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*A commentary by the
Committee on the Administration of Justice (CAJ)*
on the

**Intrusive Surveillance
Code of Practice**

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Intrusive Surveillance

Code of Practice

The main concern of the Committee on the Administration of Justice (CAJ) with regard to this code of practice is the absence of any definition of urgency or any guidelines on how this is to be operated. The CAJ is of the opinion that judicial authorisation should be required for all forms of intrusive surveillance. We are disappointed that the Act only requires prior authorisation by a Commissioner in a number of limited circumstances but even these may be diluted when the case is characterised as "urgent". A broad reading of urgency by the police and the Commissioners could undermine this safeguard entirely. Given the state of current technology, where a Commissioner equipped with a mobile phone should be able to receive voice and data information instantaneously and at any time we find it difficult to see when it should be necessary for the surveillance to take place without a Commissioner being informed in advance. In the time it takes to set up a surveillance operation or install a surveillance device there should be ample time to contact a Commissioner. Therefore we feel that there should be some guidance in the Code of Practice as to when a case is urgent. This should be along the lines that

- (a) Where an effort has been made to contact the Commissioner who proves to be unavailable; and
- (b) There is an immediate threat of injury to a person or destruction of evidence relevant to a current investigation of a serious crime if surveillance does not take place before it is reasonable to believe that a Commissioner can be contacted.

With regard to the appointment of Commissioners we assume that there will be a Commissioner for Northern Ireland appointed from among qualified candidates in Northern Ireland. It would be most unsatisfactory if the RUC had to contact a judge in England who was unfamiliar with Northern Irish law and the policing environment of Northern Ireland.

Some other points

Paragraph 2.3

We are concerned that at least one of the forms of activity which comes within the Act's definition of "serious crime" (criminal activity involving a large number of people) could result in the targeting of activity, notably political protest campaigns, which are sometimes close to the border of legality. Therefore while we welcome the reference to proportionality in the initiation of surveillance we would like to see a more explicit indication that in deciding whether to initiate surveillance the authorising office would have regard to whether he or she may be infringing on rights to privacy and free association. With the impending incorporation of the European Convention into the United Kingdom law these are rights which all state agencies in the United Kingdom will be under an obligation to respect in their activities and it would be good to make explicit reference to them here.

Paragraph 2.19

We feel there should be clearer guidance on when a Commissioner should not order the destruction of material obtained via surveillance which a Commissioner has subsequently decided to cancel. The Code currently states that he or she "may" destroy such material other than that required for pending civil or criminal proceedings. We find it difficult to decide in what other circumstances the retention of such material could be justified and would argue that if any do exist they should be set out clearly.

Paragraph 2.21

We find it difficult to see in what circumstances a renewal of an authorisation could be seen as urgent and so not requiring the authorisation of a Commissioner when it falls into one of the classes of cases which requires such an authorisation. If the police think that a renewal may be required they should be able to notify the Commissioner well in advance.

Paragraph 2.25

Will the authorisation record also indicate the reasons for authorisation, especially in cases where such authorisation was deemed to be urgent. Collecting such material might be most valuable for any independent review of these procedures after a period of time, enabling a reviewer to examine the types of grounds which were deemed adequate and inadequate for urgency.

Paragraph 2.29

With regard to the retention of material at the end of a period of surveillance we would express concern that the "no reason to believe" standard in respect of material retained with a view to use in possible future criminal proceedings is too broad. We are concerned that this will result in large amounts of material being retained "just in case" any future proceedings may be taken in respect of someone who has been a target of surveillance. We would argue that guidance should be given to the Commissioner that he or she operate on a standard of a balance of probabilities on the basis of the reasons offered by the police or customs in line with paragraph 2.28 that this material will be relevant to particular future proceedings.

Paragraph 3.6

We remain concerned that the Chief Commissioner is expressly required not to give any reasons for determinations made. We feel that such a blanket rule is unnecessary and that the Chief Commissioner should have a discretion to give reasons in those cases where he or she feels that security would not be endangered by doing so. Such a discretion might be especially valuable in cases where appeals are upheld so that public debate on when surveillance is or is not justified can be better informed. In the absence of any reasons ever being given for decisions to uphold or reject appeals the public is likely to remain unconvinced that the system adequately safeguards individual rights.