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***CAJ's response to the draft Northern Ireland
(Emergency Provisions) Act, Code of Practice***

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A response by the Committee on the Administration of Justice (CAJ) to the draft Northern Ireland Emergency (Provisions) Act Code of Practice dealing with provision for the silent video recording of interviews with terrorist suspects

Generally, CAJ must once again reiterate its concern that the language used in this code of practice is sexist. It is unacceptable that the government continues to use language which is non-inclusive,

The draft Code of Practice is a welcome but limited safeguard

CAJ welcomes the proposal to introduce the silent video recording of interviews with detained persons at the holding centres. This step will serve to improve on the few mechanisms which are currently available for safeguarding the rights of detained persons but it is with deep regret that we must state our concern that the proposed change does not go far enough.

CAJ has long been on record as saying that video recording should take place of all interviews with detained persons. As such the proposal to introduce this facility is long overdue. At the same time we have argued that silent video recording is a limited safeguard unless it is accompanied by an audio recording facility to operate simultaneously with video. The argument in favour of this combined approach is persuasively simple: it is only when both visual and sound recording equipment are used together that a detained person can be assured almost beyond peradventure that he/she is protected from physical, psychological and verbal abuse during interrogation. This approach would also protect police officers from false allegations.

CAJ remains convinced that verbal abuse over a prolonged period and in the circumstances which persist at holding centres is detrimental to the health and confidence of detained persons at a time when many are feeling vulnerable. It must be remembered that a person arrested under the Prevention of Terrorism Act can be detained without charge for up to 7 days. His/her access to a solicitor can be deferred for the first 48 hours of this period. Moreover, unlike the situation which pertains under the Police and Criminal Evidence Order in Northern Ireland, a person detained on suspicion of having committed a terrorist offense has no right to have his/her solicitor present at an interview with police. Such persons have no exercise or recreation facilities nor can they make contact with family or friends.

CAJ are not alone in these concerns. In 1994, the European Committee for the Prevention of Torture concluded that detainees in the holding centres faced a "significant risk" of psychological abuse and occasional physical abuse. In 1995 the United Nations Human Rights Committee called on the government to close Castleragh as "a matter of urgency." This followed an admission by the government that conditions there were unacceptable. The United Nations Committee Against Torture expressed concern at the practice of "vigorous interrogation of detainees under the emergency powers, which may sometimes breach the Convention." The Committee also called on the government to abolish the detention centres and introduce taping of interrogations to "all cases and not merely those that do not involve terrorist related activities and in any event to permit lawyers to be present at interrogations in all cases."

Given the absence of these basic safeguards and facilities and in the context of a holding centre where the emphasis of the police is frequently focused on pushing the detained person in the direction of agreeing with their version of events, rather than discovering the *truth*, CAJ views

verbal abuse as having the potential to be as damaging as physical abuse. CAJ has documented numerous complaints of incidents where detectives at Castlereagh, Gough and Strand Road have attempted to pressurize detained persons by engaging in periodic bouts of verbal abuse. These complaints have taken the following forms:

- **personal abuse, denigration, insults and abusive remarks**
- **coercive tactics such as threats to self, family and friends including the arrest of family and friends**
- **confusion tactics such as shouting accusations and changing modes of questioning between pleasant and aggressive, constant repetition of the same question**
- **misleading explanations of the caution, and attempts to undermine the role and advice of solicitors**
- **the use of inducements**

CAJ believes that the use of any of the above tactics can have a serious psychological impact on the detained person. It believes that such conduct can constitute inhuman and degrading treatment. It is concerned that any confession which is obtained in these circumstances is unreliable.

CAJ is convinced that the implementation of a system of audio recording to complement video recording will help to monitor and control verbal and psychological abuse. If such abuse is alleged a court could have reference to the audio record of the interview in order to determine whether admissions which were made during the interview should be admitted into evidence. By adopting this safeguard CAJ believes that confidence in the police and in the administration of justice would be considerably enhanced.

The Government has made one substantive argument against any electronic recording of the interviews of terrorist suspects:

“In the circumstances of Northern Ireland, any electronic recording of interviews would inhibit still further the chances of lawfully obtaining information that would lead to the conviction of terrorists or to the saving of other people’s lives.” (Sir Patrick Mayhew, Secretary of State for Northern Ireland, Hansard, 24 May, 1994, pg. 66)

It appears that the government has now resiled from this position, one which CAJ has never regarded as correct. If the government has accepted the invalidity of the above view, what is the justification for refusing to introduce audio recording? The suspicion must be that part of the reason for this reluctance is that in Northern Ireland interviews are often used for the purpose of information gathering. CAJ believes that arrests under the PTA carried out for that purpose are illegal and are unlikely to increase confidence in the police or the rule of law. This is particularly so when unlawful methods are adopted for that purpose. While CAJ recognizes that the police have a legitimate interest in investigating and thwarting paramilitary activity it does not accept that interviews should be used for general intelligence gathering, nor does it accept that verbal and psychological abuse is lawful.

CAJ’s view is that there should not be any difference between the interview framework which surrounds the investigation of ordinary crime and that which pertains to the investigation of paramilitary activity. There have been no reports from Great Britain that this parity, by which we believe the interview of PTA detainees is audio recorded on the same basis as those interviewed under PACE, has caused any difficulties in ensuring the efficiency and security of an investigation.

CAJ's advocacy of the argument that video and audio recording is the only means to an independent and objective record of the proceedings at police interviews, has been supported by a disparate body of opinion. The rationale for the Government's opposition to audio recording is inconsistent and wrong in principle. CAJ urges the Government to consider the above submissions and to examine the issue afresh.

A consideration of the substantive features of the draft Code of Practice

1.1 We would recommend that solicitors for detainees and appropriate adults be added to the list of those allowed to consult the code.

1.4 We do not understand the rationale for not including those arrested under section 14 (1) (c) in the provisions of the code.

2.1 As at 1.4.

3.1. states that a detained person has the right to make representations if he or she does not wish the interview to be video recorded. CAJ does not understand why detainees are to be given the option of objecting to the video recording of interviews. The corresponding sections of the PACE Code of Practice do not provide for the suspect to be asked if he or she has any objection to the interviews being tape-recorded. If the video-recording of interviews is a safeguard for those arrested under the PTA surely all of those arrested should enjoy the same safeguards. We would be concerned that this "opt-out" clause may be a recipe for disaster as there will undoubtedly be cases where contested confessions allegedly were made during unrecorded interviews. However, it may be that there are convincing reasons for this particular formulation. For instance, CAJ would anticipate that at least initially there could be widespread concern amongst detained persons about the purpose for which recording is to be carried out. That concern may in part relate to the well publicized disappearance from police stations of documents relating to PTA detainees and the communication of these documents to paramilitary groups. We would be obliged to be informed if this is indeed the rationale behind this clause or, if it is not, the reasons justifying it.

3B. In the event that the "opt-out" clause remains, we believe that an appropriate officer should explain to the detained person or his or her solicitor that video recording is an additional safeguard. Therefore, CAJ would make the following proposal:

In a case where a detained person objects to the silent video recording of interviews the authorized officer shall explain to him/her that the purpose of recording is to safeguard the rights of the detained person. If the detained person still objects to the recording of the interview no further interviewing shall take place until the detained person's solicitor has been contacted and the detained person has had an opportunity to discuss the issue of recording with him/her. After consulting with his/her solicitor the detained person shall be asked whether s/he continues to object to video recording in the presence of the solicitor. His or her remarks shall be recorded in writing and the interviewing of the detained person shall proceed with or without a video record, in accordance with the detained person's wishes.

4.3 We are concerned that this paragraph and 4.2 may present logistical difficulties in that it is made clear in 4.2 that if a second tape is needed then it will not result in an interruption of the interview. However, 4.3 obliges the officer responsible for issuing interview booklets to show the seal on the tape to the suspect and invite him or her to make a mark on it. It is stated that this same procedure be repeated if a second tape is needed. How will this be accomplished without interrupting the interview to ask the detainee to make a mark on the tape?

4A. CAJ have recently had sight of a forensic scientist's report which suggests that the tape of an interview under PACE was tampered with. We are therefore worried that similar scope for tampering with video tape evidence may exist. We would be grateful to be informed whether the NIO have examined other methods of ensuring that tapes cannot be interfered with.

7. details the procedures which will be put in place for securing the master tape. CAJ welcomes the suggestion that a police officer will not have the authority to break the seal on the master tape except in certain specified circumstances. However, CAJ does not accept that this provision goes far enough as it is completely silent on the question of the sanctions which might be imposed on an officer who wrongfully interferes with a master tape. In this context the RUC must consider that among sections of the community there is no confidence in the force's ability to securely retain records of suspects. In this context CAJ makes the following proposals:

(1) That interference with a master tape be made a criminal and a disciplinary offence;

(2) That the Commissioner for the Holding Centres (or some similar body) be given the power to make spot checks so as to ensure the integrity of the system for retaining video tapes, and the security of individual tapes.

Additionally we are concerned at the apparent inequality in the position of the legal representatives of the detainee as opposed to the Crown Solicitors or DPP. If court proceedings have not begun but are being contemplated, we find the notion that one of the most vital pieces of evidence can be accessed in the absence of the detainee or his or her representatives unacceptable. We are also concerned that the PACE Code of Practice makes provision for lawyers from the DPP to be present when seals on tapes are broken. We do not see why the Crown Solicitor's office have been included in this code in addition to the DPP's office.

8.1. The above comments apply to this provision.

8.3. Potentially, this provision will reverse much of the benefit which will accrue from the introduction of video recording. If neither the interviewing officers nor the detainee will be recognizable on the tape, inevitably concerns will be expressed about the integrity of the tape and its accuracy as a record of the interview. It may also then prove to be useless in cases where detainees are alleging serious verbal abuse, evidence of which may be gleaned from facial expressions and movements.

9.1. This section provides that the master tape will be destroyed after a period of twelve weeks following the detained person's release from police custody unless the police have been informed that proceedings are to be issued. While the procedures for warning a person of the imminent destruction of the master tape are entirely appropriate, the time frame for the destruction of the tape is not. A person who has up to three years in which to issue civil proceedings cannot be expected in every case to make a firm decision on that question within a period of 12 weeks. If, for whatever

reason, a decision to institute civil proceedings is not communicated to the police within the stated period of time, a valuable piece of evidence will have been lost. This is unacceptable. Therefore, the CAJ recommends the adoption of one of the following positions:

- (1) That the master tape is stored securely for a period of 3 years after which, if the institution of proceedings has not been communicated to the police, the tape should be destroyed; or*
- (2) A person who has been released from police custody or his or her solicitor should, after receipt of the notice from the police telling him/her that the tape is to be destroyed at the end of 12 weeks, be entitled to inform the police that s/he has reserved his/her decision on the question of whether civil proceedings are to be issued for a period of up to 12 months. If no communication is made to the police at the end of this 12 month period, the tape will be destroyed without further notice.*

Conclusion

Paragraph 2.2 of the draft Code states that video recording should be carried out in such a way as to “instill confidence in the conduct of the interview, with the aim of demonstrating that police officers are acting at all times with due respect for the rights of persons in custody; [and to] instill confidence in the reliability of the video recording as an accurate visual record of the interview.”

Silent video recording and the methods which are to be adopted to ensure the integrity of the process are welcomed as confidence building measures. However, in CAJ’s view they are of limited value. While observers will be able to monitor the physical activities which take place during an interview they will not be in a position to consider the dialogue. Therefore, silent video recording, despite the elaborate technical procedures which will be put in place to ensure its operational success, cannot serve to provide an accurate record of an interview.

CAJ is concerned that while complaints of physical abuse will in all likelihood decrease, the opportunity for verbal and psychological abuse of the detained person will still exist. In the absence of the full audio and video recording of interviews there will continue to be a serious lack of confidence in the willingness of police officers to respect the rights of suspects. The Government must consider again the basis of its opposition to audio recording.

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