



**JUSTICE response to the Home Office consultation on
the European Commission proposal on certain
procedural rights in criminal proceedings throughout
the European Union**

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1. JUSTICE is an independent all party law reform and human rights organisation that aims to improve British justice through law reform and policy work, publications and training. It is the British section of the International Commission of Jurists.
2. This paper is based on the JUSTICE response to the House of Lords Select Committee on European Union, Sub-Committee E, Inquiry into the Commission Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, October 2004.¹ It has been adapted to take account of subsequent developments, in particular the report of that committee,² the report of the European Parliament³ and recent developments in UK law.
3. JUSTICE has closely monitored the development of a European area of freedom security and justice. It has, in principle, supported the decision of the Tampere European Council to make 'mutual recognition' - of judicial decisions and judgments taken in other Member States – the governing principle in judicial co-operation in criminal matters. This support has, however, been conditional on the development and implementation of adequate EU-wide safeguards, notably in criminal proceedings. JUSTICE sees this as necessary to ensure that suspects and defendants are treated in a fair and comparable way wherever they face criminal proceedings in the EU. There is a particular need to address disparities in the way that the special legal, linguistic, financial and technical implications of cross border litigation are presently dealt with in the different Member States. This was specifically envisaged from the inception of the mutual recognition project as a precondition for both protecting the right to a fair trial in cross border cases and achieving greater efficiency in prosecutions.
4. JUSTICE welcomes the Government's support for this proposal and urges it to seize the opportunity of the UK's Presidency of the EU, beginning on 1 July, to make its adoption a top priority in the field of justice and home affairs. The UK has high standards of

¹ See www.justice.org.uk and the House of Lords European Union Committee Report at fn 2

² House of Lords European Union Committee, 1st Report of Session 2004-2005, Procedural Rights in Criminal Proceedings, HL Paper 28, 07/02/2005

³ European Parliament Report on the proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur Kathalijne Maria Buitenweg, A6-0064/2005, 01/03/2005

procedural rights in criminal proceedings and a good record of compliance. It should take the lead in Europe to ensure that its mostly enviable standards set the pace for EU-wide rules and not those of the lowest common denominator. British citizens facing justice abroad will only be guaranteed access to standards of criminal justice comparable to those in the UK if the Government takes a stronger stance on minimum safeguards now.

5. In its negotiations on the Framework Decision, the Government should seek to ensure that:

- It guarantees a high level of protection that reaches at least that of the European Convention on Human Rights (ECHR) and the EU Charter;
- It is drafted in sufficiently precise language to add value to these instruments and promote greater conformity amongst EU Member States;
- It is regularly and independently monitored to successfully tackle the issue of non-compliance with the ECHR. The results must be published to demonstrate improvement and foster mutual trust, or to indicate problem areas.
- Sufficient funds are allocated, if necessary from a central source, to ensure the minimum standards set out in the Framework Decision – particularly regarding legal aid, the effectiveness of lawyers, interpreters and translators and the provision of adequate facilities in detention - can be given effect in practice.

JUSTICE's assessment is that the proposed Framework Decision does not meet all these requirements as presently drafted.

Minimum standards

6. JUSTICE welcomes the inclusion of the non-regression clause in article 17 of the Commission proposal. There will, however, always be an implicit danger of the legitimising effect of minimum standards and the downward pressure they may induce. The former Home Secretary's proposals to reduce the burden of proof for serious crimes, to place restrictions on trial by jury and the evidential reforms of the 2003 Criminal Justice Act that expand the circumstances in which hearsay and evidence of bad character will be admitted in criminal proceedings demonstrate the strong interest of the state in securing convictions. There is a potential danger that standards in the UK will be reduced to the minimum standards that are eventually agreed by the EU unless a stronger stance is taken now to ensure the level of protection is indeed that which is presently guaranteed

in the UK. Furthermore, this will be the only way to secure that same level of protection to UK citizens and residents facing criminal proceedings abroad.

Scope of application of the Framework Decision

Suspected person

7. Article 1 applies the Framework Decision to all persons suspected of having committed a criminal offence in any proceedings to establish his guilt or innocence, or to decide on the outcome following a guilty plea in respect of a criminal charge 'from the time when he is informed by the competent authorities of a Member State that he is suspected of having committed a criminal offence'.
8. This is an ambiguous notion in UK law that may not, at present, entitle a suspect to the Framework Decision rights before a police interview takes place unless being cautioned is treated as being so informed. A related problem is stop and search procedures. In most circumstances, searches can only be undertaken where there is reasonable suspicion that an offence has been committed and the reason for the search is communicated to the suspect (see Code A Pace). This would trigger the Framework Decision rights but not all the Code C rights.
9. It is highly likely that the notion of 'being informed' will be equally ambiguous in many other EU Member States, with the result that the Framework Decision rights will apply at different points in the proceedings depending on where in the EU a person is being investigated. This is unacceptable both from the point of view of rights being 'practical and effective' as required by the ECHR and for the purposes of mutual recognition.
10. The Home Office consultation document does not, however, focus on the adequacy of the concept of 'when a person has been informed'. It assumes that this is a clear and undisputed notion and instead focuses on whether the Framework Decision should apply, in any event, at a later stage, namely once an individual has been charged. The effect of such an amendment would be to remove an individual's entitlement to these *minimum* protections - including access to an interpreter, access to legal advice, and any special measures that are required by virtue of the individual's age, mental, physical or emotional condition - during any time spent in custody or after arrest but prior to charge, including where police interviews take place. Many of these rights have particular relevance to the time of arrest, such as the right to have someone informed of the arrest, and will be virtually worthless if they can be delayed until the person is charged.
11. In the UK, most of the PACE Code C rights come into play when a suspect has been arrested and arrives at a police station. They also apply to those who attend voluntarily.

The major right available to those being questioned who have not been arrested is the duty of police to caution those who are suspected of committing an offence (Code C paragraph 10). The leading case is *R. v Absolam (Calvin Lloyd) (1989) 88 Cr. App. R. 332 Times, July 9, 1988* which is authority for the proposition that questions put by a police officer for the purpose of securing evidence and answers to them, are an 'interview' for the purposes of the Police and Criminal Evidence Act 1984 and must therefore be conducted under caution.

12. There is no justification for applying the minimum standards of the Framework Decision at a later stage than currently guaranteed by PACE. The potential injustice of applying these guarantees only after a person has been charged would be compounded by the fact that under section 34 of the Criminal Justice and Public Order Act 1994, a court may draw inferences from a suspect's failure to mention a fact which he could have been reasonably expected to have mentioned when questioned. In these circumstances, the European Court of Human Rights (ECtHR) has held that access to legal advice is of "paramount importance" and any delay in such cases, whatever the justification – and it should be noted that *Murray v UK* concerned an arrest pursuant to the Prevention of Terrorism (Temporary Provisions) Act 1989 - will amount to a breach of the right to a fair trial guaranteed by article 6(1) ECHR and the right to access to legal advice under article 6(3)(c).⁴
13. In order, therefore, to achieve the appropriate level of protection as well as the consistency the Framework Decision seeks, article 1 must apply from the time an individual is cautioned, arrested, or otherwise affected by the compulsory powers of such authorities (whichever is the earlier), and in every case before any police questioning takes place in relation to the suspected offence. This solution corresponds to current UK practice, it coheres with article 2 of the Framework Decision in relation to legal advice and will be most likely to produce a fair trial as required by article 6 ECHR and the Human Rights Act 1998.

Criminal proceedings

14. The Framework Decision applies to 'all proceedings taking place within the European Union aiming to establish the guilt or innocence of a person suspected of having committed a criminal offence, or to decide on the outcome following a guilty plea in respect of a criminal charge'. However, in the absence of a common definition of 'criminal offence' and 'criminal charge', the limitation of the protections of the Framework

⁴ *Murray v UK*, 22 EHRR 29, at 67

Decision to criminal proceedings will not necessarily achieve equivalence across the 25 Member States of the EU.

15. The ECtHR has repeatedly emphasised that there is no common definition of these terms across Europe and has developed autonomous concepts to ensure the protections of article 6 apply in all the Member States of the Council of Europe in comparable circumstances.⁵ Three criteria are taken into account: (a) the classification of proceedings in domestic law; (b) the nature of the offence or conduct in question, including how the offence is regarded in other Council of Europe countries and whether the offence applies to the population as a whole or only to an identifiable sub-group; and (c) the severity of any possible penalty. The problem is illustrated in the UK by 'civil orders' that impose sanctions e.g. Anti-Social Behaviour Orders, the breach of which is a criminal offence punishable by up to five years imprisonment, and control orders which impose indefinite punishment based on secret intelligence. The Framework Decision must therefore be interpreted in light of the jurisprudence of the ECtHR.
16. Article 1 of the Framework Decision therefore needs to be more precise as to the proceedings to which it applies as well as at what point it comes into play. Following the case law of the ECtHR, the Government should seek clarification that it applies to all proceedings that are criminal *in substance*, with reference to the criteria employed by the ECtHR to make this determination.

The European arrest warrant (EAW)

17. JUSTICE also seeks clarification that the protections of the Framework Decision will apply to any proceedings that relate to the execution of a EAW. The explicit application of article 3 (obligation to provide legal advice) to individuals subject to an EAW indicates that EAW proceedings are intended to come within the scope of this Framework Decision. However, given the case law of the ECtHR, which has classified extradition proceedings as administrative rather than criminal, and the lack of consistency in the definition of criminal proceedings in EU Member States, JUSTICE advocates an explicit reference to EAW proceedings in article 1.

Terrorism and other serious crime

18. JUSTICE has serious concerns about paragraph 8 of the preamble to the Framework Decision, which purports to exclude the provisions of the Framework Decision from

⁵ Engel v Netherlands (1979-80) 1 EHRR 706; Benham v UK (1996) 22 EHRR 293

‘specific measures in force in national legislations in the context of the fight against certain serious and complex forms of crime in particular terrorism’.

19. In the absence of any clear definition of ‘serious and complex forms of crime’, and widely varying definitions between Member States of ‘terrorism’ for that matter, this provision raises the possibility that the *minimum* protections of the Framework Decision – access to a lawyer, translation and interpretation, special measures for those with special needs, access to consular assistance, written notice of their rights – will not apply to an undefined group of offences. This would render the minimum guarantees nugatory. The point is made clearly and firmly in ‘The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights’:⁶

National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse.

20. Furthermore, the blanket removal of these minimum protections from ‘serious criminal offences’ purports to deprive individuals of their basic protections in precisely those cases where prosecutions may result in a loss of liberty or livelihood. For example, if ‘serious criminal offences’ includes all offences for which individuals can be surrendered pursuant to a European arrest warrant, the exclusion would apply to all offences punishable by imprisonment for one year or more. Those subject to an EAW are particularly likely to require the basic guarantees offered by the Framework Decision since they will often be in a country other than their own.
21. JUSTICE can see no reasonable justification for excluding these minimum protections from all ‘serious and complex forms of crime in particular terrorism’ and calls upon the Government to remove paragraph 8 of the Preamble. Although JUSTICE recognises that some variation of standard procedure may be appropriate in respect of terrorism offences in order to protect evidence-gathering and witness protection, any variation in safeguards must continue to comply with the ECHR, it must be clearly defined and ancillary provisions must be drafted to ensure any derogation from minimum standards is strictly necessary, both as regards the ends sought and the means employed to achieve them.

⁶ United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984), at para 31

Right to legal assistance

22. The right to legal assistance is the most crucial procedural safeguard since it facilitates all the others. Articles 2 – 5 of the Framework Decision do not, however, meet the standards of article 6 ECHR and the 1999 UK Access to Justice Act (AJA). In particular, the right is unjustifiably limited to legal ‘advice’, the right to legal advice ‘as soon as possible’ is too flexible a notion, it does not adopt the ‘interests of justice’ test and the right to confidential communications with a lawyer is not protected.

Definition

23. The very definition of the entitlement has been unacceptably limited to ‘legal advice’ so that it does not comply with the ECHR.

Article 6(3)(c) ECHR reads

(3) Everyone charged with a criminal offence has the following minimum rights:

- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require

Article 2 of the Framework Decision reads

1. A suspected person has the right to legal advice as soon as possible and throughout the criminal proceedings if he wishes to receive it.
2. A suspected person has the right to receive legal advice before answering any questions in relation to the charge

24. The wording of article 2 is repeated in article 3 in relation to free legal advice and neither matches the ECHR right to legal assistance nor the AJA 1999 categories of assistance to be funded by the Legal Services Commission, which distinguish between advice and representation. The Framework Decision reference to legal ‘advice’ only will not necessarily extend to advocacy assistance at trial, nor the presence of a lawyer during police questioning, the tracing of witnesses or the obtaining of expert evidence. It must be amended to conform to article 6(3)(c) ECHR and the AJA 1999.

Legal advice ‘as soon as possible’

25. Article 2(1) provides that legal advice shall be provided ‘as soon as possible’. Article 2(2) states that the right to legal advice applies ‘before answering questions in relation to the

charge', the intention of the Commission being to ensure legal advice was available before any questioning.⁷

26. JUSTICE is concerned that the phrase 'as soon as possible' is too imprecise and flexible to provide a satisfactory minimum standard. The right to legal assistance is a key safeguard that facilitates all the others and JUSTICE urges the Government to ensure this provision is strengthened. Article 2 could be improved by replacing the words 'as soon as possible' with 'without delay and in any event before answering any questions'. This would produce greater clarity and also remove concerns regarding rights that arise prior to charge, discussed in detail at paragraph 10 of this briefing.

27. Possible incompatibilities of UK law with such an amendment are discussed below at paragraph 36.

Entitlement to legal aid

28. The article 5 Framework Decision right to free legal advice is restricted to those instances where article 3 of the Framework Decision applies, i.e. to any suspected person who

- Is remanded in custody prior to the trial, or
- Is formally accused of having committed a criminal offence which involves a complex factual or legal situation or which is subject to severe punishment, in particular where in a member state there is a mandatory sentence of more than one year's imprisonment for the offence, or
- Is the subject of a European arrest warrant or extradition request or other surrender procedure, or
- Is a minor, or
- Appears not to be able to understand or follow the content or meaning of the proceedings owing to his age, mental, physical or emotional condition

29. JUSTICE has hitherto argued that, in the interests of justice, the existence of an international element in connection with criminal proceedings should suffice to obtain legal aid, as should the possibility of a mandatory sentence of any period of imprisonment. Furthermore, there should be a presumption in favour of granting legal aid in all of these situations given the prejudice to the defence that may otherwise result.

⁷ COM (2004) 3289. Commission's explanatory memorandum, para 55

'Interests of justice' test

30. The test of 'undue financial hardship to the suspect or his dependents' does not reflect the article 6(3)(c) ECHR 'interests of justice' test where a suspect or defendant 'has not sufficient means to pay for legal assistance'. The Commission's research revealed that not all Member States (including the UK) applied a means test to qualify for legal aid, on the basis that it was more cost effective to provide legal aid than to carry out the means testing. Furthermore, those Member States that do apply a means test will set different levels of income or capital assets to qualify for legal aid. A means test alone, therefore, will not only be unsuitable for some Member States but it will also fail to establish parity of access to justice across the EU.
31. JUSTICE advocates the adoption of a means test that reflects the ECHR standard, where applicable, combined with a wide 'interests of justice' test as applied by the ECtHR and the UK courts. Any means test must be transparent and must require the state to demonstrate that a suspect could pay for his own legal costs without his income or state benefits falling below the national minimum and without requiring the unreasonable sale of any capital assets.
32. The 'interests of justice' test should be assessed by reference to the facts of the case as a whole and should not be restricted to a limited number of considerations as articles 3 and 5 of the Framework Decision purport to do. In particular, the criteria listed do not take account of the possible public value or importance of a case. Moreover, under article 3, the complexity of a case and the severity of potential punishment are only relevant for the purposes of entitlement to legal aid where a suspected person is 'formally accused'. This will not protect suspects who are being investigated in connection with such an offence but who have not been formally charged, nor does it comply with the autonomous definition given by the ECtHR to 'charge'.

Confidentiality

33. No provision is made for an accused's right to confidential communications, both written and oral, with his lawyer. This may also necessitate the provision of private interview facilities. This is an essential aspect of the right to have adequate time and facilities for the preparation of the defence, as guaranteed by article 6(3)(b) ECHR, and must be included in article 2 of the Framework Decision.

Children

34. Children are listed in article 3 amongst those entitled to legal aid as a category of suspect/defendant entitled to special assistance. This raises the very real issue of disparities in the age of criminal responsibility between Member States, ranging from eight in Scotland to 15 in Portugal and Finland. It provides an example of where substantive law may need to be harmonised if minimum procedural safeguards are to produce comparable results across the EU.

Lawyer of choice

35. A further shortcoming in article 2 of the Framework Decision is its lack of reference to the suspect/defendant's right to a lawyer of his own choosing in accordance with article 6(3)(c) ECHR.

Compatibility of UK law

36. The article 2 requirement to provide legal advice 'as soon as possible' does not appear to admit any exceptions. As such, section 58 PACE 1984, which permits the right of access to legal advice as soon as practicable to be delayed in the case of a person who is in police detention for a serious arrestable offence⁸ (bar under the terrorism provisions) and an officer of at least the rank of superintendent authorises it, would amount to a breach of article 2. Where a detainee's right to legal advice is delayed under section 58, it must not persist once the reason for the delay has ceased and, in any case, not in excess of 36 hours from the suspect's initial detention.

37. PACE Code C, Annex B, also allows the police in cases of serious arrestable offences to delay the right of access to legal advice. These exceptions have been substantially expanded to all indictable offences by the Serious Organised Crime and Police Act 2005. Detainees must, at the latest, be permitted to exercise their right of access to legal advice within 48 hours of being detained. The right to receive legal advice as soon as practicable is also affected by paragraphs 6-8 of Part 1 of Schedule 8 to the Terrorism Act 2000 which apply to anyone detained under section 41 PACE (arrest without warrant of persons reasonably suspected of terrorism). In particular, paragraph 8 allows the police to delay access to legal advice for up to 48 hours where they have a reasonable belief that allowing access to legal advice would, for instance, cause interference with witnesses, evidence or the gathering of information about the commission, preparation or instigation of acts of terrorism. A further interference under paragraph 9 is that the police

⁸ Defined in section 118(2)

may allow access to legal advice but only 'within sight and hearing of a qualified officer'. These provisions would also be incompatible with the article 2 entitlement to legal advice 'as soon as possible'.

38. The UK and other Member States with comparable exceptions to the right of access to legal assistance in their domestic law may have deliberately chosen the flexible wording of article 2 in order to ensure compatibility between the two sets of rules. As a minimum set of standards, however, the imprecision of article 2 is unacceptable and should be redressed, making any strictly necessary exceptions explicit and proportionate.

Effectiveness

39. Article 4 of the Framework Decision reflects the case law of the ECtHR on article 6 ECHR, which requires legal representation to be 'practical and effective' and not simply nominal.⁹ In *Artico v Italy*, the ECtHR emphasised

[A]rticle 6(3)(c) speaks of 'assistance' and not of 'nomination'. Again, mere nomination does not ensure effective assistance, since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations.

40. However, it is not clear at what point the state is required to intervene where a suspect/defendant is dissatisfied with his legal representation. The ECtHR has taken a relatively narrow view in such cases and has held that

[t]he competent authorities are required under article 6(3)(c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way¹⁰

41. The most practical way of bringing ineffective legal representation to the notice of the authorities would be by the suspect/defendant himself. In order to make this workable, he or she would need to be made aware through the Letter of Rights of the right to *effective* legal advice, of the possibility of informing the appropriate authorities where he or she is unhappy about the legal representation provided and of the right to be given a replacement lawyer of choice. Member States must be responsible for establishing a visible complaints mechanism to which all those involved in the proceedings can report.

⁹ *Artico v Italy* (1981) 3 EHRR 1, para 33

42. The Commission identifies in its Extended Impact Assessment¹¹ that disparities in the levels of remuneration and training of lawyers across the EU is a serious problem but does not address these vital issues in the Framework Decision. Member states should be required to provide appropriate training to ensure that lawyers appointed under the Framework Decision have the necessary expertise to deal with the highly specialised types of case that may arise under EU co-operation measures such as the European arrest warrant. They must also be committed to adequate levels of pay for those participating in national legal aid schemes if they are to attract lawyers with the necessary qualifications. JUSTICE recommends that Member States establish a register of suitably qualified legal representatives, including those who participate in national legal aid schemes.

Directive 98/5/EC

43. As a further check on effectiveness, article 4(1) of the Framework Decision only allows lawyers as defined by Directive 98/5/EC to be appointed. The Directive limits the definition of a lawyer to advocates, barristers and solicitors. There may be two areas of incompatibility with UK law. Under the Courts and Legal Services Act 1999, although only these professionals have rights of audience in court, the right to conduct litigation – including the provision of advice - has also been extended to legal executives by section 40 AJA 1999. Secondly, under paragraphs 6.12 and 6.12A Code C PACE, ‘solicitor’ is defined to include trainee solicitors, accredited representatives, and non-accredited and probationary representatives sent by or on behalf of solicitors. The European Commission has, however, indicated that it would not necessarily object to such schemes as this provided that they are properly regulated and the quality is guaranteed. It is important to remember that cases involving foreign suspects may often be complex and/or involve knowledge of European surrender and mutual assistance practice. Such cases will necessitate a suitable level of expertise.

Audio and/or video recording of proceedings

44. JUSTICE recommends the audio and/or video recording of all police questioning of suspects, excluding confidential counsel-client communications. A copy of the audio/video tape should in every case be supplied to the suspect and/or his lawyer. In the UK, PACE Code E requires police interviews with all persons cautioned under Code C to

¹⁰ Kamasinski v Austria (1991) 13 EHRR 36, para 65. See also Imbrioscia v Switzerland, *ibid*, for a similar decision in the context of a private lawyer

¹¹ SEC (2004) 491 28/04/2004

be tape-recorded, unless (i) it is not reasonably practicable due to equipment failure or the lack of availability of a suitable interview room and the officer considers, on reasonable grounds, that the interview should not be delayed, or (ii) where it is clear from the outset that there will be no prosecution, and is not limited to serious crime only. This has proven to be an effective protection against ill treatment in custody as well as a means to protect police officers from false allegations of mistreatment during questioning. Recording of proceedings will make an important contribution towards achieving mutual trust and confidence in the fairness of criminal proceedings across the EU.

45. Article 9 of the Framework Decision proposes to record proceedings only where an interpreter is used, and for the unique purpose of quality control. A transcript of the recording must be provided in the event of a dispute. However, use of the transcript is again limited to quality control. This is an artificial constraint and there is no justification for restricting the use of such transcripts where they may assist in relation to a dispute about any other aspect of a fair trial. Furthermore, the transcript should be accompanied by a copy of the tape as there are many relevant features of interview that cannot be revealed by a transcript alone, such as the tone with which questions are put.

Right to interpretation and translation

Language

46. Translation and interpretation services should be provided in all Community languages, all domestic minority languages and Braille for those with sight impairments.

'Necessity' to provide free interpretation of legal advice

47. Clarification of where it is 'necessary' to provide free interpretation of legal advice received throughout the criminal proceedings is imperative to achieve consistency across the EU. JUSTICE considers it will always be 'necessary' whenever a person does not 'understand the language of the proceedings', the criteria used to determine entitlement to free interpretation of the proceedings in article 6(1) of the Framework Decision.

'Relevant' documents to be freely translated

48. JUSTICE also recommends providing a non-exhaustive list of 'relevant documents' that should be freely translated for suspects who do not understand the language of the proceedings in order to limit disparities between Member States. This will help promote best practice across the EU. This list should include but not be limited to:

- The police statement

- Statements by the complainants and witnesses
- Statements by the suspect/defendant to the police and judicial authorities
- An indictment by the public prosecutor or other prosecuting authorities
- A judicial order imputing the crime to the defendant

Accuracy

49. In order to improve the accuracy of translations and interpretations, Member States should be required to appoint a national accreditation body responsible for training and certifying translators and interpreters. Continuous technical training must be available that covers use of specialised terms that may arise in the context of criminal proceedings and the functioning of judicial systems. Member States should be required to publish a register of certified translators/interpreters. The register should indicate where translators/interpreters have undergone appropriate technical training and are certified for the purposes of the Framework Decision. In the UK, there is a duty on criminal justice agencies to use translators on the National Register of Public Service Interpreters whenever possible but, in practice, this is not always the case and there is no statutory requirement for court interpreters to hold the Diploma in Public Service Interpreting or any other qualification. In the absence of a requirement to provide such training and certification, or to publish a register of those who have completed such training, adequate provision of translation and interpretation services will continue to fall short of what is necessary to ensure proceedings are fair in accordance with article 6 ECHR.

50. The issue of inadequate levels of remuneration across the EU was identified as a problem by the Commission. This critical aspect is also left untackled by the Framework Decision. However, unless adequate training and fees are provided by all Member States, with the implicit financial commitment this implies, the rights to free interpretation and translation in all criminal proceedings will continue to be violated in many if not all Member States, denying those who do not speak or understand the language of the proceedings the right to a fair trial and inhibiting the success of the mutual recognition programme.

51. To check the accuracy of translation and interpretation services, lawyers, judges, suspects and defendants, and all those involved in the criminal proceedings should be made aware that they can report any concerns they have in this regard and be provided with a replacement. Member States should be required to provide a visible and effective complaints mechanism.

Compatibility of UK law

52. Section 13 of PACE Code C addresses the issue of suitably qualified interpreters, provided at public expense, for suspects at police stations. No provision is made for translators. This will need to be rectified to comply with the Framework Decision. Furthermore, exceptions are envisaged where to delay the interview would, for example, interfere with evidence or witnesses, or alert persons suspected of an offence (see section 13.2, 11.1 and 11.18-11.20 PACE Code C) and these may also be incompatible with the Framework Decision.

Specific attention

Entitlement

53. The Framework Decision provides for specific attention to be given to a suspect/defendant 'who cannot understand or follow the content or meaning of the proceedings owing to his age, mental, physical or emotional condition'. JUSTICE is concerned that those requiring specific attention may be able to understand or follow the content or meaning of the proceedings but nonetheless require special attention. This qualification of entitlement to specific attention is not broad enough to address the needs of all vulnerable persons in state custody to whom Member States have a special responsibility. The categories of those entitled to such attention should not be exhaustive, nor should it be limited to those who cannot understand the proceedings.

Medical assistance

54. Timely medical assistance should be available to all suspects wherever a person appears to be suffering from physical illness; or is injured; or appears to be suffering from a mental disorder; or appears to need clinical attention; and if a detainee requests a clinical examination, not solely where a person cannot understand or follow the proceedings by virtue of his physical condition. This would bring the Framework Decision in line with paragraph 9(b) of PACE, Code C.

Other specific attention

55. Other specific attention will, by its very nature, not be required by every suspect or defendant. The measures listed in article 11 should not be exhaustive and the appropriate measures to be taken must be assessed in light of the particular needs of the individual. More detailed guidance and examples could nonetheless be provided in the Framework Decision without losing the necessary flexibility of the provision.

Compatibility of UK legislation

56. Under UK legislation, PACE, Code C paragraphs 3(b) and 11.15 make provision for special protection for juveniles and other vulnerable groups, primarily by requiring the involvement of an 'appropriate adult', such as a parent or guardian, an interpreter or registered medical practitioner. However, the exceptions in paragraphs 11.1(a) – (c) do apply so that the interview will go ahead without special protection if to delay the interview would, for example, cause interference evidence or witnesses, alert other people suspected of an offence or hinder the recovery of property obtained in connection with an offence, provided an officer of superintendent rank or above is satisfied that the interview would not significantly harm the person's physical or mental state. These exceptions would, again, be incompatible with the Framework Decision as presently drafted.

Letter of Rights

57. JUSTICE welcomes the Commission's initiative of a Letter of Rights setting out the procedural rights to which suspects are entitled. This will improve the visibility of those rights and so contribute towards greater accessibility, compliance and consistency across the EU.

58. It is not, however, clear from article 14 of the Framework Decision when the Letter of Rights should be given to the suspect. From article 1 it can be deduced that a suspect is entitled to receive the Letter of Rights 'from the time when he is informed by the competent authorities of a Member State that he is suspected of having committed a criminal offence'. As noted above, this will not take place at the same point in criminal investigations across the EU. In the interests of clarity, therefore, it should be specified in article 14 that suspects are entitled to be given the Letter of Rights 'without delay, and before answering any questions in relation to the charge'.

Language

59. The Letter of Rights should be made available in all official Community languages as proposed by the Commission, but also in all the domestic minority languages of the EU and Braille. Audio recordings should also be kept of the Letter of Rights for those who are illiterate.

Compliance of UK law

60. Under PACE, Code C paragraph 3.2, there is already a duty to provide detainees with written notice of their procedural rights. Article 14 of the Framework Decision should

therefore be easy to implement in the UK. There may, however, be an issue as to when the rights under the Framework Decision arise, depending on whether being cautioned or presented with a search warrant amounts under UK law to being informed that a person is suspected of having committed a criminal offence. For this reason, it needs to be clarified that the Framework Decision applies before any police questioning in relation to the suspected offence. Written notice must be given in addition to any caution regarding the right to silence under PACE, Code C paragraph 10. This should be specified in article 14 of the Framework Decision.

Content of the Letter of Rights

61. JUSTICE supports the structure of the Letter of Rights, set out in Annex A to the Framework Decision. However, greater detail should be added to its content. In particular, to comply with the article 6(3)(a) requirement to inform a suspect 'promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him', to the first sentence 'You [insert name], are a suspected person in connection with [X criminal offence]', should also be added the circumstances surrounding the offence and the possible penalties that could be incurred in the event of conviction. An indication of the legislative source of the powers relied on to detain the suspect should also be given.

62. As mentioned above, the Letter of Rights does not replace the requirement to caution a suspect as to his right to silence. This right, inherent in article 6 ECHR, should be included in the Letter of Rights.

63. Finally, the suspect should be informed through the medium of the Letter of Rights of his right to medical treatment or check-ups.

64. It should be incumbent on Member States to regularly update the Letter of Rights.

Right to communicate

65. Article 12 of the Framework Decision grants a suspected person the right to have his family, persons assimilated to his family or his place of employment informed of the detention 'as soon as possible'.

Compatibility of UK law

66. Section 56 PACE 1984 allows the right to have someone informed when arrested as soon as is practicable to be delayed where a person is detained for a serious arrestable

offence¹² (bar under the terrorism provisions) and an officer of at least the rank of inspector authorises it. Any delay must come to an end where the reasons for the delay cease to exist and, in any event, within 36 hours of the person being detained.

67. PACE Code C, Annex B, also allows the police in cases of serious arrestable offences to delay the right to have someone informed when arrested. These exceptions have been substantially expanded to all indictable offences by the Serious Organised Crime and Police Act 2005.¹³ Detainees must, at the latest, be permitted to exercise their rights to have someone informed when arrested and of access to legal advice within 48 hours of being detained. The right to have someone informed of arrest as soon as practicable is also affected by paragraphs 6-8 of Part 1 of Schedule 8 to the Terrorism Act 2000 which apply to anyone detained under section 41 PACE (arrest without warrant of persons reasonably suspected of terrorism). In particular, paragraph 8 allows the police to delay informing someone of the arrest for up to 48 hours where they have a reasonable belief that informing the person named by the suspect advice would, for instance, cause interference with witnesses, evidence or the gathering of information about the commission, preparation or instigation of acts of terrorism. These provisions would also be incompatible with the article 12 right to have someone informed of the detention 'as soon as possible'.

68. Paragraph 7 of PACE, Code C addresses the right to communicate with consular authorities which derives from the Vienna Convention on Consular Relations. However, there is currently no right to assistance from a recognised international humanitarian organisation as an alternative to consular assistance. The inclusion of the right to consular assistance in the Framework Decision is also important in that, contrary to the Vienna Convention, it ascribes this right to individuals rather than to states who are the subjects of international law.

Evaluation

69. Given that the principal problem has been identified as one of compliance and lack of consistency across the EU in the implementation and application of procedural rights, regular evaluation, at yearly intervals in JUSTICE's view, is imperative. This will allow the Commission and, most importantly, all those involved in the operation of criminal justice systems across the EU, to gain a true picture of whether and how procedural rights are being respected on the ground. This is vital if genuine trust is to be established between the police and judicial authorities of the Member States.

¹² Defined in section 118(2)

70. The Framework Decision states that the Commission shall supervise and co-ordinate reports on the evaluation and monitoring exercise. Member states are required to collect and make available certain statistics on the operation of the Framework Decision. The evaluations must not, however, be limited to the bare statistics collected by Member States themselves. Independent experts should interview professional bodies, especially interpreters, translators and lawyers and carry out spot checks on courts and police stations to gain a fuller picture of how the Framework Decision is operating in practice. The Commission seems to imply in its impact assessment that decisions of the national and European courts should be excluded from the evaluation. This would unjustifiably restrict any serious monitoring exercise and diminish the value of its conclusions.

71. One of the main purposes of the evaluation exercise will be to inform all those involved in the criminal justice systems of the 25 Member States, as well as the media, of eachothers' practices and records of compliance. It will therefore be necessary to publish the annual reports.

Financial implications

72. The realisation in practice of the minimum standards set out in this proposal is crucial for EU Member States to fulfil their international and domestic law obligations to guarantee the right to a fair trial. Effective access to these rights will serve, in turn, to promote greater co-operation between Member States in the fight against cross border crime. If the Framework Decision is, however, to make a real difference to existing standards across Europe, it will require a firm financial commitment on the part of Member States. Without the allocation of adequate resources, the requisite training and remuneration for lawyers, interpreters and translators will not be provided, denying the safeguards of the Framework Decision of any real value. This needs to be given serious consideration in all Member States to ensure the Framework Decision is not reduced to another, well intentioned but empty, piece of rhetoric.

¹³ See schedule 7, part 3