of another person – for example a friend or relative. Otherwise, threats towards a relative or friend would be irrelevant to the decision as to whether to make an order. We further suggest that sub-clause 69(8) is amended so that the court must be satisfied that there are reasonable grounds for believing that the person would be unwilling to provide the information if the order were not made. If they are not in fact in fear and would be willing in all events to provide information then it must be questioned why the order is being made.

Clause 78 – Witness anonymity orders: Conditions for making order

Amendments

Page **45**, lines **32-33** [*Clause 78*]*,* leave out " or to prevent any serious damage to property"

Page **45**, lines **34-36** [*Clause 78*], leave out paragraph (b) and insert –

> (b) in order to avoid compromising the practice of undercover policing and/or undercover operations by police, law enforcement agencies or the security services, whether in relation to specific operations or generally;

Page **46**, line **5** [*Clause 78*], leave out paragraph (b)

Briefing

The right of a defendant to know the identity of a witness against him in criminal proceedings is both a common law principle and a constituent part of the right to a fair trial under Article 6 ECHR, which provides inter alia for the minimum right of a defendant 'to examine or have examined witnesses against him' in criminal cases. The Court of Appeal has made clear in the recent case of *R v Mayers* in relation to the Criminal Evidence (Witness Anonymity) Act 2008 (which this Bill would supplant), that:[3]

> *Notwithstanding the abolition of the common law rules, it is abundantly clear from the provisions of the Act as a whole that, save in the exceptional circumstances permitted by the Act, the ancient principle that the defendant is entitled to know the identity of witnesses who incriminate him is maintained.*

While it may be necessary for a witness to be anonymised in exceptional circumstances, these should be narrowly defined. In particular, we do not believe that the risk of 'any serious damage to property' is sufficient to displace the primary right of the accused to a fair trial and the public interest in the fair and transparent administration of justice. We therefore do not believe that a risk to property should be a qualifying condition under clause 78 of the Bill, and suggest an amendment here to remove references to property damage. The only legitimate circumstances, in our view, where a witness should be even *considered* for anonymity are in

[3] [2008] EWCA Crim 1416, para 5.

order to prevent a risk of death or serious physical harm to the witness or another person, or in order to protect undercover operations (by police, security services, etc). The criterion of 'real harm to the public interest' in sub-clause 78(3) is in our view too broad, and should be replaced by a criterion referring to undercover officers. We therefore suggest a more specific amendment here. If the government does have other circumstances in mind that would fall within the Bill's "public interest" criterion, we believe that these should be specified in the legislation.

Clause 86: Eligibility for special measures: offences involving weapons

Amendments

Clause **89**, page **50**, leave out clause.

Briefing

JUSTICE believes that special measures should only be used if their use does not compromise the defendant's right to a fair trial, *and* they are genuinely useful in that they help maximise the quality of the witness's evidence, where that quality would otherwise be compromised because of age, fear, vulnerability or disability or where protection of identity is otherwise exceptionally necessary.[4] It is simply not the case that all witnesses (including professional witnesses) in weapons cases will fulfil these criteria. Where special measures will not help to maximise the quality of a witness's evidence they should not be used, because firstly, they can have a prejudicial impact upon the defendant's trial (by suggesting, for example, that he is a person to be feared); and secondly, because we are concerned that they could impair the quality of evidence if used in inappropriate cases. In relation to defendants who are under 18, or have mental health problems or learning disabilities, there are grounds for particular concern since the defendant may be vulnerable to a similar or greater degree than the witnesses.

Decisions as to special measures should not depend on the witness's wishes but upon the interests of justice. We therefore suggest that this clause be removed from the Bill. Without it, special measures would continue to be available under the normal criteria of the Youth Justice and Criminal Evidence Act 1999. We believe that these criteria are sufficient to provide for special measures in appropriate cases.

[4] For example, in relation to undercover and test purchase officers where if oral evidence is necessary screening may be appropriate.

Clause 94 – Examination of accused through intermediary

Amendments

Clause **94**, page **54**, leave out clause.

Briefing

Where a defendant's level of intellectual ability or social functioning is so compromised that he is unable to understand and respond to questions asked in language appropriate to their age by a prosecutor, defence lawyer or the court, it is very probable that he will be unable to participate effectively in his trial for the purposes of that trial being fair according to Article 6 European Convention on Human Rights. In these circumstances he should not be on trial but should be diverted to an appropriate alternative process, whether through the 'fitness to plead' procedure or a new, alternative, procedure. We believe that Clause 94 reflects an attempt by the government to deal with the case of *SC v United Kingdom*[5] in which it was ruled that the trial of an intellectually impaired 11 year old in the Crown Court had violated Article 6. The court said that:

> *… "effective participation" in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence…*

If the defendant is unable to do all these things then the mere presence of an intermediary when he gives his evidence cannot 'cure' this defect. We also believe that there are inherent dangers in the use of an intermediary when a defendant gives evidence: the intermediary may not be independent of the defendant or the case (for example, a parent or carer) and may, whether independent or not, misinterpret the defendant's speech and that of those asking him questions. We therefore believe that this clause should not form part of the Bill.

[5] App No. 60958/00, judgment final 10/11/2004, para 29.

Clauses 104 and 105 – Bail

Amendments

Clause **104**, page **62**, leave out clause.

Clause **105**, page **62**, leave out clause.

Briefing

We responded to the Ministry of Justice's consultation paper on *Bail and Murder*, which was issued following concern over the cases of Gary Weddell (acknowledged in the consultation paper to have been an unusual one) and Anthony Leon Peart (where failings to ensure proper monitoring of bail and proper communication between judicial areas were the main problems exposed). These tragic cases do not justify changes to the law as to when bail can be granted in murder cases, nor that there should be specific rules for bail in murder cases. Although murder is a charge of the utmost seriousness, the circumstances of a murder charge can vary – from a professional assassination to a consensual mercy killing by the family member of a terminally ill person – as can the strength of the evidence against the accused and the degree of their alleged involvement. Further, there are other offences that can be committed at an equal degree of seriousness – for example, certain terrorist offences. The seriousness of the charge, while it may be a relevant factor in relation to bail, cannot alone determine whether bail can be granted. One defendant charged with a less serious offence may present a far greater danger to the public than another charged with murder.

Crucially, the right to liberty, as guaranteed under Article 5 ECHR, is not abrogated because a person has been charged with murder. There must still be 'relevant and sufficient' reasons for bail to be withheld.[6] We believe that clause 104 would either have to be read down under s3 Human Rights Act 1998 (like s25 of the Criminal Justice and Public Order Act 1994) or be judged incompatible with Article 5 ECHR.

Article 5 ECHR provides the right for a detained person to be brought before a judicial authority within a reasonable time. In our view an extra delay of 48 hours before the detainee can be released simply because of the fact that the charge is murder is not justifiable. If the Crown Court is to make the bail decision at first instance then the

[6] *Wernhoff v Germany* (1979) 1 EHRR 55.

jurisdictional rules should be changed so that the person is brought before the Crown Court when they would otherwise have been brought before the magistrates' court. There is also no good reason why the regime in clause 105 should apply to murder but not to other equally serious cases.

Part 5 – Miscellaneous Criminal Justice Provisions

Clause 134 and Schedule 16: Treatment of convictions in other member States etc

Amendment

Clause **134**, page **82**, leave out clause.
Schedule **16**, page **167**, leave out entire schedule.

Briefing

Schedule 16 to the Bill amends domestic legislation pertaining to the consideration of criminal convictions pre-trial (bail), during trial (character) and post conviction (sentence) by imposing a mandatory requirement upon a tribunal to include convictions from other Member States in this consideration.

The purpose of the amendments is to transpose the *Council Framework Decision of 24 July 2008 (2008/675/JHA) on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings*[7] ("the Framework Decision") into UK law. The Proposal for the Framework Decision explained[8] that currently there is no consensus between Member States as to how convictions from other Member States are considered, which is contrary to the mutual recognition principle and puts the citizens of Europe on an unequal footing.

The Proposal follows a White Paper[9] which sets out that the current system under Articles 13 and 22 of the 1959 *European Convention on Mutual Assistance in Criminal Matters*[10] has three problem areas: the difficulty in rapidly identifying the Member States in which individuals have already been convicted; the difficulty in obtaining information quickly and by a simple procedure; and the difficulty in understanding the information provided. To this end, two stages were proposed, the first in which recognition of convictions is established, and the second where the means by which the convictions can be obtained is created. Both have resulted in framework decisions setting out the principles to be incorporated into domestic

[7] O.J. L 220, 15.8.2008, P. 32
[8] Proposal for a Council Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings Brussels, 17.03.2005 COM(2005)91 final, p 2.
[9] White Paper on exchanges of information on convictions and the effect of such convictions in the European Union, COM(2005) 10 final.
[10] And supplemented by Article 4 of the Additional Protocol dated 17 March 1978

law. Council Framework Decision on taking account of convictions must be implemented by 15th August 2010.

Council Framework Decision on the organisation and content of the exchange of information extracted from the criminal record between Member States was adopted in the Justice and Home Affairs Council on the 26th February 2009[11] and must be implemented by 26th February 2012. Article 1 defines the purpose of this second framework decision as being:

> *(a) to define the ways in which a Member State where a conviction is handed down against a national of another Member State (the "convicting Member State") transmits the information on such a conviction to the Member State of the convicted person's nationality (the "Member State of the person's nationality");*
> *(b) to define storage obligations for the Member State of the person's nationality and to specify the methods to be followed when replying to a request for information extracted from criminal records;*
> *(c) to lay down the framework for a computerised system of exchange of information on convictions between Member States to be built and developed on the basis of this Framework Decision and the subsequent decision referred to in Article 11(4).*

Whilst we agree overall with the Explanatory Notes to the Bill that the amendments do not change the existing provisions and simply extend the ambit of a court's consideration to include foreign convictions, without a comprehensive and regulated system in place, there is no way of *effectively* recognising convictions from other Member States. The second Framework Decision attempts to achieve this and produces a pro forma by which to understand the non-domestic conviction, but is not incorporated into the Bill.

We consider that the following non-exhaustive examples highlight the practical problems tribunals will face in giving effect to the amendments as they currently stand whilst continuing to fulfill their obligations to act in the interests of justice:

- Proposed section 73(2)(c) provides that a certificate, signed by the proper officer of the court where the conviction took place, giving details of the offence, conviction, and sentence will be proof of conviction. This presumes that the type of offence, conviction and sentence are equivalent to that of the UK. In the context of 27

[11] PRES/09/51

countries with different cultural and historical premises upon which their punitive systems are based this will not be the case.

- Where a particular type of offence or repeat offending results in a particular sentence under UK law, the non-UK conviction would have a significant bearing upon the outcome.

- No mechanism is included in the Bill to indicate how a tribunal might take account of the information received to conclude a decision on bail, character, or sentence.

- There are no provisions by which explanatory information as to the penal or sentencing system(s) in the other Member State(s) may be requested by the tribunal, upon which an attempt to equate the conviction(s) with the UK counterpart can be made.

- No procedure is constructed in the Bill to deal with *obtaining* those foreign convictions. Should adjournments be granted where full convictions are not to hand or are not understood, thereby extending the period during which a Defendant is remanded in custody?

- No mechanism is proposed to consider the trial procedure that gave rise to the conviction(s) and whether that should have an effect on its application. For example, how is the tribunal to know whether the conviction was rendered in absentia, and whether that complies with UK law? Irrespective of whether the defendant was present at the trial, was evidence accepted that would be excluded in a UK case? Did the trial comply with UK standards with respect to representation and/or interpretation?

- No consideration is given to what happens to the information once it has been provided. Is there an obligation upon the UK to retain that information and incorporate it into the PNC on that person? How does that accord with data protection considerations? If not incorporated, what measures are to be taken to explain why the sentence passed was imposed?

- The Framework Decision requires the provision of details of convictions rendered in the UK to other Member States. No proposal deals with how this would be effected.

- Spent convictions are not protected in the Framework Decision. The Select Committee on European Scrutiny in its Second Report of 2005 whilst considering the Framework Decision raised this issue. The then Parliamentary Under-Secretary of State at the Home Office (Andrew Burnham) in his Explanatory Memorandum of 23 May 2005 explained that a spent conviction was not a concept commonly found in other Member States and whilst acting within the atmosphere of mutual recognition,

  [W]e would wish to ensure that UK nationals do not receive unfair treatment on account of spent convictions. It may be that we will seek to include a reference to spent convictions not being taken into account by an overseas court, if that spent conviction would not be taken into account by a United Kingdom court[12]

This was not achieved and the result is that each Member State is to take account of convictions in accordance with their national law. It follows therefore that where a conviction is spent for the purposes of criminal proceedings in the UK and would not be relied upon in a UK court, the conviction may be used in another Member State to impose more onerous conditions upon a Defendant's treatment.

Article 11 of the second Framework Decision states that a standardised format shall be adopted for the transmission of convictions. To this end, *Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision2009/315/JHA*[13], envisages the creation of a system based on decentralised information technology, where criminal records data will be stored solely in databases operated by Member States and are transferable. A uniform format for transmission is proposed which adopts a numerical code to identify each crime and method of involvement. A Committee is envisaged to oversee the technical development of the programme. Pilot projects are currently being undertaken as to the use of such a system. The Council adopted this Decision on 6th April 2009.

The European Data Protection Supervisor, Peter Hustinx, offered an opinion on the Proposal on 16th September 2008[14] in which he voiced the following concerns, with which we concur:

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[12] Select Committee on European Scrutiny, Chap. 6, *Taking previous convictions into account in new criminal proceedings*, HC, 13.07.05 http://www.publications.parliament.uk/pa/cm200506/cmselect/cmeuleg/34-ii/3408.htm, para 6.21

[13] OJ L 93, 7.4.2009, P. 33

> *The processing of personal data relating to criminal convictions is of a sensitive nature, and the confidentiality and integrity of criminal records data sent to other Member States must be guaranteed. It is therefore paramount that high standards of data protection be applied to the functioning of the system, which should ensure a solid technical infrastructure, a high quality of information and an effective supervision.*

We also share the EDPS' views that the use of automatic translations**,** as proposed in the instruments, should be clearly defined and circumscribed, so as to favour mutual understanding of criminal offences without affecting the quality of the information transmitted. Clearly much work is needed to create a system in which convictions can be exchanged with confidence and understanding.

Whilst we acknowledge that there is an obligation to implement the Framework Decision within a finite period, passing that obligation on to the criminal justice system by means of amendments proposed in the 16th Schedule to an already heavily burdened Bill is an inappropriate means of giving effect to the instrument's intentions and affording sufficient time to its consideration. Furthermore, now that the second Framework Decision has been adopted, it is incumbent upon Parliament to consider both Decisions together in order to give proper scrutiny to implementation measures.

We consider that the wide-ranging effect of Schedule 16 should not be taken forward until the mechanisms for mutual recognition are included. No benefit lies in imposing a mandatory obligation upon UK criminal tribunals and practitioners to take into consideration convictions from other Member States when the implementing system by which to do so has not been provided. We therefore oppose the Schedule in its entirety and propose a redraft which incorporates practical implementation proposals and gives a prominent position to this important change to criminal procedure in the body of a Bill and proper Parliamentary time.

As a minimum, an assurance from the Minister that these provisions will not be brought into force until the mechanism contained in the second Framework Decision is fully transposed into Bill format must be forthcoming. Whilst this approach would be piecemeal, it would allow for proper scrutiny before the courts are obligated to grapple with these provisions.

JUSTICE, October 2009

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[14] http://www.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2008/08-09-16_ECRIS_EN.pdf