



CAJ

**Committee on the
Administration of Justice**

CAJ's response to the

**Government Proposals in Response to a Review of Police &
Criminal Evidence (PACE) in Northern Ireland**

April 2009

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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, Human Rights First (formerly 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, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON.

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

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1 April 2009

Dear Sir/Madam

Re Consultation in relation to the Government Proposals in Response to a Review of Police & Criminal Evidence (PACE) in Northern Ireland

Thank you for allowing the Committee on the Administration of Justice to participate in the above-named consultation process. As you will know, CAJ is an independent non-governmental human rights organisation that was established in 1981. 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 policing, emergency laws, criminal justice, equality and the protection 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.

Thank you for permitting CAJ to submit our views on PACE. Please see attached.

Yours Sincerely,

Aideen Gilmore
Deputy Director

Consultation in relation to the Government Proposals in Response to a Review of Police & Criminal Evidence (PACE) in Northern Ireland

The focus of the proposals is to ‘further develop policing powers to meet the needs and expectations of the criminal justice system’. Clearly these needs and expectations alter as social and economic influences change, and CAJ commends the NIO for monitoring these needs and expectations. Nonetheless CAJ would be concerned about several proposals in response to the review of Police and Criminal Evidence (PACE) in Northern Ireland. Our first query relates to a commitment made by the NIO in 2006: the Section 75 screening of the proposed amendments of PACE in November 2006 states that ‘an Equality Monitoring policy is currently being developed and following on from this, a system will be put in place to monitor the impact of the policy in relation to the nine s.75 categories’. **Has this policy been developed and is ‘data relating to the s.75 categories for all those subject to specific provisions in PACE (e.g. those searched, those who are arrested, and individuals detained in police custody)’ available?** Although this question refers to a previous PACE it is still significant to the present review (see section 3 below).

Specific to the presentation consultation our concerns are as follows:

Section 3

Section 3 proposes an annual review although consultation with stakeholders and inclusion of independent or impartial persons on the review team is not mentioned. Clearly all updates to the PACE Codes would need to be assessed in view of human rights obligations and significant changes to provisions of the codes of practice are subject to an Equality Impact Assessment, a measure not specified in the consultation document.

Further details about who would carry out this annual review are needed. The community are obviously one of the main stakeholders yet no specific community consultation is mentioned.

Section 5

Entry to arrest

Section 5 proposes to amend PACE so that the PSNI have the power to enter premises in order to arrest for summary offences previously deemed ‘arrestable’. For accessibility for all stakeholders wishing to engage and respond to this consultation, what these offences are should have been stated explicitly. Despite the revisions of the *Police and Criminal Evidence (Amendment) Order 2007*, most of the circumstances in which police are allowed to enter to arrest have been re-established in the Criminal Justice (Northern Ireland) Order 2008. It appears that the remaining summary offences for which the police are not permitted entry for arrest without a warrant are:

- in relation to when a person uses threatening, abusive or insulting words or behaviour, or displays any written material which is

threatening, abusive or insulting (re Art 9 Public Order (Northern Ireland) Order 1987;

- breach of peace; or in order to
- save a life, limb or to prevent serious damage to the property

The fact that these powers were taken away from the police by the PACE amendment in 2007 suggests that there was a reason for this. By increasing the powers of the police, without adequate safeguards, increases the possibility for abuse of power. .

Immediate Pursuit

Moreover, the power of entry for the purpose of arrest in *any* situation where a person is unlawfully at large and the officer is not in 'immediate pursuit' raises, concerns regarding the state's obligations under the *European Convention on Human Rights*. The power of entry to arrest raises concerns regarding increased potential to contravene art 5 (right to liberty and security) of the *European Convention of Human Rights* and may open up the perception of breaches of art 14 (prohibition of discrimination).

Entry to arrest- Uniform

CAJ recognises the constraints that may manifest by the requirement that arresting officers be in uniform. Although PACE Code B requires the officer to identify him/herself and present their proof of status prior to exercising their power to arrest, we are apprehensive about the repercussions that this may have on vulnerable individuals within the community. It is important that members of the community can visually identify an officer so as to diminish the circumstances in which someone, through impersonation or other deceit, may gain entry into someone's home. Northern Ireland has seen an increase in attacks on the elderly in their own homes, for example, and it is important to offer assurance and decrease the vulnerability of such individuals. We feel that it is important to maintain the condition that only uniformed officers be permitted to exercise the power of entry of a premise in order to arrest a suspect.

Voluntary Interviews at a Police Station

CAJ commends the recognition that there are discrepancies between the *Police and Criminal Evidence (Northern Ireland) Order 1989* and relevant PACE Codes and welcomes clarification in this regard. Due consideration must be given to human rights and equality standards. The proposals made in relation to voluntary interviews at a police station are not substantial enough to make a thorough response. The proposal to 'make clear that the requirement to caution and liability to arrest does not arise if the person concerned is not suspected of involvement in an offence' is itself unclear in that it does not state who this is aimed at, the interviewee or the interviewing officer or both.

Necessity Criteria

The proposal suggests expanding the current necessity criteria on arrest in relation to dealing with so-called 'on-going offences'. This implies that officers would have the power to arrest for civil offences including certain types of anti-social behaviour. This issue was touched upon in the recent Community Safety Strategy consultation.

It appears that this proposal has the potential to broaden the scope and application of the already subjective concept of 'anti-social behaviour' and is cause for concern particularly in light of the fact that the United Nations monitoring committee of the *International Covenant on Civil and Political Rights*, in its examination of the UK government last year, expressed various concerns relating to legislation on anti-social behaviour orders (ASBOs).

Extending the PACE legislation in relation to anti-social behaviour would raise a number of concerns, not least the potential to criminalise a civil offence. Moreover, given the generally higher incidences of anti-social behaviour in deprived communities it is important to assess the potential equality and human rights repercussions that the proposal may have.

Section 7

Search Warrants

Section 7 proposes to set out a framework for search warrants for *specific* offences and subject to a test of necessity. Further safeguards are needed: it is our view that the officer should be required to conduct risk and impact assessments in relation to any vulnerable individuals who are present at the address prior to requesting authorisation for the search. This information should be presented to the magistrate or judge involved in deciding whether to issue a search warrant. Such a measure would further safeguard the rights enshrined in Art 8 of the *European Convention on Human Rights*, as noted by the NIO in the consultation document.

Section 7.11 proposes that PACE be amended so as to 'clarify that the copy of the warrant can be redacted to show only the address of the relevant premises'. Clarification is needed as to what information could be redacted before comment can be made in relation to this proposal.

Entry and Search after Arrest without a search warrant

It is proposed that an officer would not be required to obtain a search warrant in order to search *premises* to find evidence after a suspect has been arrested. The proposal states a warrant would 'still be needed to enter premises not occupied or controlled by an arrested person or premises where the suspect was when arrested or immediately before arrest' however, clarification is needed as what premises would be entered without warrant.

As stated above, it would be necessary for the officer to conduct risk and impact assessments in relation to any vulnerable individuals who are present at the premise. Given that the safeguard of judicial involvement is not relevant in these circumstances, criteria should be set in place so as to minimise the repercussions on

those present or living in the house which is to be subject of a search, particularly children or otherwise vulnerable individuals.

Authorisation of Entry without arrest

Paragraph (7.16) propose circumstances which would permit an officer of Inspector rank or above to authorise a search of the suspect's premises for evidence of the offence in question without the suspect having been arrested. Yet in previous paragraphs (section 7.7 & 7.8), the consultation document acknowledges the role of the judiciary in providing independent oversight around the issue and execution of search warrants and CAJ feels that it is necessary to maintain this safeguard of independent oversight by the judiciary.

Entry to Search for Information in Relation to Missing Persons

While it is completely reasonable for the police to have the power to enter a premise in order to search for a missing person, we would however be concerned about extending this power to search for information or material which might assist in locating a missing person. Such a search should be subject to a test of necessity and the authorisation of a judge.

Section 8

Detention

The responsibility to authorise and grant extension detention should remain with a superintendent and not transferred to an inspector. The high level of authority needed reflects the seriousness of the issue and offers a guarantee that the decision will be made with professional independence (from a case). To lower the authorisation level opens up the possibility of the power to detain without charge becoming routine.

Moreover, CAJ is concerned about the proposal to enable authorisations of extensions of detention to be carried out by telephone or video-conferencing. The authorisation of detention by an individual in person is a safeguard and permitting this to be done remotely leaves this power open to abuse.

Section 9

Bail

It appears that further consideration needs to be given to power to impose conditions on street bail. How and when would the officer assess the vulnerability of the suspect? Exactly what offences would be considered appropriate for arresting a person on bail and how would breaches of bail be dealt with? CAJ is concerned that there the risk of blurring of the line between civil and criminal law by the criminalisation of behaviour which is not actually criminal in nature, such as aspects of anti-social behaviour, for example.

Powers of entry to enforce bail

For the reasons mentioned previously, CAJ view the involvement of the judiciary in the issuing of warrants as a necessary safeguard and that in the circumstances described in section 9.9 a warrant should be required in order for an officer to enter and search a premise.

New power to arrest when failure to answer police bail to attend a police station is anticipated

Unless the suspect's behaviour indicates that there is a significant potential risk to the public, the subjective nature of this proposed power is worrisome. That 'no offence would be committed but the arrest would allow police to bring forward any action planned for when the suspect answered bail' appears to fly in the face of due process of the law.

Section 10

This section states the PSNI has adopted the *ACPO Guidance on the Safer Detention and Handling of Persons in Police Custody*. It stands to reason that this significant document should be accessible to the public using the PSNI website.

CAJ commends the NIO for undertaking a review of the healthcare provisions for detainees within PSNI custody. It is important to bear in mind that immediate needs of detainees may be require attention from professionals other than the FMO, specifically a counsellor or mental health specialist. Moreover, due consideration should be given to how the conditions of detention may contribute to health problems.

Section 11

Appropriate Adults

CAJ commends the recent decision to appoint Rethink to deliver the Appropriate Adult Scheme in Northern Ireland. However several questions remain in this regards. Who is responsible for identifying when an 'appropriate adult' is needed? How will they identify when an 'appropriate adult' is needed or if a detainee is 'mentally vulnerable'? How will they determine who is the more appropriate 'appropriate adult?' (ie non-parent relative v designated RETHINK personnel) The subjective nature of various aspects of these issues could be problematic and requires consistence and informed decision-making process.

CAJ welcomes the amendment to PACE which defines a juvenile from anyone under the age of 17 years to anyone under the age of 18 years, although the NIO had said in 2006 that PACE would be amended *then* so as to treat 17 year olds as minors and that 'this is a clear statement of intent by the Government to align PACE with the current treatment of 17 years under the Youth Justice system in Northern Ireland and international conventions which define children as anyone under the age of 18 years'.

Section 12

CAJ recognises the need to protect witnesses from potential harm and intimidation.

The proposal to permit a ‘visual recording’ of the witness during a video identification procedure suggests that the rights of the suspect may be undermined; no mention is made of an ‘audio and visual’ of the identification process.

CAJ is also concerned about the proposal permitting the courts to draw adverse inferences from a refusal of a person (suspect) to co-operate in ‘capturing their image’.

Section 13

CAJ would be concerned about provisions which would allow the court to draw inferences based on a suspect’s silence ‘in the face of post-charge questioning’. The right to remain silent, while not infallible, is a recognised international standard.

Article 6 the European Court of Human Rights has been interpreted as upholding the right to remain silent and the right not to self-incriminate. Article 14(3)(g) of the ICCPR states that in the determination of any criminal charge against a person, everyone shall be entitled to a guarantee not to be compelled to testify against himself or herself or to confess guilt.

Suspects should have access to legal advice before being questioned so as to understand the possible inferences and implications of remaining silent during questioning.

The lack of mention of specific need for safeguards in relation the needs of vulnerable people, notably juvenile suspects and/or suspects with learning disabilities or mental health, issues is worrying.

All questioning of suspects must be in the presence of legal counsel so as to ensure that the rights of the detainee are upheld and to prevent the suspect from self-incrimination. It is worth bearing in mind a suspects right to have *unrestricted* access to legal counsel which exists from the time of arrest and during pre-trial investigation. Detainees should be informed of their rights including their right to legal counsel and have access to legal counsel as asserted in the *UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment* (Principles 13, 17 and 18)

Section 15

Article 3 of the *United Nations Convention against Torture* asserts that state parties must not ‘expel, return (“refouler”) or extradite’ a person to a state if there are significant reasons for believing that the prisoner would be in danger of being tortured. Moreover, consideration must also be given for potential breaches of Article 2 (right to life), Article 3 (prohibition of torture) or Article 6 (right to a fair trial) of the ECHR. Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) also prohibits torture and cruel, inhumane treatment and punishment.

Clearly the assessment of the potential risk of a violation needs to be done case by case. The UK government has the responsibility to assess every request for transit for prisoner transfer, extradition and deportation in view of how well the receiving country upholds ECHR (Article 3), in particular.

It is important that the UK avoids complicity in what may amount to extraordinary rendition. Importantly the proposal does not specify that prisoners would have to be *sentenced* prisoners. Given that Council of Europe member states may only legally transfer a *sentenced* prisoner, it holds that COE member states may only authorise *transit* of sentenced prisoners.

It seems particularly worrying that there is nothing in place regarding legal jurisdiction over deportees, extradition and transfer of prisoners in transit. Clearly such transits have occurred before now and neither the *European Convention on Extradition* nor the *COE Convention on Transfer of Prisoners* speak of jurisdiction of prisoners *when in transit*. As regards granting UK law enforcement officers powers to use handcuffs or otherwise restrain a prisoner in transit who poses a potential risk to the public or him/herself surely there is clearly a more appropriate place for regulating provisions relating to prisoners in transit than the Police and Criminal Evidence (*Northern Ireland*) Order, particularly given that Belfast is not a significant transit hub, particularly compared to other UK cities.

Section 16

It would seem the UK Cross Border proposals made in section 16 would best be left until after devolution of policing and justice issues as a matter to be negotiated between the relevant policing bodies, the new NI Minister of Justice and parallel institutions in England and Wales and Scotland (with public stakeholder consultation subsequent to these negotiations).