



**JUSTICE response to the European Commission
Consultation Paper on Procedural Safeguards for
Suspects and Defendants in Criminal Proceedings**

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1. JUSTICE is a British all party law reform and human rights organisation. JUSTICE seeks greater fairness, effectiveness and advancement of human rights in the legal system. JUSTICE works through policy-orientated research; interventions in court proceedings; education and training; briefings, lobbying and policy advice.

2. JUSTICE welcomes the Commission Consultation Paper seeking to establish minimum standards in procedural safeguards across the European Union as a positive step in protecting the rights of the individual in the European Judicial Space where judicial co-operation between police and prosecuting authorities is increasingly close. As the Commission is aware, JUSTICE believes that there is an additional need for EU standards in the specific circumstances of criminal proceedings involving international judicial co-operation. This paper will not deal with those issues which are outlined in a separate JUSTICE proposal¹

3. As stated in the Consultation Paper, the rights described are already recognised in Europe, in particular the rights are mostly enshrined in:

- the European Convention on Human Rights
 - ARTICLE 3 – Prohibition of torture
 - ARTICLE 5 – Right to liberty and security
 - ARTICLE 6 – Right to a fair trial
 - ARTICLE 7 – No punishment without law
 - ARTICLE 8 – Right to respect for private and family life
 - ARTICLE 13 – Right to an effective remedy
 - ARTICLE 14 – Prohibition on discrimination
 - PROTOCOLS 4, 6, 7, 12 and 13

- the Charter of Fundamental Rights of the European Union (2000)
 - Chapter VI – JUSTICE
 - ARTICLE 47 – Right to an effective remedy and to a fair trial
 - ARTICLE 48 – Presumption of innocence and right of defence
 - ARTICLE 49 – Principles of legality and proportionality of criminal offences and penalties

¹ for a Framework Decision on the rights of the individual in criminal proceedings involving international judicial co-operation (JUSTICE) January 2002.

ARTICLE 50 – Right not to be tried or punished twice in criminal proceedings for the same criminal offence

4. The difficulty within the European Union is that these rights are guaranteed and interpreted in varying ways from jurisdiction to jurisdiction. Any exercise in establishing minimum standards in the EU must, therefore, go further than simply reiterating these rights in general by establishing with sufficient clarity, exactly where the line lies in the EU for respecting those rights. Once the level of minimum standards is established, that level must be enforceable and JUSTICE believes that a framework decision would be the appropriate instrument with which to implement minimum standards. JUSTICE would suggest the following as a useful hierarchy of sources for identifying where that line must lie:

- the case law of the ECHR
- additional international norms (such as Council of Europe recommendations and UN instruments)
- the procedure and practice in the Member States themselves (JUSTICE is in a position in particular to comment on the system in England and Wales)
- the highest level of minimum standards available within the EU in a Member State's legal system should provide the guide rather than the lowest

5. While any proposal for minimum standards must take into account the political realities of its potential for acceptance, it should aim to raise standards in general in the EU and not simply to endorse the status quo. JUSTICE is concerned that a non-regression clause should be incorporated into legislation on minimum standards so that Member States cannot use the establishment of minimum standards at EU level as a reason to lower existing national standards.

6. JUSTICE strongly opposes the use, in the context of EU minimum standards, of the notion of “margin of appreciation” as developed in Strasbourg jurisprudence. As judicial co-operation on an EU level is founded on trust between the legal systems of the Member States, there should be no room for a margin of appreciation on standards in criminal procedure within the EU.

7. The notion of proportionality should be incorporated into any legislation on minimum standards relating to procedures that involve limitations on the exercise of fundamental rights.

8. Minimum standards in criminal procedures must contain provision for challenging breaches of fundamental human rights in substantive law. This is particularly important in the light of developments such as the European Arrest Warrant which signal an erosion in the principle of dual criminality in international judicial co-operation. A tacit acceptance of the validity of the substantive criminal law of all Member States must be based on an assumption that the substantive laws of all Member States should not be in breach of human rights and that, where a question as to the validity of a law arises in relation to human rights principles, that law must be open to legal challenge.

9. An overarching principle in any statement of minimum standards must be the enforceability of those standards. JUSTICE believes that any instrument establishing minimum standards across the European Union must have the following qualities:

- **It must be binding on Member States**
- **Implementation of the rules on minimum standards must be independently monitored across the European Union**
- **It must contain provision for judicial accountability at a European level in case of breach of the rules on minimum standards (including the right of the individual to bring proceedings in case of breach) – the appropriate forum for decisions to be taken at EU level would be either the ECJ or some form of European Criminal Court**
- **It must contain provision for sanctions against Member States who are found to be in breach of the rules on minimum standards**
- **It must require adequate funds to be provided by Member States and/or a central EU fund for appropriate legal representation of defendants and suspects.**

10. The main problem at the moment in terms of standards, as identified by the Commission in the consultation paper, is not their absence but the deficiencies in practice. Without the possibility of enforcement, the establishment of minimum standards would do little to change this. JUSTICE believes that effective enforcement and sanctions for breach of minimum standards is absolutely crucial in the establishment of meaningful minimum standards across the EU.

11. This paper will deal firstly with JUSTICE's views and comments on the rights contained in the "summary of the rights" contained in para 2.2.3 of the Consultation Paper. Some topics will be dealt with more thoroughly than others but this is not an indication that those areas dealt with more superficially are any less important. The issues will be dealt with using the following structure:

- Principles and JUSTICE recommendations for minimum standards
- Discussion and justification for principles and recommendations:
 - (i) Which right is engaged?
 - (ii) What, if any ECHR case law exists to clarify this point?
 - (iii) What are the minimum standards on the issue in England and Wales?
 - (iv) Where problems might arise in terms of comparative minimum standards across the EU in relation to this issue

12. Secondly, the paper will address some of the questions posed at the end of the Consultation Paper and finally, it will conclude with some general comments on the consultation paper and the nature of an instrument designed to establish minimum standards.

I – A SUMMARY OF THE RIGHTS

a) The right to be presumed innocent until proved guilty

13. In JUSTICE's view, European minimum standards should reflect the fact that the right to the presumption of innocence under Article 6(2) ECHR requires that reverse onus burdens imposed on defendants should be strictly confined to requiring the defendant to adduce evidence rather than to prove elements of the offence.

14. The presumption of innocence is protected by Article 6(2) of the Convention, which states:

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

15. One of the most problematic issues in relation to the presumption of innocence, both in UK and in ECHR case law, has been the assessment against Article 6 of "reverse onus" clauses, which transfer the burden of proof to the defendant in relation to at least one

element of an offence. It is well established in the Convention case law that such presumptions of law or fact will not always breach Article 6(2).²

16. The Court of Human Rights in *Salabiaku v France* (1988) 13 EHRR 670, whilst accepting that some presumptions of fact and law were legitimate stated:

Article 6.2 does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence...

17. Similarly, the Privy Council in *McIntosh v HM Advocate*³ noted the limits to the interests of the community in limiting Article 6 rights: "the general interest of the community in suppressing crime, however important, will not justify a state in riding roughshod over the rights of a criminal defendant ..."⁴.

18. In *R v DPP ex p Kebilene* [2000] 2 AC 326, reverse onus clauses in the Prevention of Terrorism Act were challenged. The Divisional Court in *Kebilene* considered that the reverse onus clauses in section 16A of the Prevention of Terrorism Act which transferred a persuasive burden of proof to the defendants in respect of elements of the offence,⁵ breached Article 6 in a blatant and obvious way. The House of Lords left open the question of whether the reverse onus clauses breached Article 6. However, Lord Cooke stated:

I see great force in the Divisional Court's view that on the natural and ordinary interpretation there is repugnancy. To introduce concepts of reasonable limits, balance or flexibility, as to none of which Article 6.2 says anything, may be seen as undermining or marginalising the philosophy embodied in the straightforward provision that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law ... it may be highly inconvenient that this should not be permissible ... but at best it is doubtful whether Article 6.2 can be watered down to an extent that would leave section 16A unscathed.

19. In *R v Lambert*, [2001] UKHL 37, the House of Lords, while dismissing the defendants' appeal on a separate issue, held by a majority that, in accordance with the principle of

² *Salabiaku v France* 13 EHRR 379

³ *HM Advocate and HM Advocate General for Scotland v Robert McIntosh* (2001) 2AER 638

⁴ Lord Bingham at (2001) 2AER 638 para 31

⁵ Section 16A provided that, on a charge of possession of an article in circumstances giving rise to a reasonable suspicion that the article is in his possession for a purpose connected with terrorism, there is a presumption that the article was in the accused's possession for a purpose connected with terrorism, subject to the accused's establishing a defence, on the balance of probabilities, that the article was not in his possession for such a purpose.

proportionality, the reverse onus provisions should be "read down" so as to impose only an "evidential" rather than a "persuasive" burden of proof, in order to comply with Article 6(2). Under the evidential burden, for example, a defendant is required only to provide sufficient evidence to raise a doubt as to the contents of a package, rather than to prove that he did not know that it contained drugs.

b) The right to have someone informed of the detention

20. The right to have someone (other than a legal representative and/or consular official – for which, see relevant sections below) informed of the detention should apply from the beginning of detention. Any possibility of denial of this right should be on a very restricted basis. Any restriction on this right should involve a degree of authorisation and the reasons for the restriction should be recorded.

21. Special consideration should be given to the consequences for particularly vulnerable people or to the carers of vulnerable people in relation to any limitation on this right.

22. Article 8 of the ECHR – Right to respect for private and family life states that:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

23. The possibility of the restriction of the right must therefore be necessary for one of the reasons outlined above as well as being proportionate and in accordance with the law. Restriction should be on a limited basis such as reasonable grounds for believing that informing the person concerned:

- (a) will lead to interference with or harm to evidence connected with a serious arrestable offence or interference with or physical injury to other persons; or
- (b) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or
- (c) will hinder the recovery of any property obtained as a result of such an offence; or

(d) where the offence is a drug trafficking offence (or an offence for which orders can be made to confiscate the proceeds of crime), that the detained person has benefited from drug trafficking (or crime) and that the recovery of the value of that person's proceeds of drug trafficking (or crime) will be hindered by the exercise of the right.⁶
as reflected in PACE 1984 in England and Wales.

c) The right to Legal Advice and Assistance; the right to Legal Aid

24. These two rights are so connected that they are dealt with together. They arise under Article 6 of the ECHR, in particular:

- (1) Article 6.1: In the determination ... any charge against him, everyone is entitled to a fair ... hearing ...; and
- (2) Article 6.3: Everyone charged with a criminal offence has the following minimum rights: ...
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (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;
 - (d) to examine or have examined witnesses against him ...

Article 47 of the Charter states that:

Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

The following issues need to be considered.

- (i) *When does the right to legal advice, assistance or aid arise?*

25. JUSTICE believes that the right to legal advice and assistance arises at the initial point where police questioning begins, whether or not the suspect has been formally arrested. In order for the right to be effective, the suspect must be informed of that right in a language that he/she understands and must be given the real possibility of contacting a lawyer.

⁶ See PACE 1984 s.56

26. Police interrogation of a suspect should not continue in the absence of a lawyer unless the suspect has explicitly waived the right to have a lawyer present. In the event that a suspect waives the right of legal assistance at the police station, a formal record should be made of that waiver. Subsequent questioning in the absence of a lawyer should also be recorded as a guarantee of fair conduct during interrogation.

27. The case of *Murray v UK (1996) 22 EHRR* gives some guidance as to when the right to legal advice arises:

The concept of fairness enshrined in Article 6 requires that the accused has the benefit of the assistance of a lawyer... at the initial stage of police interrogation.⁷

28. Legal advice at the initial stage of police interrogation is particularly important where domestic legislation allows for the drawing of adverse inferences from a decision not to answer questions in interview as is the case in the England and Wales.

29. The Council of Europe Standard Minimum Rules for the Treatment of Prisoners Article 93⁸ gives useful guidance on this point:

Untried prisoners shall be entitled, as soon as imprisoned, to choose a legal representative, or shall be allowed to apply for free legal aid where such aid is available and to receive visits from that legal adviser with a view to their defence and to prepare and hand to the legal adviser, and to receive, confidential instructions. On request, they shall be given all necessary facilities for this purpose. In particular, they shall be given the free assistance of an interpreter for all essential contacts with the administration and for their defence.

30. The standards relating to the right of access to a solicitor while “held in custody in a police station or other premises” are enshrined in England and Wales in s.58 PACE Act 1984 and are elaborated in Code C 3.1, 3.2, 6 and Annex B of the Act (the 1995 version of Code C is the latest). The obligation to inform a person of their right of access to a solicitor arises when they are under arrest at a police station or in “police detention”. The possibility for limitation of that right in England and Wales is extremely narrow. Firstly, access to legal advice may only be delayed for up to 36 hours and then only if a person is detained for a “serious arrestable offence” and such delay is authorised by an officer of at least the rank of

⁷ para 66

⁸ Annexed to Rec. (87) 3 of Committee of Ministers, Council of Europe

superintendent (a different regime applies to those held under Terrorism legislation). The grounds upon which such delay may be permitted are reasonable grounds for believing that access to a solicitor:

- (a) will lead to interference with or harm to evidence connected with a serious arrestable offence or interference with or physical injury to other persons; or
- (b) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or
- (c) will hinder the recovery of any property obtained as a result of such an offence; or
- (d) where the offence is a drug trafficking offence (or an offence for which orders can be made to confiscate the proceeds of crime), that the detained person has benefited from drug trafficking (or crime) and that the recovery of the value of that person's proceeds of drug trafficking (or crime) will be hindered by the exercise of the right.

31. Two key British cases⁹ stress the importance of the right of access to a solicitor as “one of the most important and fundamental rights of a citizen”¹⁰. These cases limit the denial of access to cases where the police officer actually believes “that a solicitor would, if allowed to consult the person in police detention, thereafter commit a criminal offence and that, to sustain such a basis for refusal, the grounds put forward would have to be by reference to a specific solicitor.”¹¹

32. Although the right under s. 58(1) does not extend to a person on remand in custody at a magistrates' court, there is a common law right, on request, to be permitted to consult a solicitor as soon as reasonably practicable in such cases¹².

33. In relation to legal aid for legal advice in the police station, the right is given additional protection by the absence of a merits test at this stage of proceedings.

34. It should be noted that the right to legal advice and assistance at the police station is not protected to the same level in Scotland as it is in England and Wales.

35. In Scotland, a person may be detained for questioning by the police or by officers of HM Customs & Excise for up to six hours, at the end of which period that person must be

⁹ *R v Samuel* [1988] Q.B. 615, 87 Cr. App. R. 232, *R v Silcott, Braithwaite and Raghip*, The Times, December 9, 1991.

¹⁰ Archbold 2002, at 15-212, *R v Samuel* [1988] Q.B. 615, 87 Cr. App. R. 232 (at pp. 630, 245)

¹¹ Archbold 2001, at 15-217

¹² *R v Chief Constable of South Wales, ex p. Merrick* [1994] 1 W.L.R. 663, DC.

arrested or released.¹³ There is, however, no right of access to legal advice during this period of detention. While some police forces will permit legal advisers to have access, this is not universal practice throughout Scotland. Persons who have been arrested and charged are entitled to a private interview with a solicitor before they appear in court (which in serious cases will be the next day). Persons in custody are not obliged to answer questions put to them by the police, and as a general rule it is not permissible for inferences to be drawn from a suspect's refusal to answer such questions.

36. Where there is a breach of section 58, this may be considered as relevant to decisions made on the admissibility of evidence obtained. JUSTICE believes that any level of minimum standards set on an EU level in relation to the right to legal advice should be at least at the level set out in s. 58 of PACE Act 1984. JUSTICE also believes that decisions taken in the courts of England and Wales on the admissibility of evidence obtained in other countries outside the remit of the provisions in PACE should apply the same standards as those applied domestically.

37. In Scotland the conduct of the police in questioning a suspect may result in submissions to the court that any statement made by a suspect should not be admitted into evidence, on the ground that it has been unfairly obtained. The fact that an incriminating statement has been made without access to legal advice would not, however, of itself justify treating that statement as having been unfairly obtained.

(ii) *Confidentiality*

38. JUSTICE believes that the principle that interviews between a suspect or defendant and their legal adviser may be within the sight but not within the hearing of police officers or court or prison staff is a useful guideline at EU level. JUSTICE understands that in some Member States there may be explicit provision for the monitoring of conversations between a suspect and their legal representative in the early stages of their detention. This practice should not be acceptable within the context of EU wide minimum standards.

¹³ Criminal Procedure (Scotland) Act 1995, s. 14.

39. The principle of legal professional privilege and the confidentiality of communications between a suspect / defendant and their lawyer arises in terms of both Article 6 and Article 8 of the ECHR although it is not explicit in the text of the Convention.

40. The extent to which this right is protected is elaborated in ECHR case law as follows:

*Brennan v UK (2002)*¹⁴

...Article 6(3) normally requires that an accused be allowed to benefit from the assistance of a lawyer in the initial phases of an interrogation. Furthermore, an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial and follows from Article 6(3)(c). If a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective..

41. *Kopp v Switzerland*¹⁵ makes it clear that there are very limited grounds permissible for restricting legal professional privilege. A violation of the Convention on these grounds does not necessarily imply the existence of an injury¹⁶.

42. The Council of Europe Standard Minimum Rules for the Treatment of Prisoners Article 93¹⁷ gives useful guidance on this point:

Interviews between prisoners and their legal advisers may be within sight but not within hearing, either direct or indirect, of the police or institution staff.

This would be an appropriate minimum standard for confidentiality of legal advice at all stages in proceedings.

43. In practice in England and Wales until very recently, breaches of confidentiality in client – lawyer contact could occur in some Magistrates' Courts. This was a particular problem in old courts where there were no interview room facilities and lawyers were obliged to take instructions through the wicket of an, often crowded, cell within the hearing of court security staff. Until recently there were unsatisfactory interview facilities at Bow Street Magistrates'

¹⁴ *Brennan v UK [2002] Crim. L.R. 216* at para 58, see also *S v Switzerland (1992) 14 EHRR 670* at para 48

¹⁵ *Kopp v Switzerland (1999) 27 EHRR 91*

¹⁶ *S v Switzerland*, supra.

¹⁷ Annexed to Rec. (87) 3 of Committee of Ministers, Council of Europe

Court (currently the only designated court able to process extradition requests and as such affecting both national and international proceedings in England and Wales) although we understand that moves have been made to provide interview facilities on demand there now. JUSTICE is aware that the Lord Chancellor's Department has been addressing this problem over the past few years and has closed many court centres where there are no interview facilities. This may, however, continue to be a problem in other Member States.

(iii) *Test of means and merits and the 'interests of justice'*

44. Minimum standards should require free legal aid to be provided where the "interests of justice" demand it and the person concerned does not have access to the means to pay for their own legal representation. The possibility of imprisonment as a result of the proceedings should always be enough to fulfil this requirement, as should an international element in the proceedings such as extradition.

45. In *Pakelli v Germany*¹⁸, the European Court of Human Rights stated that 'if [a person charged with a criminal offence] does not have sufficient means to pay for such assistance, he is entitled under the Convention to be given it free when the interests of justice so require'. Relevant criteria in the determination of the 'interests of justice' in this context include the complexity of the proceedings, the capacity of the individual to represent himself and the severity of the potential sentence¹⁹. It is clear that a sentence is sufficiently severe if it involves imprisonment.²⁰

46. In terms of well-established English law, legal aid must be available according to the interests of justice. These have been defined to include:

- (a) whether the individual would, if any matter arising in the proceedings is decided against him, be likely to lose his liberty or livelihood or suffer serious damage to his reputation;
- (b) whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law;

¹⁸ (1984) 6 E.H.R.R. 1 at p31

¹⁹ *Quaranta v Switzerland* (1991) Series A No 205, *Granger v UK* (1990) 12 E.H.R.R.469

²⁰ (1996) 22 E.H.R.R. 293

- (c) whether the individual may be unable to understand the proceedings or to state his own case;
- (d) whether the proceedings may involve the tracing, interviewing or expert cross-examination of witnesses on behalf of the individual, and
- (e) whether it is in the interests of another person that the individual be so represented.²¹

47. These should be the minimum criteria for the merits test of legal aid. In fact, English legislation purports to allow the Lord Chancellor to vary the list.²² Minimum European standards should not be set below these criteria or allow for these criteria to be reduced.

(iv) *Effectiveness of representation – quality*

48. Certain kinds of case involve particular levels of expertise in order for legal representation to be effective. This is particularly the case in proceedings with an international aspect and serious, complex crimes such as fraud or money laundering. For this kind of offence, there should be recognised lists of appropriate legal representatives to ensure adequate representation across the EU. It is clearly not appropriate for a trainee lawyer or a purely family law practitioner to be the sole legal representative of someone in a case concerning, for example, international drug trafficking and/or extradition. JUSTICE recommends that National Bars could easily set up an official directory of lawyers appropriately qualified to deal with serious offences and/or cases with an international aspect to ensure an appropriate level of quality of representation in very serious and complex cases.

49. Quality will, of course, be affected, to some extent, by the level of fees paid to representation funded by the state. Minimum standards should require payment at an adequate level and funding for such payment should be provided either by Member States and/or, as a last resort, if necessary out of central EU funds (this might help to alleviate the financial burden of increased legal aid in poorer countries).

50. The quality of representation by lawyers under legal aid has been the subject of some discussion in England and Wales.²³ As a result, specialisation schemes have been developed by the Law Society and the Legal Services Commission has introduced

²¹ Formerly known as the 'Widgery criteria', now incorporated in Sch 3, para 5(2) Access to Justice Act 1999.

²² Sch 3, Para 5(3)

²³ See eg McConville et al *Standing Accused: The organisation and practices of criminal defence lawyers in Britain* OUP 1993

contracting on approved service standards, at least for solicitors. The requirement for representation of adequate quality arises from the requirement to provide a 'fair trial'. Accordingly, minimum standards should specify that representation be effective in terms of quality. Consideration might be given as to whether minimum standards should specify a requirement of certified specialisation in appropriate cases.

(v) *Effectiveness of representation – investigation etc.*

51. The purpose of legal aid is to provide a fair hearing. Thus, legal aid costs should not be limited to those simply of legal representation. A defendant must be capable of receiving assistance with the adequate preparation of his case. Thus, 'legal aid' should be broadly defined to include, for example, the tracing of witnesses or the obtaining of expert evidence.

52. Notably, the European Commission's draft directive for civil legal aid in cross-border disputes defines legal aid as 'all resources made available to persons to ensure their effective access to justice ...'²⁴ Minimum standards should be similarly broad in their understanding of the term 'legal aid' and the purpose which it is to satisfy.

(vi) *Effectiveness of representation – time*

53. Article 6 of the ECHR guarantees "a fair and public hearing within a reasonable time". Delays in proceedings are, however, still a major problem in some Member States and are of concern to most courts. While, clearly, swift administration of justice is desirable, the speed of proceedings should not be to the detriment of the rights of the defence.

54. JUSTICE would suggest that guideline time scales could be imposed to ensure that minimum standards of preparation time for defence lawyers could apply across the EU. These would be particularly important in cases where deprivation of liberty or very serious consequences for the defendant²⁵ are possible outcomes of proceedings. Time limits could apply in relation to general case preparation time (and disclosure – see below) and to notification to the court of the identity of the trial lawyer (for

²⁴ COMn (2002) 13 final Article 2

²⁵ *Pham Hoang v France* (1992) 16 EHRR 53 where " the proceedings were clearly fraught with consequences" for the defendant who was convicted of importing drugs and ordered to pay a substantial fine.

example, notification could be made 24 hours before the trial is due to start). This kind of time limit would allow lawyers to make effective applications for adjournment where the defendant's rights could be at risk from lack of time to prepare a case either in general or specifically at trial stage. An exception to this time limit should occur in cases where the defendant has consistently dismissed defence lawyers when a trial was due to commence but should not occur where it is the diary of the defence lawyers in question that have led to a last minute change.

55. The issue of effectiveness of legal representation is affected by many elements, not least, the time to prepare. Although there may realistically be limitations on the number of consultations with a lawyer provided by the state²⁶ due to restricted resources, a defence lawyer must have sufficient time to prepare a case.

56. It is clearly difficult to express in exact terms what "sufficient time" is as it will vary from case to case depending on issues such as complexity and seriousness of the offence as well as on the nature of each different legal system. The ECHR does, however, provide guidance as to how to approach cases where a new lawyer has been appointed at the last minute.

57. A defence lawyer must be appointed in sufficient time to enable a case to be properly prepared²⁷. *Murphy v UK*²⁸ makes it clear that counsel should apply for an adjournment where there is not adequate time to prepare a defence. This must be understood to extend to a court's obligation to consider such applications very seriously in the light of a potential breach of Article 6 of the ECHR (for which there is no requirement to show prejudice²⁹). Strasbourg case law indicates that in cases where there is a change of lawyer, the newly appointed lawyer must be given additional time to prepare³⁰.

58. There can be a tendency in courts to have a close eye on the speed with which the court's business is despatched without taking into account the possible prejudice to the defendant of the late appointment of a defence lawyer. The rights of the defence must be respected and there should not be professional pressure exerted on defence lawyers by the courts (or by the legal profession) to represent a defendant without adequate time to prepare

²⁶ *Borgers v Belgium* (1993) 15 EHRR 92 at para 24

²⁷ *Perez Mahia v Spain* (1987) 9 EHRR 145

²⁸ *Murphy v UK* (1972) 43 CD 1; 2 Digest 794

²⁹ *Artico v Italy* (1981) 3 EHRR 1 at para 35

³⁰ *Goddi v Italy* (1984) 6 EHRR 457

a case. Likewise, a defendant should not be prejudiced by a perceived fault on the part of a defence team in changing lawyers at the last minute. There may be cases where defendants use the legal system to put off trial by constantly changing defence lawyers at the last minute a discretion to waive such a time limit should apply in cases of clear abuse of process on the part of the defendant in this way.

59. JUSTICE would suggest that time limits for the preparation of a case could be drawn up that reflect the possible differences in procedure and the different levels of seriousness of offences.

60. There are particular difficulties that arise in the split profession as found in England and Wales. The system of “warned lists” in courts amplifies the problem of trial counsel being changed at the last minute. The fact that the adversarial system relies on the trial stage of proceedings almost exclusively in reaching a decision as to guilt or innocence exacerbates the problem of trial counsel being appraised of a case at a very late stage. The fact that the instructing solicitor is rarely present in court at a trial does not help the situation. (JUSTICE is not aware that this is a problem in Scotland where an instructing solicitor would normally be present. In any case, in most cases the accused will be dealt with in the sheriff court where solicitors have rights of audience. And in an increasing number of cases in the High Court the accused will be represented by a solicitor-advocate with full rights of audience.) As the practice of changing trial counsel at the last minute (in both Magistrates’ and Crown Courts) is such an accepted part of legal practice in England and Wales, adjournments are seldom sought on this basis and where applications are made they are often refused to the detriment of the rights of the defendant. It is possible that this issue does not arise in inquisitorial systems where less weight is placed on the final trial stage in proceedings or in fused systems where one lawyer or team of lawyers takes a case from start to finish.

d) The right to a competent, qualified (or certified) interpreter and/or translator so that the accused knows the charges against him and understands the procedure

61. JUSTICE believes that everyone who needs an interpreter should have access to a competent interpreter at all stages of the proceedings from police questioning through trial and sentencing. This should apply to foreign languages, domestic minority languages and disability related interpreting such as sign language. The “letter of rights” suggested by the Commission in the consultation paper should be made available to the defendant in a language which he/she understands (not just EU languages) and should be available in Braille.

62. JUSTICE understands that practice and principle vary greatly in this area across the EU on this point and that there is a need for some kind of harmonisation of practice. Fair Trials Abroad has done a significant amount of research in this field and JUSTICE would suggest that the results of that research may form a useful reference for establishing minimum standards.

e) The right to bail (provisional release) where appropriate

63. The right to bail is an issue that needs to be addressed in the particular light of the European Arrest Warrant and is of key importance to the development of procedural safeguards for the suspect and/or defendant in a European judicial space. As the Commission states that it intends to address this issue in a separate piece of work, JUSTICE will not deal with this issue further in this response but looks forward to responding to specific proposals regarding bail in the near future.

f) The right against self-incrimination

64. In JUSTICE's view, where serious, non-regulatory offences are involved, the minimum standards should make clear that the very essence of the freedom from self-incrimination should be preserved, whatever the public interest considerations that prevail.

65. The freedom from self-incrimination is established as an implied right in Article 6 ECHR, in criminal cases, (*Funke v France*³¹) closely connected to the presumption of innocence and the right to remain silent. It is regarded as an important element of the right to a fair trial, in preventing miscarriages of justice and ensuring fair procedures. At the investigatory stage, there is, therefore, a right not to be unfairly compelled (by threat of criminal sanctions or otherwise) to answer questions which would incriminate the accused; there is also a right at trial to exclude evidence which has been unfairly or improperly compelled from the accused. The freedom from self incrimination may be breached where, for example, evidence obtained under compulsion in a non-criminal investigation by revenue authorities or similar bodies, is then used in evidence in criminal proceedings (see for example, *Saunders v UK*³²).

³¹ *Funke v France* (1993) 16 EHRR 297

³² *Saunders v UK* (1996) 23 EHRR 313

66. It is accepted that the freedom from self-incrimination is not an absolute right, and that the public interest may therefore be relevant to its construction. Nevertheless, the circumstances in which the freedom can be interfered with have been strictly construed under Article 6. The recent case of *Heaney and McGuinness v Ireland*³³ has confirmed this, stating that as a matter of principle the freedom from self-incrimination is not absolute. However the court found that the legislation challenged in the case, which conferred powers to compel self-incriminatory statements under emergency anti-terrorist legislation, breached the "very essence" of the freedom from self-incrimination, and was therefore contrary to Article 6. The legislation could not be justified as proportionate to the public interest in the investigation of terrorist offences.

67. In determining whether there has been a breach of the right of self-incrimination, the degree of compulsion involved, the fairness of procedures, and the seriousness of the offence, are all likely to be relevant (*Funke v France*³⁴, *Heaney and McGuinness v Ireland*³⁵, *Stott v Brown*³⁶). However, the Court of Human Rights, in stressing the importance of preserving the "very essence" of the right in the *Heaney and McGuinness*³⁷ case, has made clear that even very strong public interest considerations, such as the prevention of terrorism, will not justify a clear breach of freedom from self-incrimination.

68. The issue has been dealt with in the UK in a Scottish case, *Stott v Brown*³⁸, in the Privy Council, where it was held that powers under road traffic legislation to compel a suspect in a road traffic offence to state who was the driver of the car at the time of the offence, did not breach the freedom from self-incrimination. In reaching this decision, the capacity of the freedom from self-incrimination to be qualified in the public interest, and the nature of the minor regulatory offence involved, were both significant. It is, however questionable whether this can be reconciled with the decision in *Heaney and McGuinness*³⁹.

g) The right to consular assistance (if not a national of the State of prosecution)

³³ *Heaney and McGuinness v Ireland*, Judgment of December 21, 2000

³⁴ See above

³⁵ See above

³⁶ *Stott v Brown* (2001) RTR 11

³⁷ See above

³⁸ See above

³⁹ above.

69. JUSTICE shares the Commission’s view that if all Member States were to ratify the Vienna Convention on Consular Relations 1963, the provisions in Article 63 of that Convention would greatly improve the respect of the right to consular assistance in the EU. Ratification of this Convention would provide a useful EU minimum standard and should be strongly encouraged.

h) Fairness in obtaining and handling evidence (including the prosecution’s duty of disclosure)

70. We understand that general issues relating to fairness in obtaining and handling evidence will be dealt with separately by the Commission and will restrict our comments here accordingly to the duty of disclosure.

Prosecution Disclosure

71. JUSTICE believes that European minimum standards of disclosure should address the following key points:

- **The duty of disclosure should apply to all material evidence whether for or against the accused**
- **There should be independent scrutiny of the extent of disclosure**
- **Disclosure should not be dependent on defence legal representation or on a defence case statement**
- **Where there is a right to presence at a hearing or access to evidence, the defence should be informed of that right and of the existence of relevant hearings and/or evidence.**

72. Disclosure of evidence against the accused is guaranteed through Article 6 of the ECHR inasmuch as it is a major element of a fair trial.

73. The differences between the civil inquisitorial systems and the common law adversarial systems mean that issues of disclosure arise at different stages and in different ways according to the procedures in the systems concerned. Some inquisitorial systems approach disclosure through the “dossier” of a case rather than in the form of prosecution disclosure seen in the England and Wales system and ECHR case law highlights some of the issues that can arise relating to the “dossier”.

74. There is a considerable amount of case law from the ECHR relating to the duty of disclosure. *Jespers v Belgium*⁴⁰ gives guidance as to the breadth of evidence covered by the duty of disclosure:

In short, Art. 6(3)(b) recognises the right of the accused to have at his disposal, for the purposes of exonerating himself or of obtaining a reduction in his sentence, **all relevant elements that have been or could be collected by the competent authorities**. The Commission considers that, if the element in question is a document, access to that document is a necessary facility ('*facilité nécessaire*') if It concerns acts of which the defendant is accused, the credibility of testimony etc.⁴¹

Jespers v Belgium also states that:

...most countries [entrust the preliminary investigation to] a member of the judiciary or, if it entrusts the preliminary investigation to a member of the Public Prosecutor's Department, instructs the latter to gather evidence in favour of the accused as well as against him.

75. This would indicate that disclosure should be of all material evidence for or against the accused and that there is a further duty on the prosecution to gather all such evidence. This has been referred to as the "common pool" principle⁴².

76. ECHR case law also suggests that there should be a measure of scrutiny independent of the executive where potentially relevant evidence may be withheld from the defence⁴³.

77. In England and Wales, the involvement of independent prosecution counsel is supposed to fulfil this requirement although it is debatable how satisfactory this safeguard is in practice. This safeguard will also become increasingly obsolete with the growth in numbers of employed prosecutors with increased rights of audience.

78. In inquisitorial systems, the question of scrutiny as to what is included in the dossier and the possibilities for the defence to challenge alleged omissions will need to be addressed in this context in order to establish true minimum standards. Clearly the close professional nature of the prosecution with the judiciary and/or the police in some inquisitorial systems

⁴⁰ *Jespers v Belgium* (1981) 27 D.R.61

⁴¹ at 87-88

⁴² *Edwards v UK* (1993) 15 EHRR 417

⁴³ *Rowe & Davis v UK* (2000) 30 EHRR 1, *Jasper v UK* (2000) 30 EHRR 441 App No. 27052/95, *Fitt v UK* (2000) 30 EHRR 1 App No. 29777/96, and see "Human Rights and Criminal Justice", 2001, Ben Emmerson QC and Andrew Ashworth QC, at p.381

could raise the question of whether the scrutiny of an investigating magistrate in fact fulfils this requirement of independent scrutiny and this is an issue that needs to be considered.

79. ECHR case law makes it clear that disclosure to the defence should be available to defence legal representatives and to the defendant himself in cases where there is no representation⁴⁴. It is no excuse for non-disclosure, even in minor cases, to say that access to documents can only be granted to a lawyer.

80. In England and Wales, the rules regarding disclosure are contained in the Criminal Procedure and Investigations Act 1996 (CPIA 1996). These have been added to by the Attorney General's Guidelines on the Disclosure of Information in Criminal Proceedings (2000) which has gone some way to addressing shortcomings in the standard of disclosure required under the CPIA 1996 for summary trials (in the Magistrates' Court). It should be noted that the duty to serve a defence case statement in proceedings in England and Wales in order to trigger secondary disclosure from the prosecution may raise difficulties in relation to the freedom from self-incrimination (see above). The duty of disclosure under Article 6 of the ECHR is not dependent on disclosure of the defence case as is currently the case in England and Wales.

81. Cases involving Public Interest Immunity (PII) raise particular questions in relation to disclosure in England and Wales. ECHR case law indicates that PII cases must go before a judge for a decision⁴⁵. The question of whether or not there should be some degree of defence representation at ex parte hearings of such decisions in the interests of the equality of arms principle remains open⁴⁶.

82. In Scotland, there are no statutory rules governing disclosure by the prosecution. Prosecution disclosure is governed, effectively, by article 6 of the Convention, as interpreted in *Edwards v United Kingdom*.⁴⁷ In *Maan, Petitioner*⁴⁸ the High Court relied on the Human rights Act 1998 and Convention case-law to hold that the duty of disclosure relates not only to information bearing directly on the accused's guilt or innocence, but to information which the defence may require in order to challenge the credibility of opposing witnesses. It is

⁴⁴ *Foucher v France* (1998) 25 EHRR 234

⁴⁵ *Edwards v UK* (see above)

⁴⁶ It was the view of the minority in *Jasper v UK* (2000) 30 EHRR 441 that there should be.

⁴⁷ 15 EHRR 417. See *McLeod v H.M. Advocate* 1998 SCCR 77.

⁴⁸ 2001 SCCR 172.

probably the case that questions of public interest immunity will have to be resolved in Scots law by the court,⁴⁹ but in *McLeod v H.M. Advocate* the Lord Justice-General suggested that:

in reaching its decision, the court will continue to attach the weight which it has always hitherto attached to an expression of view by the Lord Advocate as to the public interest in maintaining the confidentiality of any document.⁵⁰

83. JUSTICE hopes that minimum standards on an EU level will, in any event, be no lower than the standards outlined in the CPIA 1996 in combination with the Attorney General's Guidelines (2000) while recognising that these instruments address the particular issues arising in the legal system of England and Wales and are therefore not necessarily relevant to other legal systems within the EU.

Witnesses – Hearings and Anonymity

84. There may be issues relating to disclosure of the existence of witness hearings in inquisitorial systems. JUSTICE believes that in cases where the defence have a right to attend witness hearings, there should be a duty on the prosecution and/or the investigating judge to inform the defence of the witness hearing giving the defence sufficient time to attend if they so wish.

85. As to the anonymity of witnesses, decisions as to the acceptability of failure to disclose the identity of a witness will involve a careful balance between the physical safety of the witness and the impact on the fairness of the trial⁵¹. The general principle in relation to anonymous witnesses which should be followed is set out in *Kostovski v Netherlands (1990) 12 EHRR 434 at para 44*:

The Convention does not preclude reliance, at the investigation stage, on sources such as anonymous informants. However, the subsequent use of anonymous statements to found a criminal conviction ... is a different matter. It involved limitations on the rights of the defence which were irreconcilable with the guarantees contained in Art. 6.

⁴⁹ See *McLeod v H.M. Advocate*, above.

⁵⁰ 1998 SCCR 77, at p. 90.

⁵¹ *Doorson v Netherlands (1996) 22 EHRR 330*

86. This principle has been more recently elaborated in the case of *Visser v The Netherlands*⁵² which makes clear that evidence obtained from witnesses in conditions where the rights of the defence have not been secured to the extent normally required under the Convention should be treated with extreme care and goes on to say:

... when assessing whether the procedures followed in the questioning of an anonymous witness had been sufficient to counterbalance the difficulties caused to the defence, due weight had to be given to the extent to which the anonymous testimony had been decisive in convicting the applicant. If this testimony was not in any respect decisive, the defence was handicapped to a much lesser degree.⁵³

87. These principles should apply equally to witness testimony for purely domestic cases and cases involving international mutual assistance.

i) The right to review of decisions and/or appeal proceedings

Appeals on conviction or sentence

88. JUSTICE believes that the ratification of Protocol 7 to the ECHR would provide a useful minimum standard for appeals on conviction or sentence. JUSTICE also believes that the fair trial rights enshrined in Article 6 of the ECHR should apply to appeal proceedings. Reasons, however brief, should be given for decisions taken by appellate courts. In appeals involving consideration of fresh evidence, the defendant should be present and legally represented.

89. Article 2 of Protocol 7 to the ECHR provides:

2(1) Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

(2) This right may be subject to exceptions in regard to offences of a minor character as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

⁵² *Visser v Netherlands*, Judgment of 14 February, 2002 at paras 43 - 46

⁵³ as above at para 46

90. In terms of establishing minimum standards in this area, it would be helpful if all the EU Member States signed and ratified Protocol 7 to the ECHR.

91. While Article 6 of the ECHR does not guarantee a right to appeal as an intrinsic part of the right to a fair trial, ECHR caselaw establishes that, where domestic law allows for an appeal in criminal proceedings, that appeal will form part of the trial process and as such will be subject to the provisions of Article 6⁵⁴. In these cases, Article 6 applies not only to the substantive appeal but also to the proceedings for leave to appeal⁵⁵. Where appeals involve any determination of fact as opposed to pure questions of law, there should be a requirement of a public hearing in the presence of the accused⁵⁶. This is particularly important in cases where there is a full hearing on appeal in serious cases, or there an appeal involves the consideration of fresh evidence.

92. Article 6(1) entails the general principle that reasons should be given for a court's decision (including an appellate court)⁵⁷ although limited reasoning may suffice where a refusal to accept an appeal is based on the absence of sufficient legal grounds⁵⁸.

Review of decisions other than conviction or sentence

93. JUSTICE believes that all decisions taken during criminal proceedings which have an impact on the exercise of key rights enshrined in the European Convention on Human Rights should be open to some form of review by an independent judicial authority.

j) Specific guarantees covering detention, either pre- or post-sentence

Pre-Sentence

94. JUSTICE believes that detention should never be arbitrary. This should apply to all de facto detention and not be limited to detention following formal arrest. To prevent arbitrary detention, reasons for detention should always be given to the

⁵⁴ *Delcourt v Belgium (1979-80) 1 EHRR 335*

⁵⁵ *Monnell and Morris v United Kingdom (1988) 10 EHRR 205*

⁵⁶ *Ekbatani v Sweden (1991) EHRR. 504*

⁵⁷ *Hadjianatassiou v Greede (1993) 16 EHRR 219*

⁵⁸ *Webb v United Kingdom (1997) 24 EHRR CD 73 at 74*

suspect/defendant in a language which he/she can understand. A written record should be made of reasons for detention. Mere witnesses should not be the subjects of police detention.

95. The conditions of detention in police custody should not amount to an infringement of any key ECHR rights. In particular, the conditions of detention must not amount to a breach of Article 3, the right to freedom from inhuman and degrading treatment. To ensure that conditions are acceptable, a record should be made of times, medical reports, those informed of the detention and any other significant information relating to police to assist in monitoring conditions. Thought should be given, as well, to the desirability of establishing audio or video recording in police stations and in particular for recording police questioning of suspects as a safeguard against breach of minimum standards. There should be regular, adequate monitoring and supervision of police detention centres by judicial authorities and/or independent bodies to ensure compliance with minimum standards.

96. EU wide minimum standards could be extremely helpful in establishing acceptable time limits for pre-trial detention. These time limits should apply equally to both domestic and international cases within Europe. Any extension of established custody time limits should not be arbitrary and should only be possible on reasonable grounds and following a review by an independent judicial authority.

97. JUSTICE believes that the added protection afforded in Article 5(3) ECHR should apply to domestic and proposed European Arrest Warrant cases equally (as opposed to traditional extradition cases covered by Article 5(1)(f)) in the spirit of the creation of a true European Judicial Space. Mutual recognition of judicial decisions should extend to decisions on bail and continued detention. This point will be addressed further in a forthcoming consultation on bail.

98. Within the context of closer European judicial co-operation in criminal matters, the protections afforded by Article 5 must be effective and clearly defined on an EU as well as on a domestic level. To this end, further thought needs to be given to proposals such as the “European habeas corpus” proposal put forward by Neil McCormick MEP in the debates around the European Arrest Warrant. In cross border cases, clear lines of state accountability with regard to the legality of arrest or detention need to be drawn up in order to allow for effective challenges to legality as

well as making the right to compensation in case of a breach of Article 5 to be truly enforceable.

99. Article 5 of the ECHR (the right to liberty and security) is the main provision of relevance to detention, both pre and post sentence. Article 5 provides:

- (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - ...
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- (2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
- (3) Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
- (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
- (5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

100. A detention may be considered as arbitrary under Article 5(1) either with reference to its motivation or to its effect⁵⁹. There will be a breach of Article 5(3) if proceedings are not dealt with within a reasonable time where a court has ordered that a person should remain in custody pending trial. The denial of bail requires that the proceedings be conducted with special diligence⁶⁰. Expedition of proceedings must be balanced against the duty of the court to ascertain the facts of a case and to allow both parties to present their case (see above in relation to legal representation – note also that, increasingly in Scotland, requests for the

⁵⁹ *Bozano v France* (1987) 9 EHRR 297

⁶⁰ *Clooth v Belgium* (1992) 14 EHRR 717, para. 36; *Tomasi v France* (1993) 15 EHRR 1 para 84; *Herczegfalvy v Austria* (1993) 15 EHRR 437 para 71

extension of the 110 day rule are being made by the Defence in cases where they have not had adequate time to prepare the Defence case). As the ECHR case law has dealt with reasonable time on a case by case basis depending on the facts of each individual case, it gives little assistance as to what time limits should be imposed.

101. Detention on remand should, where possible, be close to the detained person's home to avoid a disproportionate restriction on the right to family life under Article 8 ECHR.

102. In England and Wales, custody time limits are governed by The Prosecution of Offences (Custody Time Limits) Regulations 1987⁶¹(as amended). Different time limits apply in the Magistrates' Court and in the Crown Court and vary according to the seriousness of the offence.

103. Briefly, for Magistrates' Courts, the maximum period of custody between the accused's first appearance and the start of a summary trial is 56 days but, where an offence is triable either way or on indictment only, the maximum period of custody is 70 days between the accused's first appearance and committal to the Crown Court for trial (or summary trial if that is decided upon in a triable either way matter after the 56 day threshold is past). The custody time limit between committal to the Crown Court and the start of trial in the Crown court is 112 days (in cases where an accused is sent for trial under s.51 of the Crime and Disorder Act 1998, directly from the Magistrates' Court, the time limit is 182 days, which is equal to the aggregate maximum custody time limit for indictable offences in any event).

104. These limits may be extended on application to the court. A defendant is entitled to be released on bail once a custody time limit, and any extension thereto has expired.

105. It should be noted, however, that caselaw in England and Wales demonstrates that each charge attracts its own custody time limit⁶². This means that new custody time limits may be imposed when a new charge substitutes the original charge, even on the same facts. There is extensive caselaw relating to mala fides on the part of the prosecution or misuse of the court process by introducing a new charge in order to avoid a defendant being released on bail on the expiration of a custody time limit⁶³. JUSTICE believes that, while time limits must be flexible enough to allow courts to take reasonable account of the individual

⁶¹ SI 1987 No 299 (see also Archbold 2002 para 3-56 et seq.)

⁶² *R v Wirral District Magistrates' Court, ex p. Meikle* [1991] C.O.D. 2, DC (see also Archbold 2001 para 1-270)

⁶³ See generally Archbold 2002 para 4-61

circumstances of a case, they should not be open to abuse through the use of substituted charges to extend the period of detention.

106. In Scotland, briefly, a person committed into custody to stand trial on indictment must receive the formal notice of the charges – the indictment – within 80 days of the date of committal, and the trial must be commenced within 110 days of the committal. Even if not held in custody, the accused must be brought to trial within 12 months. Extensions of these periods are permitted by the court on application, although the Court's willingness to grant applications by the Crown has been less ready than previously.

Post sentence

107. Detention post sentence must not be arbitrary. The sentence must be lawful and clearly defined. The conditions of detention must not amount to inhuman and degrading treatment in breach of Article 3 ECHR. Prisoners should be allowed to consult with their legal advisers confidentially (see above re. Legal Advice). Prisoners should be allowed effective contact with their families and respect for their correspondence in accordance with Article 8 ECHR, the right to respect for private and family life. Where possible, prisoners should be held within a reasonable distance of their family to ensure that the necessary restriction on their right to family life is not unnecessarily exacerbated. Dispersal of prisoners far from their homes should only be possible on the basis of necessity, not on the basis of general government policy – prisoner's families should not be unnecessarily penalised for the crimes of their loved ones, any breach of Article 8 rights must be proportionate. There should be a mechanism for external monitoring of prison conditions to ensure compliance with minimum standards.

k) Ne bis in idem

108. In relation to this consultation paper, JUSTICE believes that the following principles are key for minimum standards relating to *ne bis in idem*:

- **While limitation is undesirable, any limitations of the *ne bis in idem* principle in relation to acquittals should only apply to murder**
- **Re-opening any case following an acquittal which has the force of *res judicata* should only be possible on the basis of new material evidence with a significant probative value (and not on the basis of cell confessions or evidence that was available to the police at the time of the case) or on the basis**

of convincing evidence that the acquittal was made unsafe due to interference with the administration of justice (whether through threats or corruption).

- **The principle should apply on a European not just a national level**
- **Re-trial or re-opening of convictions or acquittals which have the force of *res judicata* should not be possible without the involvement of an appellate court**

109. This right is found in Article 4 of Protocol 7 to the ECHR, in Article 50 of the Charter of Fundamental rights and in Article 14(7) of the ICCPR. The details of how this right is applied, however, vary greatly throughout the EU making consensus difficult.

110. In the context of EU minimum standards, perhaps the most important principle relating to the rule against double jeopardy is that it should apply equally to proceedings that have taken place in another jurisdiction within the EU as it does to domestic proceedings – i.e. a person should not be tried for an offence in country A and then be tried again for the same offence in country B. Article 4 of Protocol 7 to the ECHR, currently only applies to the national level and does not prohibit successive prosecutions in different countries⁶⁴. JUSTICE would suggest that within the spirit of trust in each others legal systems that is being fostered in the EU and within the context of increased mutual recognition in the EU, any rule relating to double jeopardy should apply on an EU and not just a national level.

111. A second guiding principle is that the reopening of proceedings, whether by the prosecution or by the defence, should not be possible in the absence of a decision by an appellate court.

112. In establishing minimum standards in relation to double jeopardy it should be borne in mind that separate offences may arise out of the same set of facts. The case of *Oliveira v Switzerland*⁶⁵ establishes that separate prosecutions for different offences arising out of the same criminal conduct will not amount to a breach of Article 4 Protocol 7.

113. In England and Wales, the defence may seek to reopen criminal proceedings which have resulted in a final verdict of guilty, even if the verdict has acquired the force of *res judicata*. In such cases, the Court of Appeal may quash the conviction on the basis of fresh evidence or of a fundamental defect such as to render the conviction unsafe. Since 1988, the Court of Appeal has had the power to order a retrial.

⁶⁴ *AP v Italy* (Application No. 204. 1986, para 7.3)

⁶⁵ Judgment July 30 1998, unreported

114. Very similar powers exist in Scotland in relation to proceedings on indictment. However, in Scotland, the court cannot order a re-trial, but may only grant authority to the Crown to bring a fresh prosecution.

115. The Prosecution, in England and Wales, on the other hand, may currently only reopen an acquittal which has acquired the force of *res judicata* where there is convincing evidence that the acquittal was tainted by intimidation of a witness or juror. The procedure applicable under the CPIA 1996 (sections 54-56) only applies when either the defendant or another person has been convicted for an administration of justice offence involving a witness or juror in the trial in which the defendant was acquitted. A further requirement is that the court before which the administration of justice conviction was obtained certifies that “there is a real possibility that, but for the interference or intimidation, the acquitted person would not have been acquitted”. The procedure will not be used in cases where lapse of time or any other reason means that it is not in the interests of justice to reopen the acquittal. The retrial can only be for the offence for which the person was initially acquitted, not for any other offence based on the same facts.

116. In Scotland it is not open to the Crown to challenge an acquittal by a jury under any circumstances. In summary proceedings, however, the public prosecutor enjoys very similar rights of appeal to those enjoyed by the accused.

117. The Law Commission of England and Wales has published a report *Double Jeopardy and Prosecution Appeals*⁶⁶ for which JUSTICE prepared a response⁶⁷. The question of double jeopardy and proposed erosion of the principle in England and Wales has been discussed at length in those papers which may provide useful background for considering where to place a minimum standard on an EU level.

l) *In absentia* proceedings

118. JUSTICE believes that proceedings should only be conducted *in absentia* where the accused person has been informed of the existence, time and place of the proceedings and there is evidence that he or she has wilfully failed to appear and could not be brought to the court (e.g. because they have left the country or because

⁶⁶ Law Commission No. 267, January 24, 2001

⁶⁷ for more details see JUSTICE response to Law Commission on double jeopardy February 2000

they have systematically failed to appear at court on a number of occasions when they were fully aware of the proceedings).

119. In the event that proceedings carried out *in absentia* result in a conviction, the convicted person should have an automatic right to retrial before the execution of any sentence that may have been imposed. The right to retrial should be absolute⁶⁸.

II – RESPONSE TO QUESTIONS

a) Categories of rights not covered

120. JUSTICE would suggest the inclusion of the right to see a doctor at the police station.

b) Time limits for rights

121. JUSTICE would suggest that time limits should be established, in particular in relation to the right to legal advice, legal representation at trial and pre-trial detention. These points have been discussed in more depth in the relevant sections of this response.

c) Rights most commonly not respected at present

122. The right to consular assistance is not commonly respected at present in the UK and only applies to a limited number of countries with which the UK has bilateral agreements on the subject.

123. Access to legal representation for those held in investigatory detention is not universally recognised in Scotland.

d) Principal causes of miscarriages of justice

124. In JUSTICE's view, the failure to disclose evidence is the primary cause of miscarriages of justice. In England and Wales, more detailed information on this can be obtained from

⁶⁸ The right to a retrial in general should reflect the 2nd Protocol to the European Convention on Extradition and should not reflect the lower standard of "opportunity to lodge an appeal or opposition" as provided for in the context of the European Arrest Warrant (Art. 5 of the Framework Decision).

previous JUSTICE publications⁶⁹. Clearly, the causes of miscarriages of justice vary from country to country. Strasbourg caselaw indicates, for example, that in Italy, the overwhelming problem is one of delay in proceedings.

e) Categories of official exercising the rights of detention, questioning, investigation

125. The case of *Saunders v UK*⁷⁰ shows that in the UK, DTI investigators also exercise rights of questioning and investigation.

III – CONCLUSIONS

126. In order for minimum standards in criminal procedures at EU level to increase mutual trust between the legal systems of the Member States, they must:

- (i) Aim to raise standards across the EU, not simply establish the lowest common denominator;**
- (ii) Not allow for a margin of appreciation in the respect of rights in EU Member States;**
- (iii) Be binding on Member States;**
- (iv) Be judicially enforceable;**
- (v) Be effective, including the provision of adequate funds for legal representation;**
- (vi) Be adequately monitored.**

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⁶⁹ Available on request to JUSTICE

⁷⁰ *Saunders v UK* (1996) 23 EHRR 313