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*Winner of the Council of Europe Human Rights Prize*

*CAJ's commentary on the*  
**NIO Code of Practice on Reports and Inquiries**  
**under Sections 59 and 60**

**June 2002**

**Submission No. S.131**  
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## **What is the CAJ?**

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, the Lawyers Committee for Human Rights and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, monitoring, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include prisons, policing, emergency laws, the criminal justice system, the use of lethal force, children's rights, gender equality, racism, religious discrimination and advocacy for a Bill of Rights.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

# **CAJ commentary on NIO Code of Practice on Reports and Inquiries under Sections 59 and 60**

## **Introduction**

The Committee on the Administration of Justice (CAJ) did not receive the draft Code of Practice on Reports and Inquiries in time to comment upon; accordingly, we are sending our comments slightly later than ideal, but we hope nevertheless that they will be taken into account.

As will be obvious from the attached single page appendix about CAJ's work on policing since our inception in 1981, our organisation has had a long involvement on policing issues. We were particularly active in the debates around the Patten Commission, and the subsequent legislation. Accordingly, we are very aware of the significance of the powers conferred by the Police (NI) Act 2000, and the relevance of the powers outlined in sections 59 and 60 for the relationships between the Chief Constable, the Policing Board and the Secretary of State. Indeed, much parliamentary time was devoted to a discussion of the powers outlined in this segment, because it is evident that the power to call for reports and inquiries is central to the operation of the tri-partite relationship, which in turn is crucial to ensuring effective legal and political accountability in policing.

## **Background**

It is worth recording what led Patten to argue for the Policing Board to be given the power to call for reports and inquiries:

- *"The Police Authority's statutory power to hold the Chief Constable to account has significant deficiencies.... The Police Authority's power to obtain a report is more limited still because it is not supported by a power to follow up the receipt of the report, if the Authority judges it necessary, for example by undertaking or commissioning inquiries" (para 5.10).*
- *"We recommend that the statutory primary function of the Policing Board should be to hold the Chief Constable and the police service publicly to account. The Board should be empowered and equipped to scrutinise the performance of the police effectively" (para 6.3)*
- *"The powers of the Policing Board must be clearly defined and robust, both in relation to the Secretary of State, or the Northern Ireland Executive after devolution, and that of the Chief Constable" (para 6.15)*

- *“Operational responsibility means that it is the Chief Constable’s right and duty to take operational decisions...It does not mean, however, that the Chief Constable’s conduct of an operational matter should be exempted from inquiry or review after the event by anyone. That should never be the case” (para 6.21)*
- *“We recommend that the Policing Board should have the power to require the Chief Constable to report on any issue pertaining to the performance of his functions or those of the police service. The obligation to report should extend to explaining operational decisions. The grounds on which the Chief Constable might question this requirement should be strictly limited to issues such as those involving national security, sensitive personnel matters and cases before the courts. We recommend that, if there is a disagreement between the Board and the Chief Constable over whether it is appropriate for a report to be provided on a particular matter, it should be for the Chief Constable to refer the question to the Secretary of State for a decision as to whether the Board’s requirement should stand”. (para 6.22)*
- *“We further recommend that the Policing Board should have the power, subject only to the same limitation set out in para 6.22, to follow up any report from the Chief Constable by initiating an inquiry into any aspect of the police service or police conduct.....We consider it important, however, that the Board should have the power to request another agency to conduct an inquiry and should have the capacity to do so itself. It is also essential that all members of the police service be required to cooperate with that inquiry. Without such an obligation, the Board would be dependent on reports from the Chief Constable with no effective follow up capacity. It would therefore be powerless against a recalcitrant chief constable unless it was prepared to call for his or her retirement. To be truly effective an institution needs to have more than just one, extreme, power which by its nature is difficult to use” (para 6.23).*

It is clear from these extracts that the Patten Commission saw the Board’s authority to call for reports and inquiries as extremely important. While its predecessor (the Police Authority) had had a power to call for reports, the power was somewhat ambiguous and had proved ineffective. The Patten Commission wanted to avoid a situation where the new Board had, as its sole potential sanction of a Chief Constable, the power to ask for his retirement. It accordingly recommended an effective power of calling for reports and inquiries. While there was extensive debate around this issue during the parliamentary debate, and many – including CAJ – argued that Patten’s recommendations in this matter were not fully reflected in legislation, the thrust of sections 59 and 60 of the Police Act are very clearly an attempt to carve out a healthy ‘balance of power’ between the Police Board, the Chief Constable and the Secretary of State. As such, getting the respective responsibilities clarified between the three elements of the tri-partite arrangement is very important.

## **Code of Practice**

### **Note**

Reference is made to the fact that prior to its completion the Secretary of State will have consulted the Policing Board, the Chief Constable and "other interested parties" as required by section 27(2). CAJ would appreciate learning who the Secretary of State considered to be an "interested party"? Clearly this did not involve groups like ourselves who, amongst other things, have published extensively on the issue of police accountability for many years and were involved in all the various parliamentary stages of the debate on this topic.

## **Introduction**

We note that the Northern Ireland Office draft suggests that the powers under sections 59 and 60 are of a "far-reaching nature". This disregards the fact that they are not as far-reaching as Patten had actually recommended, and indeed it carries echoes of earlier government statements which tried to suggest that Patten had thought these powers of calling for reports or inquiries to be "extreme". To avoid any repeat of the past misunderstandings on this point, the NIO's attention is directed to para 6.23 (see quotation earlier) wherein it is clear that Patten thought that the power to call on the Chief Constable to retire was "extreme", and that other – lesser – powers (for example to call for reports and inquiries) were therefore important if the Board was to play its primary function of holding the Chief Constable to account.

## **A. Reports**

### **1. General**

**Para 1.5:** Is this paragraph intending to give a blanket exemption to any matter which might be considered to be an issue touching on covert law enforcement? This might be the understanding read into it, and yet no such provision exists in law. The statement that "*Specific cases of this kind should not, therefore, be the subject of reports or inquiries under sections 59 or 60*" appears very categorical. Given the extensive and protracted parliamentary debates around the exceptions clauses 59.3 and 60.3, CAJ does not understand where the authority lies for this additional exclusion. Moreover, the significance of the current formulation is far from clear – if an Omagh bombing or the murder of Pat Finucane were to happen in the future, would this formulation mean that the Policing Board would be automatically excluded from calling for reports or inquiries because they would need to address issues such as the techniques used by Special Branch, allegations of collusion, the use of informers etc.? If this is the meaning being attached to this paragraph, it will seriously undermine the inquiry power of the Board.

Please note that CAJ is not suggesting that the Board should ignore the existence of the Investigatory Powers Tribunal. The Tribunal essentially deals with individual complaints, but some of its work will obviously have relevance for concerns that come to the attention of the Policing Board. However, it is unlikely that the Tribunal's activities would ever cut across a Board desire to call for a report and/or inquiry, and the text should not therefore suggest that the Board must leave this kind of issue to the Tribunal. Patten argued, wisely, for close cooperation and coordination of efforts between the different regulatory bodies. We do object strongly, however, to decisions being arbitrarily taken out of the hands of the Board and established as blanket exemptions.

## **2. Timescale – Requirement for a Report**

**Para 2.1:** CAJ proposes omission of the last sentence in this paragraph. Most times the Board will be looking for information precisely with the intention of avoiding an inquiry, and we do not consider it helpful for them to have to indicate – prior to receiving solid information – what their later intentions might or might not be.

**Para 2.5:** While CAJ has no strong objection to saying that the Chief Constable would not often be expected to ask for an extension, we think it would be better to just omit the last sentence in this paragraph. We think it is sufficient to ensure that the request for an extension is justified, and there is a time-limit to that extension to avoid any unnecessary prevarication.

## **3. Grounds for referral**

**Para (a) national security:** As indicated, there is no statutory definition of the term, and it is CAJ's fear that this rubric could be all too easily abused by either the Chief Constable, the Secretary of State, or both, to avoid too close scrutiny of issues that are likely to be of grave public concern. We welcome para 3.5 as, in part, addressing this concern. CAJ recommends that this segment at least include some examples of what might and might not be considered a matter of "national security". Would the break-in at Castlereagh, for example, constitute an issue of "national" or "local" security for these purposes?

**Para (b) individual information:** Government clearly must have had some specific interpretation in mind when withstanding parliamentary amendments to the effect that the law should reflect Patten's language of "sensitive personnel matters". These amendments were not acceptable and the Act now includes the, presumably wider, ground for referral of – "because it relates to an individual and is of a sensitive personal nature". This section as currently drafted is far from clear, and we think it is unwise and unhelpful simply to import language from other totally distinct legislation.

The Code of Practice seems to be suggesting that the Chief Constable should be able to refer to the Secretary of State *any* request for a report about an individual, since it is difficult to conceive of a report about an individual wherein it would not be relevant to mention some at least of the characteristics mentioned in (a) to (h). Could, for example, some very serious concern about racial harassment (of a police officer or of a civilian) be excluded from consideration since it would require the Board considering “the racial or ethnic origin of the data subject”?

The inclusion of grounds (g) and (h) seem particularly unusual, in that it suggests that if the Board can be excluded from considering a case on the grounds that the civilian or police officer concerned may have committed an offence. One must also ask what authority the Board could hope to have if it was prevented from asking for reports on something like the recent dispute between the Police Ombudsman and the Chief Constable, since individual sensitivities were involved.

CAJ is aware that it is difficult to define clearly the legal obligations here, but believes that the current formulation of para 3.6 does nothing to help. The practical example given in para 3.8 is much more the kind of guidance that is needed.

**Para 3.8:** While it is right to clarify that the Secretary of State should consider his obligations under the European Convention (and indeed the Human Rights Act), this is also true of the Chief Constable and the Policing Board. It might be better to state that all parties – whether requesting, referring or deciding on the request for a report – should consider their obligations to respect the rights of all involved and to interfere with those rights only to the extent that is proportionate to the intended objective. In doing this, it makes it clear that – as public authorities – all three parties have responsibilities to a range of different individuals and constituencies. It also makes it clear that the Secretary of State is not necessarily in any better position than the other partners in the tri-parite structure to adjudicate in any conflict of rights.

**Para 3.9:** CAJ does not see the value of separating out the issue of discrimination. Indeed, as it stands it is misleading since article 14 is not a stand-alone anti-discrimination provision in the ECHR. This issue should be integrated into point 3.8 so that it is clear that people’s rights, including the right to non-discrimination, must be safeguarded. The practical example given here is particularly useful since it highlights a useful distinction between what might be an inappropriate request for specific individual details, and an appropriate request for statistics and trends that may highlight important policy issues of relevance to the work of the Board.

**Para 3.10:** This paragraph should be amended to read “...against an *assessment of the real possibility of harm to the individual concerned*”. If left undefined, this clause might be interpreted to include harm caused to something like the ‘reputation’ of the police, the Policing Board, and/or the Chief Constable. To cite Patten again “*The presumption should be that*

*everything should be available for public scrutiny unless it is in the public interest – not the police interest – to hold it back” (para 6.38).*

**Para © prejudice court proceedings and para (d) prevention/detection of crime.**

These two segments highlight a very serious problem in the different treatment given to the Chief Constable and the Policing Board in the deliberations of the Secretary of State. See for example –

**Para 3.12:** The Secretary of State is expected “to have regard to ...*the extent to which (the information) is required by the Board in fulfilling its statutory role”*. CAJ is unclear how this determination is to be made by the Secretary of State, since no reference is made to any obligation on the Secretary of State to seek advice or reactions from the Board before making a decision.

We understand the procedure of referral to consist essentially of the (i) Board making a request of the Chief Constable (ii) the Chief Constable determining to refer it to the Secretary of State and (iii) the Secretary of State determining whether the grounds for exemption exist. There is no suggestion in the Code of Practice that the Secretary of State must consult with the Board prior to deciding on the Chief Constable’s request. Indeed, it is notable that the Secretary of State “may seek views” from the Attorney General, and in cases involving others “would consult” the Police Ombudsman, Customs and Excise, etc. but no reference is made to consulting the Board.

While the Chief Constable can make his arguments for an exemption, the Board is not given a guaranteed opportunity to counter those arguments. The absence of the Board throughout these stages of the process is made very obvious again in **para 3.14** where it is noted that “*the Secretary of State may have to consult others besides the Chief Constable...*” The text makes it clear that the Chief Constable must be involved in his determination, but no similarly explicit role is given to the Board.

If the Board is to perform its function of holding the police to account, the presumption should be (even in cases of court proceedings) that information should be supplied to it unless there is a clear risk of prejudice to the legal process. Otherwise, even the fact that – say – the Omagh families are taking civil action against certain suspects could be used as a reason not to allow the Board to ask for reports/inquire into the police investigation of Omagh.

#### **4. Consideration of Referral**

The concerns noted above are confirmed in para 4.6, when the Secretary of State “*may invite the Board to comment on the referral*”. To ensure effective decision-making, this should be changed to “*shall invite...*”. Again, the

presumption should be that the Board will receive full details as to why the Chief Constable is referring their request to the Secretary of State, and on the basis of this information can make an informed comment to the Secretary of State.

## 5. Explaining the decision

**Para 5.3:** This short paragraph contains two caveats. CAJ thinks that this should simply read: “*The Secretary of State will give the reasons for his decision*”.

## 6. Publicity/Openness/Consultation

**Para 6.7:** CAJ welcomes reference to section 75 of the Northern Ireland (and indeed is following up with the NIO our concerns about its own failure to comply with Section 75).

**Para 6.8:** The opening sentence here is very categorical. It should not always be the case that “*the interests of those directly involved should be given priority over informing the wider public*”. This could imply that serious allegations of collusion, financial corruption, or individual wrong-doing, should be shielded from public view because of the need to protect the individual(s) involved. Obviously “*natural justice and issues of fairness to individuals should be borne in mind*” – but that does not imply automatically giving priority to the protection of individuals over the public good.

## B. Inquiries

Many of the comments made earlier with regard to reports relate equally to this section on inquiries. CAJ will only note here additional points.

**Para 7.1** See comments earlier about “far reaching power”. This tenor runs through this section with the Board being ‘warned’ to consider this option “*when all other appropriate courses of action have been considered and exhausted*” and later on (para 7.4) with the Board being “*advised to be aware at the outset of the full implications of what it is doing...*”. CAJ recommends that this emphasis be changed to better reflect Patten’s proposals.

**Para 10.1:** This section seems to suggest an even weaker line of communication between the Secretary of State and the Policing Board than that we have already criticised earlier. “*The Secretary of State will, to the extent that he thinks appropriate, inform the Board of the Chief Constable’s reasons for referring the decision to him, and may invite the Board to*

*comment on the referral....” (our emphasis). CAJ suggests amending this as follows: “The Secretary of State will inform the Board of the Chief Constable’s reasons for referring the decision to him and shall invite the Board to comment on the referral.....”*

**Para 10.3:** the final comment in brackets is confusing since it refers only to the Board. It would be better to amend as follows “(unless extensions have been requested and granted in line with the following section 11 on timescale)”.

**Para 12.1:** While correct that there is no provision in the law for the Secretary of State to modify or amend the Board’s request, CAJ is not clear why the Secretary of State could not exercise his authority to ensure that valid concerns being expressed by the Board on the one hand, and the Chief Constable on the other, are adequately met in a re-formulated request (for either a report or an inquiry). CAJ believes that the fixation on the “gravity” of inquiries (commented on elsewhere) has made the drafters of the Code of Practice overly cautious. Where there is a genuine public interest in having an inquiry, but equally genuine concerns to protect the safety perhaps of named individuals, the Secretary of State should aim to diminish the adversarial nature of the debate and encourage an outcome that all parties can agree to. Para 12.4, which allows for some flexibility, should either be integrated here (or cross-referenced) so that alternative options are not ruled out as they appear to be in a simple reading of 12.1.

**Para 12.2:** CAJ understands the motivation for the opening sentence of 12.2, allowing the Board (whose request may have previously been denied) to again request an inquiry if circumstances materially change. We do not, however, see the legal or other basis for the Chief Constable asking to make a referral while the inquiry is ongoing, and indeed even to seek a second referral. At the very least, the Chief Constable should be subject to the same limitation as the Board ie something like “if circumstances materially change”. Given the timescales and detailed procedures that have to be followed with each referral, this loose formulation would allow a Chief Constable to delay and thwart an inquiry by returning on several occasions to the Secretary of State.

**Para 12.6** – see earlier comments

## **Contact Details**

We are not sure what the intention of the contact-details are in appendix D. We note that statutory bodies with an interest in policing such as the Equality and NI Human Rights Commission are not included. This may be an appropriate place to note CAJ’s disappointment at finding nowhere in the text any reference at all to the Northern Ireland Human Rights Commission as a

body that might have an appropriate interest in any of the matters being discussed. Given the kinds of issues that are likely to lead the Policing Board to establish an inquiry or call on the Chief Constable for a report, this seems to us an unacceptable oversight.

.....

**More generally, we think that where reference is made in the text to section 75 of the Northern Ireland Act and to the Human Rights Act, reference should also be made to international human rights principles, since there are obviously a range of international human rights standards that the UK government has signed up to, and which are relevant to the kinds of issues which may trigger sections 59 and 60 of the Police (NI) Act 2000.**

## Brief synopsis of CAJ's policing work

- 1981 CAJ founded after conference at Queens on civil liberties
- 1982 Publication "Complaints Against the Police" – police complaints' systems became a routine topic of concern with subsequent publications in 1983, 1990, 1991, 1993, advocating an independent complaints system. This culminated in active work pre-and post the Hayes report setting up a Police Ombudsman.
- 1985 Publication "Consultation between the police and the public"
- 1988 Publication "Police Accountability in NI". This topic was also regularly re-visited with work on lay visiting to police stations (1990) and responses to various consultation documents (1994 NIO document on "Policing in the Community"; submissions to the Police Authority in 1995, and legislative proposals in 1995 and 1998).
- 1990 Publication on "Plastic Bullets and the Law" (which updated an earlier 1985 report, and was then complemented by a 1998 report)
- 1996 Publication entitled "Misrule of Law" on the policing of public order disturbances in 1996. Subsequent publications and shorter submissions were produced in 1997, 1998 and 2001 as well as a number of documents relevant to the Parades Commission
- "Patten"
- 1997: Major report "Human Rights on Duty: Principles for better policing- international lessons for Northern Ireland";
- 1998: submission to Patten organised Council of Europe visit to Belfast facilitated follow up visit by Patten team to Strasbourg
- 1999: CAJ holds pre-Patten report conference (February) submission to US Congress (April)
- CAJ holds post-Patten report conference (November)
- Commentary to NIO on Patten report (November)
- 2000: Extensive lobbying around Policing (NI) Act
- 2001 Organised Council of Europe seminar for Oversight Commissioner team; produced Benchmarks for Oversight Commissioner (April); spoke on panel at Policing and Human Rights conference (October); commented on draft police Code of Ethics (November).