The Committee on the Administration of Justice (CAJ)
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Winner of the 1998 Council of Europe Human Rights Prize

CAJ's commentary on the

Draft Code of Practice on Audio Recording under Section 53A of the 1996 EPA

January 1999

Submission No. S.81
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What is the Committee on the Administration of Justice (CAJ)?

CAJ is an independent non-governmental organisation which is affiliated to the International Federation of Human Rights (FIDH). CAJ monitors the human rights situation in Northern Ireland and works to ensure the highest standards in the administration of justice. We take no position on the constitutional status of Northern Ireland, seeking instead to ensure that whoever has responsibility for this jurisdiction respects and protects the right of all. We are opposed to the use of violence for political ends.

CAJ has since 1991 made regular submissions to the human rights organs of the United Nations and to other international human rights mechanisms. These have included the Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, the Human Rights Committee, the Committee Against Torture, the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination, the Special Rapporteurs on Torture, Independence of Judges and Lawyers, and Extrajudicial, Summary and Arbitrary Executions, the European Commission and Court of Human Rights and the European Committee on the Prevention of Torture.

CAJ works closely with international NGOs including Amnesty International, the Lawyers Committee for Human Rights and Human Rights Watch.

Our activities include: publication of human rights information; conducting research and holding conferences; lobbying; individual casework and legal advice. Our areas of expertise include policing, emergency laws, children's rights, gender equality, racism and discrimination.

Our membership is drawn from all sections of the community in Northern Ireland and is made up of lawyers, academics, community activists, trade unionists, students, and other interested individuals.

CAJ was recently awarded the Council of Europe Human Rights Prize in recognition of our work in defence of rights in Northern Ireland. Previous recipients of the award have included Medecins Sans Frontieres, Raoul Wallenberg, Raul Alfonsin, Lech Walesa and the International Commission of Jurists.

Comments on the Draft Code of Practice on Audio Recording under Section 53A of the 1996 EPA

Introductory remarks

It is profoundly disappointing that the government extended the life of the Emergency Provisions Act by a further two years, beyond August 1998. This means that emergency legislation in Northern Ireland will in all likelihood continue to apply until the year 2000. This will be three years after the restoration of the IRA cease-fire and six years after the declaration of the loyalist cease-fire. This is a clear breach of international law. International human rights norms are explicit in relation to emergency measures: once the emergency is over, the recourse to exceptional measures must end. CAJ would argue strongly that the use and abuse of emergency legislation in Northern Ireland has actually exacerbated the conflict rather than helping to resolve it. However, regardless of the merits of that argument, the dramatic reduction in the level of the security threat since 1994 should have resulted in the removal of emergency legislation from the statute books.

The lack of any real movement to repeal emergency legislation sets an entirely inappropriate tone in the context of a peace process. This negative approach is even more disturbing when viewed alongside the incorporation into domestic law of the UK's derogation from the European Convention on Human Rights and the government's decision to refurbish rather than close the detention centres.

It is our view that the powers contained in the Police and Criminal Evidence (NI) Order are more than sufficient to deal with the level of the security threat currently posed in Northern Ireland. Additionally we believe that there should be one detention regime for all of those arrested, whether on suspicion of paramilitary offences or ordinary offences.

While we welcome the introduction of audio and video recording, CAJ therefore firmly opposes the continued use of emergency legislation and our specific comments below should be read in that context.

Section 3

1. We do not see any reason why interviews with individuals suspected of offences under the Official Secrets Act would be conducted in the holding centres. However, even in that event, we see no justification for the failure to tape record these interviews despite the fact that this is also provided for under PACE. It is likely that anyone suspected of offences under the Official Secrets Act will be particularly in need of all possible safeguards.

2. The Pace Codes of Practice requires that when someone has come to a police station voluntarily but in the course of an interview an officer has reason to believe that they have become a suspect then the remainder of the interview should be tape recorded. There is no equivalent in this Draft Code. Presumably this is because it is rare for anyone voluntarily to

attend a holding centre. However, it may be worthwhile clarifying this matter.

3. Section 3.3 of the Draft Code provides for an officer not below the rank of Inspector to authorise that an interview is not tape recorded on a number of grounds relating to the non availability of tape recording facilities and the desirability of not delaying the interview. The officer is required to record his or her reasons for this but as a further safeguard he or she should be required to inform the suspect's legal representative who should also have the opportunity to record whether or not they agreed with this decision. In addition either in the body of the code or the notes for guidance the authorising officer should be urged to do everything to ensure that recording of the interview can begin as soon as possible.

Section 4

1. There should be relatively few circumstances where any questions are put to the detainee in advance of the interview and the Notes for Guidance should make this clear to custody officers. The probative value of any such silence or statement is obviously reduced by occurring outside the scope of the interview.

2. 4.7 allows for the interviewing officer to turn off the tape if the detained person raises an objection to the interview being tape-recorded even if the detainee refuses to record his/her reasons for the objection on tape. In such circumstances we believe that the interview should be suspended and the custody officer should explain to the detainee that the tape recording of the interview is a safeguard for the detainee and that access to the tape will be strictly limited. If the detainee still insists that he/she wishes the recorder turned off, then the interviews should be suspended until he/she has had a consultation with his/her solicitor.

3. While it may be legitimate for a detainee to tell the police about other matters not connected to the offence for which he/she is being questioned after the interview, these matters should not at any stage become the subject of charges against the detainee. If at any point it appears that what the detainee is telling the police may result in him/her becoming a suspect, then the police should immediately begin to record the conversation.

4. While the notes for guidance at 4E indicate that a decision to continue to tape record against the wishes of the detainee may be the subject of comment in court, surprisingly it does not mention the more obvious corollary that a decision to stop recording may also be the subject of comment, particularly if the detainee has refused to record his/her objections.

Section 5

1. Section 5.6 of the Draft Code provides that "in circumstances which the Chief Constable or DPP may specify" a summary of the interview will not be exhibited to the written statement of evidence prepared by the interviewing officer. It is difficult to see what these circumstances would be (none are described in the notes for guidance) and why such a provision should exist. Providing for the withholding of this summary record would only appear likely to contribute to unnecessary delay and complication of proceedings and indeed appears to militate against the rationale which led to the introduction of audio recording.