



**Freedom, security and justice: what will be the future?
European commission consultation on priorities for the next
five years (2010-2014)**

The Law Society of Scotland's Response

December 2008

INTRODUCTION

We refer to the Freedom, Security and Justice: What will be the future? European Commission consultation on priorities for the next five years (2010-2014) dated 25 September 2008. We welcome the opportunity to respond to this consultation.

We do not propose to respond to the list of closed questions. We note that the consultation states that additional contributions will also be taken into account. We are therefore providing a detailed response, following consideration of the non-binding report of the Future Group on Justice entitled Proposed Solutions for the Future EU Justice Programme and the non-binding report of the Future Group on Home Affairs titled Freedom, Security, Privacy – European Home Affairs in an open world.

This position is presented by the Law Society of Scotland. The Law Society of Scotland 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. This position paper comprises an Executive Summary followed by a detailed analysis.

EXECUTIVE SUMMARY

Criminal

Criminal procedure

We call for common procedural rights and safeguards in criminal proceedings from the moment an individual first becomes a suspect, throughout the investigation, trial and post-trial period. They should: apply in all cases not just cross-border cases; build on existing rights and safeguards; and in no way limit existing rights and safeguards that offer a higher degree of protection. A supplementary letter of rights should be available in the language in question and its service evidenced. The detainee should have access to legal advice before answering questions in relation to a criminal charge backed by adequate funding and provisions. There should be free interpretation of legal advice also extending to communication between the solicitor and the client and free translation of all relevant documents. There should be vetting, accreditation and continued professional development of legal translators and interpreters and comprehensive accessible national registers of such translators and interpreters. There should be a uniform commitment to respect the right of review of decisions and or legal appeal proceedings throughout the EU.

Evidence

We emphasise that the European Evidence Warrant should be accessible to the defence as well as the prosecution.

We are also extremely concerned about outsourcing of evidence.

Police cooperation

We are strongly opposed to replacing procedural safeguards with “more flexible” “simplified formalities” or such like.

We also call for a joined up approach to data protection between Home Affairs and Justice and an effective data protection regime at EU level across the board.

Mutual recognition and double criminality

We call for greater scope for judicial oversight where traditional safeguards such as dual criminality are being phased out under new mutual recognition instruments.

Criminal records

We emphasise the importance of ensuring that information on previous convictions and sentences is understandable. We also call for further consideration of rehabilitation and spent convictions and emphasise the need for effective data protection.

Diplomatic assurances

We believe that it is wholly inappropriate to use diplomatic assurances to facilitate extradition or deportation.

Family

We would resist harmonising conflict-of-law rules in the family area. In Scotland the local law is applied to divorce and this works satisfactorily.

Allowing parties a choice of law would cause considerable difficulty for the courts.

If there were a choice it should be limited to the law of the forum. It will be important in this regard to consider the implications for Member States in which there are different systems of law in different territorial areas. In the United Kingdom, individuals may be habitually resident, or domiciled, in Scotland, England and Wales or Northern Ireland.

If it were not the law of the forum then the law should be that of the closest connection with the marriage. Allowing any choice to extend beyond the law of a Member State could cause significant problems.

Moreover, there is more to divorce than choice of law rules. It is not just a question of what law is applied, but a question of how that law is applied.

As regards jurisdiction, we acknowledge that the existing rules encourage a “rush to court”. Parties in marital difficulties should not be under pressure to commence litigation, and measures which alleviated this pressure would be helpful. We therefore favour the potential to transfer a case, at the discretion of the court, to a more convenient forum.

We believe that it is important to consider civil partnership status and cohabiting couples in proposals in the area of family law. For example, it is consistent with free movement of persons that other parts of the EU recognise the financial implications of civil partnership status.

Wills

Any harmonised conflict rules which are developed should be geographically universal and not limited to cases involving only Community countries.

Applicable law

The administration and completion of title should be determined by the law of the place where the assets are situated.

A version of habitual residence would be a better form of connection for almost all aspects of succession. However, we draw attention to the specific nature of trusts.

It is important to preserve a coherent and reliable system of titles to land. In view of the continuing deep differences between those countries which attach fundamental irrevocability to inter vivos gifts such as England and Scotland and those which do not, such as France, it may be expedient to retain the lex situs for immoveable property unless and until it is possible to find either agreement or an acceptable compromise.

Recognition and enforcement

It should be possible to simplify procedures, especially in granting local recognition to foreign appointments of executors or equivalent administrators.

The procedure for the recognition and enforcement of documents establishing rights of inheritance should be simplified.

A single type of certificate to certify the designation of the executor and describe his powers would be desirable.

Trusts

Nothing should disturb trusts validly created by testators inter vivos at the time of their creation, but any reserved portions applying a morte testatoris (i.e. where a bequest is payable immediately upon the death of the testator, as opposed to one postponed to a later date) under the law chosen by the testator (or failing a choice, the law of the closest real connection/habitual residence) or vested beneficiaries should be preserved.

European certificate of inheritance

We believe that a European certificate of inheritance would be desirable. In principle the certificate should be recognised automatically, but there would have to be local authority to present a challenge to its validity.

Registration of wills

There would be convenience in a centralised register of wills, but the convenience would be largely outweighed by resulting difficulties. Any register, which may be set up, would have to be voluntary, and is unlikely to have any greater success than the existing one. We are of the view that a centralised European register is not worth pursuing.

Better justice for citizens and businesses

Enforcement of judgments and provisional measures

We welcome the focus on this and encourage practical measures that are transparent, fair and consistent with human rights.

Common frame of reference

We accept that it is useful to have non-binding guidelines for use as a common source of inspiration or reference in the Community law making process with practitioners closely involved in its development.

e-Justice

We support e-Justice but call for a number of important considerations to be taken into account. Not least exercising caution in relation to videoconferencing, among other things, in the light of the Council of Europe anti-torture committee report to the UK, which, in relation to extensions of pre-charge detention by video-link, emphasises that the physical presence of a detainee should be seen as an obligation, not as an option open to the judicial authority.

Asylum

We are strongly opposed to shifting responsibility for decision-making offshore.

General

We welcome better law making, not just in terms of legislation, but also in terms of providing assistance to Member States and closely monitoring the implementation of EU legislation in both the lead up to the implementation deadline and beyond. We welcome mobilising legal actors to be better involved in drafting the instruments they will have to implement. We call for awareness-raising, periodic reviews, increased training of the judiciary and coordination between and within relevant Directorate Generals.

DETAILED ANALYSIS

CRIMINAL

Criminal procedure

Approach

On procedural rights in criminal proceedings, we support standards which will be applied throughout the EU in relation to those suspected of crime. All EU citizens should be confident that they will receive equivalent protection in all Member States.

At present, the Member States are parties to the European Convention on Human Rights ("ECHR") and the Treaty on European Union provides mechanisms to address serious violations of human rights by Member States. This does not, however, ensure that any existing or future State actually complies consistently with the minimum obligation set in the ECHR. The provisions in the Treaty on the European Union which deal with breaches of human rights by Member States relate only to "serious and persistent" breaches.

Furthermore, increased police, prosecutorial and judicial co-operation in criminal matters (through the European Arrest Warrant, European Evidence Warrant, mutual assistance and mutual recognition of criminal judgments) underlines the need for common standards of justice within the European Union. These initiatives proceed on the principle of mutual confidence amongst Member States in the criminal justice systems of all members of the Union. The adoption of standards, to be applied throughout the Union in criminal proceedings from the moment an individual first becomes a suspect, throughout the investigation, trial and post-trial period, is therefore essential.

The opportunity should be taken to build upon existing standards, to clarify areas of doubt and uncertainty and to strengthen existing rights. This is particularly so since it is accepted that existing international standards are interpreted and applied in different ways and to different levels in the various national legal systems of the European Union.

We believe that common procedural standards should apply in all cases within the Union and should not, for example, be confined to cases with a "cross-border" element. Common procedural safeguards should likewise apply irrespective of whether the suspect or accused is a national of a Member State and should also apply irrespective of that person's residence status.

We would welcome provisions that would in no way limit existing rights and safeguards which offer a higher degree of protection.

Letter of rights

We believe that a letter of rights should be produced and given to a suspect on arrival at the police station or place of questioning. However, the letter of rights should be seen as a document which is supplementary to and does not replace, the formal statement of a suspect's rights which should be produced by the appropriate national criminal authorities. Care must be taken to ensure that there is no possibility of confusion where the common standards reflected in the letter of rights secure a

lesser standard of protection than is accorded by the national law of the State in which the suspect is located.

If the letter of rights is to be meaningful, it should be available in all of the languages of the EU, as well as other languages likely to be spoken by persons arrested or detained in the jurisdiction in question (including, for example, minority languages spoken by nationals of the State in question and by non-national residents of that State).

Service of the letter of rights will, in our view, become an integral element of the operation of the procedural safeguards in the EU. It will therefore be important to be able to demonstrate that the suspect has been given a copy of the document and the circumstances in which such service took place.

Access to legal advice

The right of a detainee to have access to legal advice before answering questions in relation to a criminal charge could, if backed by adequate funding and provisions, ensure that all those suspected of crime would be entitled to parity of treatment and would introduce greater certainty in relation to detainees' rights.

Interpretation and translation

We would welcome providing the suspected person with free interpretation of legal advice received throughout the criminal proceedings, extending the provision of free interpretation services to include communication between the solicitor and his or her client.

We would welcome clarification that the suspect would be entitled to be provided with free translations of all relevant documents to safeguard the fairness of proceedings.

We believe that translators and interpreters should be subject to a vetting procedure and be in a position to provide evidence that they are accredited at national level.

Consideration could also be given to the creation of a national register of legal translators and interpreters. It would be important to ensure that such a register would be comprehensive and include legal translators and interpreters for minority languages. It would also be helpful if Member States had access to the registers of interpreters compiled by other Member States. We would also favour a system of accreditation and believe that there is considerable merit in adopting principles of renewable registration and continued professional development.

Review and appeal

We would favour a uniform commitment to respect the right to review of decisions and/or legal appeal proceedings throughout the EU.

Police cooperation

Procedural safeguards are essential. We are strongly opposed to replacing them with "more flexible" "simplified formalities" or such like.

As regards police co-operation and security, whilst effective co-operation amongst authorities and swift exchange of information are vital there must be an accompanying effective data protection regime. A proper data protection regime at

EU level is necessary across the board, not just one based on the Council of Europe regime.

We welcome a public debate on strengthening fundamental rights. Home Affairs can already learn from the Justice Report's recognition that using information for purposes other than that for which it was collected and unlimited cross-referencing to other databases is a threat for individuals and society as a whole. Also from the Justice Report's acknowledgement that the right to privacy, including in data protection, should not be erased by the necessities of law enforcement.

We would call for a joined up approach to data protection between Home Affairs and Justice and believe that Home Affairs should take on board these important considerations. We are concerned that the Home Affairs Report overly focuses on data flow within European information networks and are extremely concerned about the open-ended extent of sensitive data exchange envisaged, about further disclosure of data outside the European Union and about the lack of concrete protection afforded.

Mutual recognition and double criminality

The principle of double criminality is important because it aims to protect the rights of the accused set out in the criminal law that he is familiar with and subject to. Where traditional safeguards such as dual criminality are being phased out under new mutual recognition instruments, there must be greater scope for judicial oversight in enforcing or recognising the judicial decision of another Member State throughout all stages of the process. This is not simply to review the substance of the judgment, but to assert that fundamental rights of the accused have been respected.

Criminal records

We can see the merits in a sentencing judge in one Member State having information on previous convictions, including on bail, and previous sentences in another. However, we are concerned that the use of the information will be prejudicial in determining guilt; there is a need to be able to understand what a criminal offence from a different Member State means, what a conviction from a different Member State means and its relevance, 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 be given to the rehabilitation of offenders and where a conviction is spent. We would emphasise the need for effective data protection.

EVIDENCE

The European Evidence Warrant should be accessible to the defence as well as the prosecution.

We are extremely concerned about outsourcing evidence gathering, and would question the legitimacy of reasons for such outsourcing, the means by which such evidence is gathered and the use to which such evidence can be put. The focus should be on the protection of the fundamental rights of the suspect.

DIPLOMATIC ASSURANCES

We believe that it is wholly inappropriate to use diplomatic assurances to facilitate extradition, deportation or expulsion.

FAMILY

Conflict-of-law rules

We would resist harmonising conflict-of-law rules in the family area. In Scotland the local law is applied to divorce and this works satisfactorily.

Choice of law

Allowing parties a choice of law would cause considerable difficulty for the courts. The court might be required to apply a law with which it was totally unfamiliar. Parties might not agree on which law should be applied, or upon the content of the law to be applied. We are strongly against allowing the parties a choice of law and see no advantages in doing so.

However, if there were a choice it should be limited to the law of the forum. This works well in Scotland. It means that practitioners can advise with reasonable certainty. It will be important in this regard to consider the implications for Member States in which there are different systems of law prevailing in different territorial areas. So far as the United Kingdom is concerned individuals may be habitually resident, or domiciled, in Scotland, England, Wales or Northern Ireland.

There has been strong support for continued application of the law of the forum in Scotland, including in light of the expense, delay and complexity of an alternative approach. Judicial time is at a premium. It would be unfortunate were parties permitted to take up disproportionate amounts of court time, because one or other had chosen a law unfamiliar to the court. Moreover, allowing any choice to extend beyond the law of a Member State could cause significant problems.

If the choice were not the law of the forum then the law should be that of the closest connection with the marriage. Moreover, we would note that there is more to divorce than choice of law rules. Parties are likely to 'rush' to secure a local court, to secure a more favourable procedure or to allow representation by a particular lawyer. If choice of law rules are introduced parties may 'rush' to ensure that they secure a court applying its own law, or not applying its own law (whichever best suits their purposes). It is not just a question of what law is applied, but a question of how that law is applied.

Jurisdiction

The existing rules do encourage a "rush to court". Parties in marital difficulties should not be under pressure to commence litigation, and measures which alleviated this pressure would be helpful. The solution we favour would be the potential to transfer a case, at the discretion of the court. Save for the potential to transfer cases, we do not favour further changes of the rules on jurisdiction.

Transfer of cases between jurisdictions is a more attractive suggestion than requiring a court to apply foreign law. It would allow some relief from the "rush to court". It would introduce some welcome flexibility into the rules of jurisdiction. The connecting factors for transfer could be modelled on the arguments relating to forum

conveniens articulated by the House of Lords in *De Dampierre v De Dampierre* [1988] AC 92, and, more recently in the Court of Session, in *RAB v MIB* [2008] CSIH 52. These cases applied the rules as to discretionary sist of proceedings in one jurisdiction to allow proceedings to take place in another. The courts consider what the natural forum is, the court in which the action may be tried more suitably for the interests of all the parties and the ends of justice. This covers not only the convenience of the parties and their witnesses but also any delay or expense which may result from cessation of proceedings in one jurisdiction to allow proceedings in another, the governing law and the place of residence or business of the parties and any young children. The courts should be left to exercise their existing discretion as to whether or not transfer should be granted.

Civil partnership status and cohabiting couples

We believe that it is important to consider civil partnership status and cohabiting couples in proposals in the area of family law. Indeed, although there is a procedure to allow persons of the same sex to enter into civil partnerships in terms of the Civil Partnership Act 2004 in Scotland, this cannot guarantee civil partners that their partnership will have property consequences outside the UK. It is consistent with free movement of persons that other parts of the EU recognise the financial implications of civil partnership status.

There is a similar argument in relation to cohabiting couples. They have rights to make a claim on cessation of a relationship, in terms of the Family Law (Scotland) Act 2006, but if they leave Scotland, they may not be entitled to any claim on cessation of the relationship.

WILLS

Conflict-of-law rules

In the area of wills, we would suggest that any harmonised conflict rules which are developed should be geographically universal and not limited to cases involving only Community countries.

Applicable law

Our view is that in principle the 'appropriate law' should govern all aspects of the determination of entitlements to inherit. However for reasons of practicality and of the fact that the locality of assets will have physical control of them we suggest that the administration and completion of title should be determined by the law of the place where the assets are situated. It is of course recognised that that this is a difficult concept for incorporeal assets, but incorporeal moveable property such as company shares do have a place where transfers have to be registered.

We are of the view that there should be rules which permit testamentary freedom but with constraints in place to prevent abuse.

Our view is that nationality is not acceptable as the sole connecting factor. It is not necessarily indicative of the person's real connection to a country, and cases have arisen of persons from colonial or military families who believed that their nationality was British but found subsequently that they were in fact Indian citizens. Equally the person who maintains a sentimental attachment to Scotland may preserve his British citizenship while living for many years in the United States with no intention of returning. It is possible to have dual nationality, which negates the value of

nationality as a connecting factor, and British citizenship includes several different legal systems to which a citizen may be subject.

We would note that domicile has been used in Britain for many purposes as a connecting factor in succession, but various complexities have attached such as the revival of a domicile of origin as demonstrated by the case of *Udny v Udny (1869) 7 M. (H.L.) 89; L.R. 1 H.L. (Sc. & Div) 441*. As such it is thought not to be suitable as a general connecting factor.

We suggest that a version of habitual residence would be a better form of connection for almost all aspects of succession, apart perhaps from the administrative arrangements for obtaining a good title to assets formerly belonging to the deceased. Attention is drawn to the provisions in the 1989 Hague Convention on succession to the estates of deceased persons which uses (a) habitual residence at death if the deceased was a national of that state, or (b) habitual residence for more than five years immediately prior to death unless the deceased was manifestly more closely connected with another state. If neither (a) nor (b) applies then nationality at death would apply unless the deceased was manifestly more closely connected with another state.

We note that executors are “trustees” under UK law and some assistance may be had from the Hague Convention on Trusts¹ as imported into domestic law by the Recognition of Trusts Act 1987.

We also note that Article 6 of that Convention states that a trust shall be governed by the law chosen by the settler and one law may be chosen for one aspect of the trust and others for others.

In addition, Article 7 states that where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected. In ascertaining the law with which a trust is most closely connected reference shall be made in particular to –

- (a) the place of administration of the trust designated by the settler;
- (b) the situs of the assets of the trust;
- (c) the place of residence or business of the trustee;
- (d) the objects of the trust and the places where they are to be fulfilled.

If the form and contents of the trust instrument are not themselves sufficient to reveal a settler’s express or implied choice of law then they will be taken into account in ascertaining the law with which the trust is most closely connected, as will other relevant factors including those mentioned in (a), (b), (c) and (d). In an inter vivos trust the domicile or habitual residence of the settler when creating the trust will be one relevant factor. In a testamentary trust the testator’s domicile at death has had much significance since the *lex domicilii* governs the validity of the will, though it does not necessarily have to govern the validity of trust provisions contained in the will (see *Re Lord Cable’s Will Trusts [1976] 3 All E.R. 417 at 431* and *Chellarman v. Chellarman [1985] 1 E.R. 1043 at 1056*).

We take the view that immovable property no longer has the sanctity it once had, and in most cases is just another asset like a bank account. We suggest therefore that there is no longer any reason for a separate connecting factor for immovables. However we feel strongly that it is important to preserve a coherent and reliable system of titles to land and that this does require a significant role for the law of the

¹ The Hague Convention on the Law Applicable to Trusts and on their Recognition of 1 July 1985.

country where the immovable property is situated in order to ensure that the process of recording titles is clear and comprehensible to the users.

In view of the continuing deep differences between those countries which attach fundamental irrevocability to inter vivos gifts such as England and Scotland and those which do not, such as France, we think it may be expedient to retain the *lex situs* for immoveable property unless and until it is possible to find either agreement or an acceptable compromise.

Recognition and enforcement

We are of the view that it should be possible to simplify procedures, especially in granting local recognition to foreign appointments of executors or equivalent administrators.

The procedure for the recognition and enforcement of documents establishing rights of inheritance should be simplified.

We would note that as between Scotland and England the formal process of local grant of authority for Probates to be recognised in Scotland and Confirmation of Executors to be recognised in England has been abolished as an unnecessary bureaucratic step which simply involved putting an official stamp on a number of documents. We would hope that similar automatic recognition could be granted throughout the Community, provided that information about the nature and function of the various relevant documents is very widely circulated. It would however seem to be necessary to permit refusal of recognition, at least on a temporary basis pending action in the original jurisdiction, if the original document had been forged or obtained by fraud.

We would suggest that grounds for refusing to recognise or enforce a judgment should include conflict of laws. Accordingly, if the judgment creates rights at odds with those which would apply under the laws of the accepting state, the judgment should not be accepted without intimation to the parties affected, who should be allowed to enter an appearance. (Even if this means the case later has to be transferred).

We believe that a judgment given in one Member State in a succession case should automatically be recognised and available as the basis for the amendment of property registers in another Member State. This should not require any formal proceedings provided that sufficient information is available in the other State to enable it to identify that the document setting out the judgment came from the competent court and provided that it did not give rise to a result at odds with that State's own provisions.

We are of the view that automatic recognition of the designation and functions of executors is desirable, if agreement can be reached on what those functions are. This however is liable to be extremely difficult. It will certainly be necessary to make provision for challenging the designation and functions of executors, particularly in the case of fraud or forgery.

We are of the view that a single type of certificate to certify the designation of the executor and describe his powers would be desirable, provided that the description of the executor's functions can be adequately set out on such a certificate. We are of the view that it should be possible to develop a list of standard powers and functions for a certificate. We suggest that a model might be the international driving licence

with a primary page certifying the executor's authority and other pages with the information repeated in various languages.

Trusts

We are of the view that nothing should disturb trusts validly created by testators inter vivos at the time of their creation, but any reserved portions applying a *morte testatoris* (i.e. where a bequest is payable immediately upon the death of the testator, as opposed to one postponed to a later date) under the law chosen by the testator (or failing a choice, the law of the closest real connection/habitual residence) or vested beneficiaries should be preserved.

European certificate of inheritance

We believe that a European certificate of inheritance would be desirable so as to permit heirs or executors to take possession of property with as few formalities as possible. However, there is a risk that a certificate might be obtained in one country without giving adequate information to the granting authority about the existence of other connecting factors or even of the existence of assets in other states. Attempts to enforce a certificate granted in such circumstances require the existence of a right to challenge the validity of the certificate. In addition, it should not be possible for individual heirs to turn up separately to claim particular assets. We are of the view that the holder of assets in a country other than that of the main administration should be entitled to obtain a full discharge by transferring the whole property held to a single executor entitled to administer the deceased's estate.

In principle the certificate should be recognised automatically, but there would have to be local authority to present a challenge to its validity.

The information on the certificate should be limited to a statement of the property, which the heir/executor is entitled to administer, but be sufficient for proper and adequate identification.

Registration of wills

We are of the view that the existing voluntary scheme for registration of International Wills has not been successful. We have always been strongly against any system of registration of wills, as it would impinge on our existing substantive law, which encourages testacy. We do accept that there would be convenience in a centralised register of wills for those jurisdictions that do maintain a register but the convenience would be largely outweighed by resulting difficulties. If registration were made compulsory, this would become another formality of execution of an onerous nature. Making a will should be as simple as possible, and if it were a requirement that it must be registered in order to be valid, many perfectly good wills would be denied effect, especially wills made in emergency situations. We are of the view that multiplication of formalities is simply unnecessary.

Any register, which may be set up, would have to be voluntary, and is unlikely to have any greater success than the existing one. We are of the view that a centralised European register is not worth pursuing.

BETTER JUSTICE FOR CITIZENS AND BUSINESSES

Enforcement of judgments and provisional measures

We welcome the focus on enforcement of judgments and provisional measures. Practical measures should be taken to ensure that enforceable orders can actually be enforced, provided that such measures are transparent, fair and consistent with human rights. We welcome the recognition that the accused's interests must be duly and sufficiently taken into account and that data protection issues have also to be taken into account. We would emphasise that recognition of this should apply in all areas.

Common frame of reference

We accept that it is useful to have non-binding guidelines for use as a common source of inspiration or reference in the Community law making process. Its development should be driven by practitioners to supplement the work already conducted in the academic sphere.

e-Justice

We support e-Justice. However there must be appropriate safeguards in place to ensure that the rights of citizens and the integrity of the justice systems are protected.

In terms of scope, as noted by the Justice and Home Affairs Council on 12 and 13 June 2007, we would emphasise that EU action should be "limited to cross-border issues."

In terms of substance, we believe that it is important to clarify not only who will be providing the information that will appear on the e-Justice portal, but also who will determine what is relevant and what mechanisms will be in place to ensure that the information is kept updated. We believe that there should be a mechanism for reviewing information and information should where necessary be provided in a basic summary followed by detail format.

We are concerned that the trend to provide videoconferencing as an additional option can quickly move to it being the main or only form of access to a suspect in custody. Many practitioners would be reluctant to rely on the confidentiality of communications with their clients over a video conferencing medium. It is essential that lawyers have access to their clients to build up a relationship of trust and confidence. Similarly it is essential that courts administer justice in the presence of offenders rather than remotely. We would also draw attention to the Council of Europe anti-torture committee report to the UK Government published on 1 October 2008,² which, in relation to extensions of pre-charge detention by video-link, emphasises that the physical presence of a detainee should be seen as an obligation, not as an option open to the judicial authority.

Regarding the interconnection of Criminal Record Databases, we are concerned about the accuracy, access, use and understanding of the information stored and how any errors or misunderstandings can be rectified.

² <http://www.cpt.coe.int/documents/gbr/2008-27-inf-eng.htm>

Regarding interoperability: we have serious concerns regarding using information gathered for one purpose for another purpose.

We are concerned that e-Justice is developing in a data protection vacuum or at least in a patchwork of national data protection rules. In providing information on cross-border proceedings, the e-Justice portal should at an absolute minimum provide information on data protection rules that apply to all of its subject matter and provide direct access to mechanisms for the correction of data. We believe that data protection rules should be a precondition to the e-Justice portal. An efficient and robust procedure for challenging inaccuracies should also be established.

We would caution against unqualified reliance on automated translations. For example, we believe that criminal records must be translated with a full explanation of the meaning, and the court process, whether summary, intermediate, or appeal. We would equally caution against the use of standardised dynamic forms with predetermined text and terminology. We believe that the use of automated translations must be clearly defined and limited and should not be relied on in proceedings.

ASYLUM

On enhancing cooperation with third states, we support technical assistance and capacity building but not shifting responsibility for decision-making offshore which would create a multi-layered system difficult to administer, with lack of clarity on which country's legal system would apply and would hinder access to essential safeguards, legal advice, representation and appeal processes, and obtaining evidence. This would exacerbate the problem of poor quality decision-making.

GENERAL

We concur that as noted in the Justice Report there is a state of fatigue and a need for a 'time-out' period. There is a tendency to churn out legislation rather than to take stock, slow down and focus on evidence-based measures and intergovernmental consultation. We welcome better law making, not just in terms of legislation, but also in terms of providing assistance to Member States and closely monitoring their implementation of EU legislation in both the lead up to the implementation deadline and beyond it.

We call for co-ordination not just between relevant Directorate Generals but also within Directorate Generals. Indeed, the production of a separate Home Affairs Report and a separate Justice Report is a good example of the absence of a co-ordinated approach which needs to be redressed, with the best aspects of each report forming a consolidated programme.

We welcome the acknowledgement in the Home Affairs Report that new entities and harmonised rules at European level are not objectives in themselves. We welcome the call for better regulation and simplification. We welcome considering whether European action generates added value in accordance with subsidiarity and proportionality and fully exploiting the effectiveness of current legislation and measures before taking new action.

We welcome mobilising "legal actors" to become more involved in drafting the instruments they will have to implement and are keen to discuss this further.

We also call for awareness raising, in particular on conducting cross-border matters, and a focus on facilitating mutual recognition in practice. Putting links to the EJN could assist but we would also call for more training and events, including for consumers and consumer organisations and their advisors on the front line, including Citizens Advice Bureaux.

It is also essential to ensure that mutual recognition works in practice, including using periodic reviews, calling Member States to account and training the judiciary.

The Law Society of Scotland
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