Joint position of the Law Society of England and Wales and the Law Society of Scotland on a vision for an area of freedom, security and justice in Europe from 2010 to 2014 in relation to criminal matters including procedural rights

14 July 2009

JOINT POSITION OF THE LAW SOCIETY OF ENGLAND AND WALES AND THE LAW SOCIETY OF SCOTLAND ON A VISION FOR AN AREA OF FREEDOM, SECURITY AND JUSTICE IN EUROPE IN 2010 TO 2014 IN RELATION TO CRIMINAL MATTERS INCLUDING PROCEDURAL RIGHTS

1. The Law Society of England and Wales (the Society) is the representative body of over 120,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and makes representation towards regulators and government in both the domestic and European arena. The Society refers to the European Commission Communication on "An area of freedom, security and justice serving the citizen" dated 10 June[1] and the Presidency "Roadmap on procedural rights" dated 1 July.[2] The Society welcomes this opportunity to set out its vision for the type of area of freedom, security and justice that would bring real benefit for individuals in Europe from 2010 to 2014 in relation to criminal matters including procedural rights. This position comprises an Executive Summary followed by a Detailed Analysis.

2. The Criminal Law Committee of the Law Society of Scotland supports the position of the Law Society of England and Wales as set out below and is pleased to endorse this response. The Law Society of Scotland is is the governing body for Scottish solicitors. It promotes the interests of the solicitors' profession in Scotland and the interests of the public in relation to the profession.

3. This position comprises an Executive Summary followed by a Detailed Analysis.

EXECUTIVE SUMMARY

4. The Society highlights the importance of the EU introducing binding minimum procedural rights in criminal matters throughout the EU for suspects and defendants at all stages of the criminal process from investigation, including for example the right to:

    a) legal advice and legal representation, with legal aid for those who cannot afford it;
    b) consult the lawyer in private and receive legal advice in the strictest confidence;
    c) access to all relevant information held by the investigatory and prosecuting agencies to enable the suspect and defence to prepare from pre-charge onwards;
    d) silence and not to incriminate oneself;
    e) interpretation and translation;
    f) audio recording of interviews;
    g) the maintenance of a written custody record accessible to the suspect and defendant;
    h) be present at all hearings in person;
    i) consular assistance and the right to communicate to a family member, employers and consular authorities the fact of being in detention;

[1] COM (2009) 262 final, 10.06.2009 at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0262:FIN:EN:PDF

[2] Presidency Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings dated 1 July 2009, 11457/09 at http://register.consilium.europa.eu/pdf/en/09/st11/st11457.en09.pdf

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j) be notified of information on rights, the charge, and the procedure at the police station, during detention, and beyond orally, and in writing in the suspect's own language;
k) proper protection of vulnerable suspects and defendants, for example children and mentally ill people; and
l) minimum standards for detention conditions and minimum rights in respect of grounds, review and length of pre-trial detention. The Society also emphasises the importance of mutual recognition of reporting, residence and curfew conditions.

Moreover:
m) the EU must ensure that the minimum procedural rights never lead to a level of protection lower than that guaranteed by the European Convention of Human Rights, which as a living instrument, will continue to be interpreted.
n) provision must be made in the legislation for evaluation and monitoring of compliance mechanisms, taking into account, among other things, the findings and activities of the European Court of Human Rights and the Council of Europe.
o) the Council should make a commitment in its roadmap on procedural rights to adopt legislation for each of the above rights in a specific time frame in the 2010 to 2014 period. The Stockholm Programme and Action Plan should also include such a commitment.
p) in the meantime, European Institutions must hold Member States accountable for human rights violations and ensure that situations incompatible with human rights are remedied swiftly and effectively.

4.2. Ensuring that the European e-Justice project respects fundamental rights, including for example, by ensuring that:

a) it does not encroach on the entitlement to be present at all hearings in person;
b) the right to interpretation and translation is not watered down by the European e-Justice project;
c) automated translations and standardised forms with predetermined text and terminology should not be relied on in criminal matters. Criminal records must be translated with a full explanation of the meaning of sentences, and the court process, whether summary, intermediate or appeal;
d) the right to privacy is respected in full; and
e) information on means of redress is available.

4.3. Providing EU funding for networking and training for all legal professionals in the criminal justice field, not just judges and prosecutors, and providing information and education to ensure that all people understand their rights.

4.4. Addressing fundamental deficiencies in current legislation:
a) focusing not only on implementation but also reflecting on the fundamental reasons for lack of accurate implementation;
b) introducing a proportionality test in the European Arrest Warrant as a matter of urgency; and
c) implementing the European Evidence Warrant to respect fundamental rights including Article 8 (Right to respect for private and family life) and the need for an effective remedy including in the executing state (Article

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13 (Right to an effective remedy) of the European Convention on Human Rights)) and providing for defence access.

4.5. Ensuring public consultation and impact assessments on all proposals, including Member State initiatives.

4.6. Consolidating mutual recognition instruments, reducing the differences between them and making it easier for everyone to understand and apply them.

4.7. Not pursuing closer alignment of substantive law including common definitions and penalties as it is not necessary to enhance mutual trust and mutual recognition. Moreover, differences including in terms of sentencing practices between different countries are dependant upon a huge variety of factors including cultural and social economic conditions within these countries and the principle of subsidiarity must be respected.

4.8. Ensuring that procedural safeguards are respected including in police cooperation.

4.9. Conducting an evaluation of the European Criminal Records and Information Exchange System, not only in terms of how the exchange of information operates but also in terms of how the information exchanged is used.

4.10. Providing implementation assistance for Member States on the transfer of convictions legislation and indeed on all EU legislation to ensure, among other things, that safeguards are respected.

4.11. Adopting a balanced approach to mutual recognition, including in relation to victims, to also ensure that defendant's rights are respected.

4.12. Ensuring that victims of trafficking are treated as such and are not victimised twice over.

DETAILED ANALYSIS

5. Background

5.1. It has been ten years since Member States agreed that their police and judges should work together to fight crime and in parallel that individual rights should be protected. During this time they have forged ahead with co-operation in the law enforcement area but have failed to take sufficient action to protect individual rights. As a result holiday makers and others could find themselves alone in a foreign country without any assistance and unable to understand or follow an investigation against them.

5.2. As the European Institutions set out their vision for the type of area of "freedom, security and justice" that would bring real benefit to the citizens of Europe in 2010 to 2014,[3] the Society calls on them to ensure that it is an area in which fundamental rights are respected.

[3] Commission Communication: An area of freedom, security and justice serving the citizen, COM (2009) 262 final, 10.06.2009 at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0262:FIN:EN:PDF and Law Society of England and Wales Response to Freedom, Security and Justice: What will be the future? European Commission consultation on priorities for the next five years (2010-2014) December 2008 at

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6. Binding minimum procedural rights

6.1. The Commission Communication acknowledges that there are differences in the level of protection in criminal proceedings (page 3). It asserts that the European judicial area must allow citizens to assert their rights anywhere in the EU by facilitating access to justice (page 10). It asserts that the EU must have a legal framework on minimum procedural guarantees (page 32) to uphold individual's rights and maintain mutual trust and confidence in the EU (page 18). It refers to the then upcoming Council action plan (roadmap) in this area on common minimum guarantees and refers to extending it, for example to pre-trial detention, but it does not set out a list of rights that should be addressed (page 17).

6.2. The Society highlights the importance of the EU introducing binding minimum procedural rights in criminal matters throughout the EU. Minimum procedural rights must provide effective, accessible and timely means of redress for individuals at national level and not just EU level. They must apply to both cross-border and domestic cases to avoid dual standards and enhance mutual trust in each others' legal systems. Such minimum procedural rights should not be based on the lowest common denominator, which would risk watering down protection already afforded, for example, by the European Convention on Human Rights protections which Member States must already uphold. The EU must ensure that the minimum procedural rights never lead to a level of protection lower than that guaranteed by the European Convention of Human Rights, which as a living instrument, will continue to be interpreted. Provision must also be made in the legislation for evaluation and monitoring of compliance mechanisms, taking into account, among other things, the findings and activities of the European Court of Human Rights and the Council of Europe.

6.3. The EU Institutions and Member States must continue to ensure the observance of human rights within the Union and that situations incompatible with such rights are remedied swiftly and effectively

6.4. The Society highlights the importance of introducing binding minimum procedural rights for suspects and defendants at all stages in the criminal process from investigation, including the right to:

- legal advice and legal representation,[4] with legal aid for those who cannot afford it;

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http://international.lawsociety.org.uk/files/LSEW%20response%20to%20Commission%20consultation%204%20December.pdf

[4] In *Salduz v. Turkey* (application no. 36391/02) Grand Chamber Judgment 27 November 2008, the European Court of Human Rights found that in order for the right to a fair trial to remain sufficiently "practical and effective" access to a lawyer should be provided as from the first interrogation of a suspect by the police (paragraph 55). http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=36391/02&sessionid=21465389&skin=hudoc-en.
In *Panovits v. Cyprus* (application no. 4268/04) Chamber Judgment 11 December 2008 the European Court of Human Rights observed that the lack of legal assistance during an applicant's interrogation would constitute a restriction of his defence rights in the absence of compelling reasons that do not prejudice the overall fairness of the proceedings (paragraph 66).
http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=4268/04&sessionid=21465389&skin=hudoc-en.
The Report to the Portuguese Government on the visit to Portugal carried out by the Council of Europe European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 25 January 2008, Strasbourg, 19 March 2009 at http://www.cpt.coe.int/documents/prt/2009-13-inf-eng.pdf emphasises

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- consult the lawyer in private and to receive legal advice in the strictest confidence ("legal professional privilege"). The Society is concerned by recent moves to undermine the basic principle of legal professional privilege;[5]
- access to all relevant information held by the investigatory and prosecuting agencies to enable the suspect and defence to prepare from pre-charge onwards;
- silence and not to incriminate oneself;
- interpretation and translation;
- audio recording of interviews;
- the maintenance of a written custody record accessible to the suspect and defendant to focus the minds of custodians and to reduce inadvertent law breaking and cases within cases;
- be present at all hearings in person. To the extent that the defendant unequivocally expressly waives this entitlement of his own free will and the circumstances are such that it would not be contrary to the notion of a fair trial or other rights for the court to hold the hearing in the specific case by video-conference,[6] it must be ensured that the defendant is able to follow the proceedings and to be heard without technical impediments, and effective and confidential communication with a lawyer must be provided for;
- proper protection of vulnerable suspects and defendants, for example, children and mentally ill people;
- consular assistance and the right to communicate to a family member, employers and consular authorities the fact of being in detention;
- be notified in their own language in writing of their rights in a "Letter of Rights" and in writing and orally of what they are accused of;
- be notified in their own language in writing of the procedure at the police station, during detention, and beyond;
- be notified in their own language by video of their rights and the procedure at the police station, during detention, and beyond. Not all people are able to read and when asked may not admit this. A video would be a simple measure to address this concern. Moreover, a video on procedure at the police station, during detention, and beyond, a procedural roadmap, should enable suspects and defendants to understand in basic terms what will happen to them, from questioning to detention conditions and beyond; and
- minimum standards for detention conditions and minimum rights in relation to grounds, review and length of pre-trial detention. The Society also emphasises the importance of mutual recognition of reporting, residence and curfew conditions.

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that the right of access to a lawyer must include the possibility to meet with the lawyer in private and to have a lawyer present during any interrogation.

[5] For example the House of Lords recently decided that covert surveillance of communications between lawyers and their clients, covered by legal professional privilege, was permitted under the Regulation of Investigatory Powers Act 2000, notwithstanding any statutory rights of persons in custody to consult their lawyers in private. *Re McE (Northern Ireland) [2009] UKHL 15* at http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090311/mce-1.htm

[6] The Society draws attention for example to the Council of Europe European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) report to the UK Government published on 1 October 2008 at http://www.cpt.coe.int/documents/gbr/2008-27-inf-eng.pdf. In relation to extensions of pre-charge detention by video-link it emphasises that the physical presence of a detainee should be seen as an obligation, not as an option open to the judicial authority. It emphasises that from the point of view of making an accurate assessment of the physical and psychological state of a detainee, nothing can replace bringing the person concerned into the direct physical presence of a judge. Further, it explains that it will be more difficult to conduct a hearing in such a way that a person who may have been the victim of ill-treatment feels free to disclose this fact if the contact between the judge and the detained person is via a video-conferencing link.

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6.5. The Society also emphasises that the Council should make a commitment in its roadmap on procedural rights to adopt legislation for each of the above rights in a specific time frame in the 2010 to 2014 period. The Stockholm Programme and Action Plan should also include such a commitment.

7. European e-Justice

7.1. As the European Institutions prepare for the launch of the European e-Justice portal in December 2009 and continue their work on the European e-Justice project[7] the Society calls for ensuring that the European e-Justice portal and project respects fundamental rights, including for example, by ensuring:

a. that a person charged with a criminal offence should, as a general principle based on the notion of a fair trial and other rights, be entitled to be present at his hearing. It is concerning that the Commission Communication asserts that better use should be made of videoconferences for example to spare the victims the effort of needless travel without having any regard to this (page 13). The Commission also asserts that a European order for bringing persons to court that takes account of the opportunities offered by videoconferences should be explored (page 17). The Society emphasises that it is also necessary to consider the drawbacks, not least in terms of fundamental rights.

b. that the right to interpretation and translation is not watered down by European e-Justice. The Commission Communication calls for improving the quality of and the pooling of legal interpretation and translation resources or the possible use of remote interpreting by videoconference (page 13). The Society acknowledges that there are fundamental issues concerning the availability and quality of translation and interpretation facilities in the field of criminal justice, which the European e-Justice programme attempts to tackle. The Society emphasises that such considerations must not weaken the proposals on procedural safeguards and access to justice.

c. automated translations are not relied on in criminal matters. It is very concerning that the Commission cites machine translations as a means to overcome language barriers (page 13). The Society emphasises, for example, that criminal records must be translated with a full explanation of the meaning of sentences, and the court process, whether summary, intermediate or appeal. The Society equally cautions against the use of standardised dynamic forms with predetermined text and terminology. This is particularly pertinent not least in the context of the interconnection of criminal records. The Society has serious concerns about various issues arising from the interconnection of criminal records. These include the accuracy, access, use and understanding of the information stored and as to how any errors or misunderstandings can be rectified. We have serious concerns regarding the ways information gathered for one purpose can be used for another purpose, arising from the principle of availability and moves towards interoperability of databases.

d. the right to privacy is respected in full. European e-Justice must not develop in a data protection vacuum nor be governed by a patchwork

[7] Council Multi-Annual European e-Justice Action Plan 2009-2013, Official Journal of the European Union C 75/1, 31.03.2009 at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:075:0001:0012:EN:PDF

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of different national data protection rules, as this is an area in which fundamental rights are at stake. Even the European Data Protection Supervisor has observed that the level of data protection achieved in the new Framework Decision on data protection in police and judicial cooperation in criminal matters[8] is not fully satisfactory. This is particularly pertinent not least in the context of the European e-Justice project.[9]

e. that information is included on what to do if something goes wrong, legally, technically or otherwise, with the European e-Justice portal or linked web-sites, including who to contact and means of redress. It will be important to consider how this will be addressed on the European e-Justice portal and linked web-sites.

8. Networking, training and education

8.1. The Commission acknowledges that the enforcement of instruments needs to be better supported in the professional sphere. Among other things, it calls for the EU's support for networks of professionals to be strengthened, coordinated and better structured. It also calls for systematic training for all legal professionals and developing e-Learning programmes (page 11). However, it is by no means clear that it envisages its assistance to extend beyond the judiciary and prosecution.

8.2. The Society emphasises the importance of EU funding for networking and training for all legal professionals in the criminal justice field, not just judges and prosecutors. The Society also calls for information provision and education to ensure that all people understand their rights.

9. Addressing fundamental deficiencies in current legislation

9.1. The Commission acknowledges that there has to be evaluation of the effectiveness of the legal and political instruments adopted at Community level (page 11).

9.2. The Society welcomes a period of stocktaking, not only in terms of focusing on implementation of EU instruments but also to consider and reflect on the fundamental reasons for lack of accurate implementation of EU instruments.

10. Lack of proportionality

10.1. For example, in relation to the European Arrest Warrant,[10] the Society highlights that the absence of a proportionality test discredits mutual trust. It is striking in this regard that to date this fundamental issue has been considered in a non-binding European handbook on how to issue a European

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[8] Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, Official Journal of the European Union L350/60, 30.12.2008 at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:350:0060:0071:EN:PDF

[9] European Data Protection Supervisor in his Opinion dated 19 December 2008 on the European Commission Communication Towards a European e-Justice Strategy, Official Journal of the European Union C128/13, 6.6.2009 at http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2008/08-12-19_eJustice_EN.pdf

[10] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Official Journal of the European Union L190/1, 18.7.2002 at http://eur-lex.europa.eu/pri/en/oj/dat/2002/l_190/l_19020020718en00010018.pdf

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Arrest Warrant11 published by the Presidency on 18 June instead of being addressed in legislation.

10.2. On 4 to 5 June 2009 the Justice and Home Affairs Council adopted[12] a report[13] on mutual evaluations concerning the practical application of the European Arrest Warrant. The report acknowledges that the way in which proportionality is dealt with in the Member States varies greatly. It asserts that some Member States apply a proportionality test in every case, often unevenly concerning the circumstances to be taken into consideration and the criteria to be applied, whereas others consider it superfluous. The Society observes that some consider the principle of legality an obstacle to considerations of proportionality. The report recommends that the Council instructs its preparatory bodies to continue discussing the issue of the institution of a proportionality requirement for the issuance of any European Arrest Warrant with a view to reaching a coherent solution at EU level as a matter of priority.

10.3. The Society calls on the EU to introduce a proportionality test as a matter of urgency. It is wholly unsatisfactory that it was not addressed in the original legislation, which continues despite this fundamental shortcoming.

11. Effective remedy

11.1. The Society observes that under the European Evidence Warrant[14] the issuing authority must be satisfied that obtaining the objects, documents or data sought is necessary and proportionate for the purposes of proceedings for which an European Evidence Warrant may be issued (Article 7(a) and Article 5).

11.2. The Society emphasises that the issuing state must provide an explanation of how the European Evidence Warrant is necessary and proportionate in order to satisfy the executing state that that is the case. Otherwise the executing state will be unable to comply with its obligations under Article 8 of the European Convention on Human Rights (Right to respect for private and family life) and the need for an effective remedy including in the executing state (Article 13 (Right to an effective remedy)).

11.3. Moreover, it will be essential to ensure that necessity and proportionality is applied in practice, so that the European Arrest Warrant experience is not repeated.

12. Lack of defence access

12.1. The Commission calls for a complete European framework for taking evidence (page 32). It calls for a real European evidence warrant to replace all existing instruments. It asserts that it would be automatically recognised

[11] http://register.consilium.europa.eu/pdf/en/08/st08/st08216-re02.en08.pdf

[12] http://www.consilium.europa.eu/App/NewsRoom/loadDocument.aspx?id=352&lang=EN&directory=en/jha/&fileName=108356.pdf

[13] http://register.consilium.europa.eu/pdf/en/09/st08/st08302-re04.en09.pdf

[14] Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, Official Journal of the European Union L350/72, 30.12.2008 at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:350:0072:0092:EN:PDF

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and applicable throughout the Union and limit as far as possible the grounds for rejection.

12.2. The Society believes that the EU should instead focus on adopting balanced legislation in which equality of arms is respected. The Society emphasises that suspects and defendants must also be able to apply for a European Evidence Warrant. The Society is concerned that this is not made explicit in the current legislation and calls on Member States to implement it to respect equality of arms.

12.3. The Society calls on the Commission to clarify exactly what is meant by a "real European evidence warrant." The Society would be concerned by moves to expand the scope of the current European Evidence Warrant and to further remove safeguards without time to see how the framework decision is implemented and how it works in practice.

12.4. The Commission also asserts that a European legal framework on electronic evidence should be explored and that minimum principles to facilitate the mutual admissibility of evidence between countries, including scientific evidence should be explored (page 17). The Society looks forward to playing an active role in the consultation on evidence further to the EU funded project on safeguarding expert evidence in which it participated.[15]

13. Public consultation and impact assessment

13.1. The Commission asserts that priority should be given to improving the quality of European legislation. It asserts that from the time when proposals are first sketched out, thought must be given to the potential impact on citizens and their fundamental rights (page 6).

13.2. The Society calls for public consultation and impact assessment on all proposals, including Member State initiatives. The Society observes in this regard the lack of public consultation and impact assessment on the 20 January 2009 proposal for a Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings published at the initiative of the Czech Republic, Poland, Slovenia, the Slovak Republic and Sweden.[16]

13.3. In its position on the proposal dated 26 February 2009[17] the Society emphasised that it is essential that procedural safeguards are in place to protect the rights of the suspect or defendant at all stages of the choice of criminal jurisdiction process. The proposal fails to address this central issue.

14. Consolidation of existing measures

14.1. The Commission asserts that the substantial progress in the justice field in past years needs to be consolidated (page 10).

14.2. The Society observes that mutual recognition instruments reduce both the grounds for refusal and the time to execute requests. The Society calls for consolidation of mutual recognition instruments, reducing the differences

[15] See report on safeguarding expert evidence in the European Union published 11 June http://international.lawsociety.org.uk/node/6234
[16] http://register.consilium.europa.eu/pdf/en/09/st05/st05208.en09.pdf
[17] http://international.lawsociety.org.uk/node/5795

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between them and making it easier for everyone to understand and apply them.

15. Harmonisation of substantive law not necessary

15.1. The Commission asserts that the principle of mutual recognition is the cornerstone of European integration in the field of justice (page 10). However, it also asserts that the development of the European judicial area requires a certain level of alignment of Member States' laws and regulations. It calls for closer alignment of substantive law in relation to serious crimes, generally of a cross-border nature, which require common definitions and penalties. It asserts that such alignment will help to extend mutual recognition and, in some cases almost completely abolish the grounds for refusal to recognise other Member States' judgments (page 12).

15.2. The Society is opposed to pursuing harmonisation of definitions and penalties. The Society is concerned by attempts to do so under the guise of a mutual recognition agenda. Mutual recognition must not be used as a means by which to introduce the harmonisation of substantive law through the back door in this respect. Closer alignment of substantive law in this respect is not necessary to enhance mutual trust and mutual recognition. Moreover, differences including in terms of sentencing practices between different countries are dependant on a huge variety of factors including the cultural and social economic conditions within these countries and the principle of subsidiarity must be respected.

15.3. The Commission also asserts that thought should be given to a Community programme to finance pilot schemes in the Member States testing alternatives to imprisonment (page 18). The Society welcomes funding in this important area but notes that again this is an area in which the principle of subsidiarity must be respected.

16. Police cooperation

16.1. The Commission calls for pilot action against organised crime involving systematic exchange of information, widespread use of European investigative tools and where necessary the development of common investigative and prevention techniques (page 20). It cites operational effectiveness as a key criterion in preventing criminals from exploiting the frontier-free area to evade investigation and prosecution (page 17).

16.2. The Society emphasises that operational effectiveness is not the only criterion. Procedural safeguards are essential and must be respected.[18]

17. Otherwise extending mutual recognition

17.1. The Commission asserts that in criminal matters, the principle of mutual recognition must apply at all stages of the procedure. It must extend to other types of judgment, which may be criminal or administrative depending on the

[18] The Society notes in this regard page 10 of its response to Freedom, Security and Justice: What will be the future? European Commission Consultation on priorities for the next five years (2010-2014) December 2008 at http://international.lawsociety.org.uk/files/LSEW%20response%20to%20Commission%20consultation%204%20December.pdf, which explains that the Society is strongly opposed to replacing procedural safeguards with “more flexible” “simplified formalities” or such like set out in the Future Group on Home Affairs report titled Freedom, Security, Privacy – European Home Affairs in an open world.

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Member State. For example, special protection measures for witnesses or victims of crime; implementing certain fines between countries including to improve road safety; and the mutual recognition of judgments imposing some kind of disqualification and encouraging the systematic exchange of information between Member States to this end (page 10 to 11). The Commission also calls for further work on the European Criminal Records Information System (ECRIS) including an evaluation of how the exchange of information operates. It asserts that the networking of criminal records should make it possible to prevent offences being committed (e.g. checks on access to certain jobs, particularly those relating to children). It asserts that ECRIS will also have to be expanded to cover nationals of non-EU countries who have been sentenced in the EU (page 17).

17.2. The Society welcomes an evaluation of ECRIS, not only in terms of how the exchange of information operates but also in terms of how the information exchanged is used. The Society also calls for implementation assistance to be given to Member States on the transfer of convictions legislation[19] and indeed on all EU legislation to ensure, among other things, that safeguards are respected. Not least to ensure that the implementing legislation does not enable previous convictions to be taken into account in circumstances where a national conviction would not have been possible for the act for which the previous conviction had been imposed.

17.3. The Society can see the merits in a sentencing judge in one Member State having information on previous convictions for recidivism purposes. However, the Society is concerned that the use of the information may be prejudicial in determining guilt if there is no context provided in terms of the conviction and sentence imposed. There is a need to be able to understand what a criminal offence from a different Member State means, the relevance of a conviction and the level and significance of a sentence, bearing in mind the very different sentencing regimes in different EU Member States, so that a judge can decide if it is appropriate and proportionate to take it into consideration. It is too crude to automatically impose a higher penalty for a repeat offence. Further consideration should also be given to the rehabilitation of offenders and where a conviction is spent.

17.4. The Society also emphasises the need for effective data protection. An efficient and robust procedure for challenging inaccuracies must also be established and the criminal record should be translated with a full explanation of the meaning, and the court process, whether summary, intermediate, or appeal.

17.5. The Society welcomes the extension of ECRIS to nationals of non-EU countries sentenced in the EU. The Society emphasises the importance of equal treatment of nationals and non-nationals in this regard.

17.6. The Society calls for a balanced approach to mutual recognition, including in relation to victims, in order to also respect defendant's rights. It will be important to resist any attempts, albeit not explicitly referred to, to introduce a system of victims' rights in which prosecutorial discretion to discontinue a case or downgrade a criminal charge would be subject to the victim's input or

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[19] Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, Official Journal of the European Union L220/32, 15.8.2008 at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:220:0032:0034:EN:PDF

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consent or that of the victim's advisor; or to introduce protective measures to afford witness anonymity that do not adequately protect the right of a defendant to challenge their evidence. The Society would be concerned if it is proposed that witness anonymity be used other than in wholly exceptional cases subject to safeguards. It is also important to have regard to the different nature of the adversarial systems (e.g. in England and Wales and Scotland) and the inquisitorial system (e.g. civil law jurisdictions).

18. Trafficking

18.1. The Commission asserts that human trafficking victims must be protected and helped by various measures including for example immunity from criminal prosecution and regularisation of their stay.

18.2. The Society welcomes this so that victims of trafficking are treated as such and are not victimised twice over, once by the trafficking and once by action taken against them in respect of their illegal entry or stay.

The Law Society of England and Wales and the Law Society of Scotland
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