THE CRIMINAL BAR ASSOCIATION

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Response to Discussion Paper on the EU Draft Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest

INTRODUCTION

1. The Criminal Bar Association ('CBA') represents about 3,600 employed and self-employed members of the Bar who appear to prosecute and defend the most serious criminal cases across the whole of England and Wales. It is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts.

2. An integral part of our daily work is the consideration of rights of suspects and accused persons on arrest. We welcome the opportunity to contribute to the discussion surrounding this EU Draft Directive and set out below our answers to each of the questions asked in the discussion paper.

<u>QUESTION 1</u>: Do you consider that the draft Directive would help provide the level of mutual trust necessary to support the mutual recognition of decisions or judgments between Member States?

3. For mutual recognition to operate effectively there must be a common basis of trust between the judicial authorities of Member States. We are of the view that introducing minimum standards for the protection of basic procedural rights will, in principle, serve to foster this mutual trust between Member States and thereby support the mutual recognition of decisions or judgments between them.

4. The reality that the right of access to a lawyer in criminal proceedings, most importantly prior to interview, is not explicitly provided for within the ECHR (see discussion below at (2)) means that there is scope for member states to diverge in their attitude toward the existence and/or substance of the right. Given that it is a right which our judiciary has deemed to be 'fundamental', any divergence in opinion or practice by the judicial authorities of other member states raises the prospect of distrust on the part of our judiciary and, in all probability, on the part of the judicial authorities of the many other Member States who similarly recognise the importance of this right. Consequently, obligating Member States to ensure that suspects and accused persons are granted access to a lawyer in criminal proceedings is likely to engender greater confidence in the fairness of the proceedings of Member States and deepen the level of trust between them.

<u>QUESTION 2</u>: In your view, do the provisions of the draft Directive add value to the European Convention on Human Rights?

5. The specific rights addressed in the Draft Directive are not contained explicitly within the European Convention on Human Rights (ECHR). However, the European Court of Human Rights (ECtHR) has held that they are a necessary component of the right to a fair trial contained within in Article 6(1) and (3) of the ECHR (*Salduz v Turkey*, Judgment of 27 November 2008, Application Number 36391/02 [2009] EHRR 19*)*. In many respects the Draft Directive represents the codification of the Grand Chamber's decision in that case, a decision which is not without its critics but which, in our view, provides important clarification regarding the right of access to a lawyer prior to interview; a right which is already entrenched in the statutory and common law of England and Wales. To the extent therefore that the draft Directive seeks to clarify and codify the substance and detail of the right to a fair trial in Article 6, specifically the right of access to a lawyer, we are of the view that it does add value to the ECHR.

6. Articles 6(1) and (3) are the relevant sections of the ECHR:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
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> ...
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> 3. Everyone charged with a criminal offence has the following minimum rights:
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> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
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> (b) to have adequate time and the 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 and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

7. In *Salduz v Turkey*, which addressed the specific question of the right access to a lawyer while in police custody, the ECtHR held at para 51:

> [A]lthough not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, *is one of the fundamental features of fair trial....Nevertheless, Article 6(3) does not specify the manner of exercising that righ*t. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial.' (emphasis added)

8. The Court proceeded to set out what it considered necessary to satisfy the requirements of a fair trial:

> National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence on any subsequent criminal proceedings. In such circumstances, *Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation.* However, this right has so far been considered capable of being subject to restrictions for good cause. The

> question in each case has therefore been whether the restriction is justified and, if so, whether in the light of the entirety of the proceedings, it has not deprived the accused of a fair hearing, for even a justified restriction is capable of doing so in certain circumstances. (emphasis added)

9. With regard to the stage at which access to a lawyer is required in order to satisfy the rights provide by Article 6, the Court held that:

> [A]s a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 .... The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation, without access to a lawyer are used for conviction.' [para 55]

10. In the Supreme Court's decision in *Cadder v HM Advocate (HM Advocate General for Scotland and another intervening)* [2010] UKSC 43, Lord Hope held that the decision in *Salduz* shows a determination on the part of the Grand Chamber 'to tighten up the approach that must be taken to protect a detainee against duress or pressure of any kind that might lead him to incriminate himself.' [para 33] and that the emphasis throughout the judgment 'is on the presence of a lawyer as necessary to ensure respect for the right of the detainee not to incriminate himself. The last sentence of para 55 could hardly be more clearly expressed.' [para 35]

11. Accordingly, at para 41, Lord Hope held that 'the statement at para 55 that article 6(1) requires that 'as a rule', access to a lawyer should be provided as from the first interrogation of a suspect...must be understood as a statement of principle applicable everywhere in the Council of Europe area. The statement that the rights of the defence will 'in principle' otherwise be irretrievably prejudiced must also be understood in the same way.' Lord Hope concluded that 'the effect of *Salduz v Turkey* is that the contracting states are under a duty to organise their systems in such a way as to ensure that, unless in the particular circumstances of the case, there are compelling reasons for restricting the right, a person who is detained has access to advice from a lawyer before he is subject to police questioning.' [para 48]

12. Lord Hope also pointed out that those member states who did not afford a right to legal representation at interview prior to *Salduz,* such as Belgium, France, The Netherlands and Ireland, have since recognised this inadequacy and taken steps to remedy it. He noted further that England and Wales already recognise this right, which was described in *R v Samuel* [1998] QB 615 as 'fundamental'. The right is also enshrined in section 58(1) of the Police and Criminal Evidence Act 1984, which provides that a person arrested and held in custody in a police station or other premises shall be entitled, if he so requires, to consult a solicitor privately at any time...' [para 49]

13. The decision in *Salduz* is not without controversy and there is a view that it is an example of the ECtHR deliberately making new law on a matter not expressed in the Convention and that, by extension, the decision of the Supreme Court in *Calder* is incorrect. The suggestion is made that the decision in *Salduz* overrides a member state's margin of appreciation as to the appropriate means for protecting Convention rights, specifically the possibility that the rights of a suspect could be protected by means other than allowing access to a lawyer. Whatever view is taken regarding the propriety of the reasoning in *Salduz* and the extent to which a right to legal advice prior to interview can properly be considered to fall within the parameters of Article 6, it is clear that the EU Directive seeks to clarify any ambiguity regarding the existence and substance of such a right. We are of the view that this is, in principle, a welcome development which adds clarity and therefore value to the rights contained with Article 6 of ECHR. We set out our reservations as to the scope of the Directive and its derogations in our answers to Questions 6 and 10.

QUESTION 3: Do you think that the provisions set out in Article 3 with regard to when a suspect or accused person should be granted the right to access a lawyer are both fair to that person and workable in practice?

14. With regard to Article 3 (1) (a) of the Draft Directive, as stated above in response to questions 1 and 2, the right to access a lawyer prior to questioning is considered a 'fundamental right' in England and Wales. Therefore, we consider that such a right is not only entirely fair but indispensable. It is also wholly workable in practice.

15. Regarding Article 3 (1) (b), the right to access a lawyer upon carrying out any procedural or evidence-gathering act at which the person's presence is required or permitted provides an important safeguard for that person's right to a fair trial. As we repeat in our answer to

Question 5, we do not see any logistical difficulties with granting such a right where the national law permits it and it would not prejudice the acquisition of evidence.

16. Article 3 (1) (c) requires that a suspect or an accused person is granted access to a lawyer from the outset of deprivation of liberty. With the qualifications expressed in our answers to Questions 6 and 10, we think that this provides important safeguards for the defendant by ensuring that he is able to obtain the range of legal assistance necessary to facilitate the preparation of his or her defence. It also enables for the conditions of detention to be checked and the needs of the suspect or accused person, particularly those who are vulnerable, to be assessed and addressed. We cannot foresee any practical difficulties with granting such a right.

QUESTION 4: Do you think that it is always necessary for a suspect or accused person to meet their lawyer, rather than, for example, gaining legal advice over the telephone?

17. We are of the view that occasions where it would not be necessary for a suspect or accused person to meet their lawyer, would be few and far between. Ordinarily, in our experience, it is only through face-to-face contact with their lawyer that a suspect or accused in the police station is able to give adequate instructions. In circumstances where there may well be language difficulties faced by the person in custody, the need for face-to-face contact is all the more apparent.

QUESTION 5: With regard to Articles 3(1)(b) and 4(3), what do you think would be the practical implications of granting lawyers the right to attend any procedural, investigative, or evidence-gathering act, albeit, only in cases where national law permits or requires the presence of a suspect or accused person and where it would not prejudice the acquisition of evidence?

18. We can see no such implications provided it is confined to cases where the national law permits it and it would not prejudice the acquisition of evidence.

QUESTION 6: Can you think of any circumstances when it would be necessary in the interests of justice to restrict the right proposed at Article 4(2) regarding a lawyer's right to be present at any questioning and hearing?

19. As is set out in the answer to Question 2 above, *Salduz* establishes the view of the Strasbourg court to be that:

> [I]n order for the right to a fair trial to remain sufficiently 'practical and effective'...Article 6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6..... The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

20. Thus, the European Court of Human Rights does not insist upon an absolute right of access to a lawyer at any questioning. In England and Wales, section 58 of the Police and Criminal Evidence Act 1984 ('PACE') allows for circumstances where the right of access of a suspect to a lawyer is restricted. The right of access to a solicitor can be delayed for up to 36 hours if it is authorised by an officer of the rank of Superintendent or above for reasons set out in s.58(8) and (8A). Those reasons are essentially concerned with preventing interference with, or harm to evidence or a person; preventing the alerting of any further suspects not so far arrested; and ensuring the recovery of property or the proceeds of criminal conduct. They thus go beyond an urgent need to prevent harm to another person specified in the permitted derogation under Article 8. Moreover, Schedule 8 paragraph 7 to the Terrorism Act 2000 allows for delay to the right of access to a solicitor for a person detained under Schedule 7 or section 41 of the same Act in circumstances broadly similar to those set out in section 58 of PACE. Indeed, 'safety interviews' are very often conducted in the absence of a solicitor with people suspected of terrorism offences. Such interviews are carried out very soon after arrest to try to establish whether there are any further devices or terrorists at large which might imperil the safety of members of the public. We are of the view that the restrictions on access to a solicitor outlined above are based on sound policy reasons. As one example, in our view it is plainly in the interests of justice that suspects who remain at large should not be able to evade justice as a result of being tipped off by another suspect who is in custody. The restrictions on access provided for in PACE and the Terrorism Act 2000 should not be undermined as a result of the implementation of the EU Draft Directive. We therefore

express reservations about the adequacy of the derogations in Article 8 in our answer to Question 10.

QUESTION 7: Do you think that granting lawyers routine access to the place where a person is detained would add any value to the existing measures in place in the UK to monitor custody conditions?

21. We are of the view that the proposed changes would add very little, if anything, to the provisions in place under PACE.

QUESTION 8: Can you think of any circumstances when it would be necessary in the interests of justice to limit the duration and frequency of meetings between the suspect or accused person and his or her lawyer?

22. In answer to question 6 above, we have identified some extant qualifications to the right of access to a solicitor in England and Wales. Plainly, those qualifications are directed at protecting and preserving the interests of justice. We consider such qualifications to be necessary in the interests of justice. Beyond the circumstances justifying such qualifications, we can see no others where it would be necessary in the interests of justice to limit the duration and frequency of meetings between the suspect or accused person and his or her lawyer.

QUESTION 9: Do you think that a derogation to any of the rights outlined in this Directive need to be authorised by a judicial authority, rather than the police or other law enforcement authorities?

23. We are of the view that the authorisation by a judicial authority of any derogation to any of the rights outlined in the Directive could only be a positive step in ensuring the proper exercise of such important powers.

QUESTION 10: Are the derogations in Article 8 adequate? Should they only apply to Article 3, Article 4 paragraphs 1 to 3, Article 5 and Article 6? What are the practical implications of the derogations?

24. Our answer to question 6 above identifies the relevant Strasbourg jurisprudence and sets out our opinion that there are sound policy reasons underpinning the qualifications to the right of access to a lawyer contained in s.58 of PACE and Schedule 8 paragraph 7 to the Terrorism Act 2000. It therefore follows that, in respect of Articles 3 and 4, we are of the view that the derogations in Article 8, concentrating exclusively as they do on an urgent need to prevent harm to another person, do not go far enough in preserving the interests of justice.

25. Under s.56 of PACE and schedule 8 paragraph 6 to the Terrorism Act 2000, similar provisions to those in respect of access to a lawyer apply to the right of a person to have someone informed of their detention. The qualifications to that right are very similar to those contained in s.58 and schedule 8 paragraph 7 as they apply to the right of access to a lawyer. We therefore have the same reservations in respect of the available derogations to Articles 5 and 6 as we do with Articles 3 and 4.

26. We believe the derogations should only apply to the Articles identified in the question. In keeping with the approach taken by the courts of England and Wales, we believe that the right of confidentiality of privileged communications secured by Article 7 should be absolute. It is fundamental to the proper functioning of the legal system as a whole and the criminal justice system in particular.

QUESTION 11: Are the provisions in Article 9 with regard to waiver of access to a lawyer fair and workable in practice?

27. The conditions placed upon the waiver of the right to legal access in the draft Directive are that the suspect has received prior legal advice on the consequences of waiver or has otherwise obtained full knowledge of these consequences, that he has the necessary capacity to understand these consequences, and that the waiver is given voluntarily and unequivocally. The waiver and the circumstances in which it was given must be recorded and it must be ensured that the waiver can subsequently be revoked at any stage of the proceedings.

28. The current procedure regarding access to legal advice is set out in section 58 of PACE, supplemented by PACE Code C. Its treatment of waiver of legal advice is largely in line with that of the draft Directive. For example, at paragraph 6.5 of Code C:

> If, on being informed or reminded of this right [to legal advice], the detainee declines to speak to a solicitor in person, the officer should point out that the right includes the right to speak with a solicitor on the telephone. If the detainee continues to waive this right, the officer should ask them why and any reasons should be recorded on the custody record or interview record as appropriate.

29. Thus, Article 9(2), regarding the recording of the circumstances of the waiver, would appear to be covered under the current law. At Note 6K of Code C, however, it is to be noted that 'a detainee is not obliged to give reasons for declining legal advice and should not be pressed to do so'. Paragraph 6.5 also goes some way to ensuring that the waiver is 'unequivocal' (as per Article 9(1)(c)); by giving the suspect the option to obtain legal advice over the telephone rather than in person, the Code goes someway to guard against flippant refusals of legal advice and ensure that the waiver is truly meant.

30. At paragraph 6.4 of Code C it is stated that 'no police officer should, at any time, do or say anything with the intention of dissuading a detainee from obtaining legal advice'. Thus, the requirement in the Article that the waiver be given 'voluntarily' would appear to be safeguarded.

31. While it is not expressly on the face of PACE Code C, the possibility of revoking the waiver of legal advice is implicit in the Code's emphasis on frequent reminders of the right to legal advice.

32. Absent from the current regime is the draft Directive's focus on informing the suspect of the *consequences* of the decision to waive legal advice. The Article does not identify those consequences perhaps because the possible detriment to a suspect who refuses legal advice and the potential prejudice to their own case would appear to be obvious. This provision perhaps creates a danger that the police are required to provide the 'prior legal advice' or to ensure that the suspect has 'full knowledge' of the consequences, which may burdensome. It may be that the measures required under the current scheme to advertise the right to legal advice (for example, the mandatory posters in paragraph 6.3 of Code C) could be adapted to detail the consequences of waiving the right to legal advice, thus complying with the demands of the Directive.

33. Also, the Article does not address what happens if the suspect does not have the 'necessary capacity' to understand the consequences of the waiver; will he be forced to accept legal advice in those circumstances? This would appear to conflict with PACE Code C paragraph 6.5A, which stipulates that 'the detained person cannot be forced to see the solicitor if he is adamant that he does not wish to do so'.

QUESTION 12: Are the provisions set out in Article 11(2) regarding the rights that a person who is subject to a European Arrest Warrant has in respect of access to a lawyer in the executing State both fair to that person and workable in practice?

34. Article 11(2) states that on a person's arrest under an EAW, in the executing member state that person shall have:

a) the right of access to a lawyer in such a time and manner as to allow him to exercise his rights effectively;
b) the right to meet the lawyer representing him;
c) the right that his lawyer is present at any questioning and hearing, including the right to ask questions, request clarification and make statements, which shall be recorded in accordance with national law;
d) the right that his lawyer has access to the place where he is detained in order to check the conditions of detention.

35. The duration and frequency of meetings between the person and his lawyer shall not be limited in any way that may prejudice the exercise of his rights under Council Framework Decision 2002/584/JHA.

36. The Council Framework Decision 2002/584/JHA makes frequent reference to the 'right to legal counsel', for example at Article 11(2) of the Decision:

> A requested person who is arrested for the purpose of the execution of a European arrest warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.

37. The current UK system for the execution of EAWs is set out in the Extradition Act 2003 ('EA 2003'). The EA 2003 holds at section 171(3) that the provisions of section 58 of PACE apply to extradition proceedings in the UK. In particular with regards consenting to extradition, this cannot be done without legal advice (section 41, EA 2003). At section 182 of the EA 2003, it is further stipulated that Part 1 of the Access to Justice Act 1999 applies to extradition proceedings as it does to any criminal proceedings in England and

Wales. Thus, persons arrested in the UK under an EAW have the right to legal aid in order to access such advice, assistance and representation as the interests of justice require.

38. PACE enshrines many of the protections that Article 11(2) of the proposed Directive suggests:

a) Re (a) and (b) above, section 58(1) states that a person arrested and held in custody in a police station or other premises shall be entitled, on request, to consult a solicitor privately at any time.
b) Re (a) and (b) above, section 58(4) states that if a person makes such a request, he must be permitted to consult a solicitor as soon as is practicable, except to the extent that delay is permitted by later subsections.
c) Re (a), (b) and (d), the provisions of PACE Code C tend to suggest that legal advice is primarily given in person (for example paragraphs 6.1 and 6.5).
d) Re (c), insofar as it applies to representation at any questioning, Code C states at paragraph 6.6 that 'a detainee who wants legal advice may not be interviewed or continue to be interviewed until they have received such advice' although there are exceptions to this right at paragraph 6.6. Also, at paragraph 6.8, 'a detainee who has been permitted to consult a solicitor shall be entitled on request to have the solicitor present when they are interviewed'. Again, there are exceptions.

39. Regarding (c), insofar as it applies to representation at a hearing, it is presumed that the right of access to legal aid, coupled with the right to legal advice prior to a hearing, should be sufficient to provide adequately for representation at the hearing itself.

40. Regarding (d), insofar as it applies to police custody, in addition to in-person solicitor visits (which do not officially amount to inspections), Her Majesty's Inspectorate of Prisons (HMIP) and Her Majesty's Inspectorate of Constabulary (HMIC) have a programme of joint inspections of police custody suites, as part of the UK's international obligation to ensure regular independent inspection of places of detention.

41. Regarding (d), insofar as it extends beyond visiting the person in the police station following arrest, in addition to the work of the HMIP, the Prison Act 1952 provides for independent monitoring boards to have free access to inspect prisons (section 6) and for justices of the peace to have the right to visit and inspect prison conditions (section 19). Rule 77 of the Prison Rules 1999 (as amended 2010) states that 'the independent

monitoring board for a prison shall satisfy themselves as to the state of the prison premises, the administration of the prison and the treatment of the prisoners'.

42. Rule 38 of the Prison Rules provides for visits to prison by legal representatives of the detainees. It does not, however, include a general right of inspection with regards prison conditions. Rule 72 states that 'no outside person shall be permitted to view a prison unless authorised by statute or the Secretary of State'. There would not therefore appear to be a general right for legal representatives to access a prison to check on the conditions of detention, although there are other mechanisms in place to ensure that conditions are sufficiently maintained. Logistically, (d) may represent a significant administrative burden on prisons and custody suites, were every visiting legal representative to be allowed to inspect conditions of detention on a client by client basis.

QUESTION 13: Is it necessary to ensure that a person who is subject to a EAW should upon request have the right to access a lawyer in the issuing State? What are the practical implications of that proposal?

43. Article 11(3) to (5) of the proposed Directive concerns the appointment of a lawyer in the issuing Member State to assist the lawyer appointed in the executing Member State.

44. This duality of legal representation seems sensible in extradition proceedings where there is not necessarily a reciprocal understanding of the legal systems of other member states.. However, it is unlikely always to be necessary and may represent an avoidable cost of proceedings.

45. Practical considerations may include:

a) A danger of overlapping functions: This would appear to be mitigated by the proposed subsection (4), which states that the lawyer in the issuing Member State would only have the right to carry out activities needed to assist the lawyer in the executing Member State. This, presumably, includes providing information as to the legal system in the issuing Member State such as may be pertinent to the proceedings in the executing Member State. There may conceivably still be some disputes over the division of labour/advice between the two legal representatives.

b) The logistics of cooperation: For example, language barriers and modes of communication.

c) Legal aid: The lawyer in the issuing Member State is likely to need funding by legal aid. It may be difficult to justify this.

QUESTION 14: What impact is the Directive likely to have on the provision of legal aid?

46. Article 12 of the proposed Directive would appear to preserve the existing legal aid regime, although it vetoes less favourable provisions on legal aid than those currently in place in relation to access to a lawyer provided pursuant to this Directive.

47. Therefore, provided that the current legal aid regime is not amended so as to be less favourable in respect of access measures pursuant to the Directive, there should not be an issue with legal aid in respect of the Directive. That is, as long as the existing regime is considered compliant with the Charter of Fundamental Rights of the European Union and the ECHR.

QUESTION 15: What should be the remedy where a person's right of access to a lawyer has been breached?

48. Article 13 of the proposed Directive holds that there must be an effective remedy in the event that a person's right of access to a lawyer has been breached. This remedy shall have the effect of putting the person back in the same position in which he would have found himself had the breach not occurred. Statements made or evidence obtained in breach of the right of access may not be used at any stage as evidence against the person, unless the use of such evidence would not prejudice the rights of the defence.

49. Article 13(3) (regarding the use of material obtained) is broadly in line with that already available in domestic proceedings under section 78 of PACE, whereby evidence may be excluded if to include it 'would have such an adverse effect on the fairness of proceedings that the court ought not to admit it', having regard to all the circumstances, including those in which the evidence was obtained. The test of unfairness would appear to be equivalent to the test of prejudicing the rights of the defence in Article 13(3).

50. There remains, however, a *discretion* to exclude under section 78. Just because there has been a breach may not necessarily mean that the evidence is excluded; every case is to be determined on its own facts (*R v Parris* [1988] 89 Cr App R 65). As we set out in answer to Question 2 above, in *Salduz* it was stated that 'although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer,

assigned officially if need be, is one of the fundamental features of fair trial'. In *R v Samuel* [1988] 87 Cr App R 232, it was described as 'one of the most important and fundamental rights of a citizen'. It may be, therefore, that there will generally be sufficient unfairness resulting from a breach to justify exclusion.

51. However, in those cases where it is not deemed unfair to admit improperly obtained evidence, it is difficult to see where the remedy under Article 13(1) would lie (the test of prejudicing the rights of the defence would appear only to apply to the exclusion of statements; the right to a remedy for a breach in Article 13(1) and (2) appears absolute). There is currently no absolute remedy where there has been a breach of the right to legal advice.

QUESTION 16: Are there any other issues that we need to be aware of?

52. No.

QUESTION 17: Do you think that the UK should participate (opt in) to this Directive?

53. Subject to the reservations we have to the adequacy of the derogations under Article 8, we are firmly of the view that the UK should opt in to this Directive.