

CAJ's Submission no. S408

**CAJ's submission to the Northern Ireland Office's
consultation on its
*Draft Code of Practice for the Exercise of Powers in the
Justice and Security (Northern Ireland) Act, 2007***

March 2013

About 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, 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.

Submission to the Northern Ireland Office on the Draft Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007, March 2013

Committee on the Administration of Justice ('CAJ')

CAJ is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.

The draft Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007 was issued for consultation in December 2012. This Code of Practice, when finalized, is for the exercise of the Police Service of Northern Ireland (PSNI) of certain statutory powers under the Justice and Security (Northern Ireland) Act 2007. The purpose of the code is to set out how these powers should be exercised, including the fundamental principles, which underpin the use of powers. It applies to PSNI exercise of powers under sections 21, 23, 24/Schedule 3 and 26 of the 2007 Act. The Armed Forces also have powers under the 2007 Act, which they can use in support of the PSNI.

Schedule 6 of the Protection of Freedoms Act 2012 amended Schedule 3 to the 2007 Act, *introducing an authorization procedure* for the exercise by the police of stop and search powers *which do not require reasonable suspicion*. Schedule 6 also introduces, by way of amendments to Schedule 3 to the 2007 Act, *a power to stop and search, whether in public or private, if a constable reasonably suspects that an individual has munitions unlawfully with him or wireless apparatus*. This Code reflects the Protections of Freedoms Act 2012 amendments which have been made to the stop and search power at section 24/Schedule 3 of the 2007 Act.

This code applies specifically to Northern Ireland and does not cover any other police powers in UK wide legislation or legislation applicable to Northern Ireland only. It does not affect the operation of other Codes of Practice, including the Police and Criminal Evidence Order (Northern Ireland) 1989 ("PACE") Codes.

Summary

CAJ's recent publication, '*Still Part of Life Here? A Report on the use and misuse of stop and search/question powers in Northern Ireland*', called for immediate provision of a Code of Practice for the Justice and Security Act, given that it has been five years since the legislation was passed.¹ CAJ therefore welcomes this draft Code in anticipation of a final Code of Practice which will reflect a human rights based approach to policing. CAJ also urges the NIO to fully consider the findings and learning within the research report in shaping this code of practice.

We submit this response to address a number of concerns and recommend clarifications or changes to make this Code of Practice a human rights compliant document. Given as they were the subject of our recent research our comments focus on the stop and search/question powers within the JSA. This would further support both police in their exercise of power under this current legislation, and those subject to stop, search and question powers, as to how these provisions apply to them.

Whilst not within the scope of the present consultation it should be noted that, CAJ questioned whether there were sufficient safeguards within the present legislative framework to prevent the arbitrary use of JSA stop and search powers. CAJ has also urged the Policing Board and Independent Reviewers to address in their reports whether it is appropriate and necessary to have two emergency-type powers with similar functions deployed in Northern Ireland, consider the arguments for their repeal and assess the adequacy of the new safeguards. Furthermore, CAJ is also concerned about the continued permanent availability of this legislation to the military. This seems to go against the principle of normalisation in Northern Ireland.

In summary this response:

- **Calls for the Code of Practice to, like those in Great Britain, to require ethnic monitoring in the exercise of the stop and search/question powers, inclusive of community background;**
- **Addresses broader monitoring and statistical requirements we feel should be provided for within the Code, included desegregated statistics on arrests/charges and age;**
- **Recommends the removal of the provision allowing officers to ask 'any' question to ascertain the identity of a person;**
- **Recommends the power to separate persons for questioning is modified, in particular to prevent separation of children;**
- **Recommends amendment to remove the explicit requirement to try to use acquaintances as interpreters;**

¹ CAJ '*Still Part of Life Here? A Report on the use and misuse of stop and search/question powers in Northern Ireland*' November 2012, p 31 at www.caj.org.uk
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Detailed response

Human Rights compliance is engaged when stop and search/question powers are used in an arbitrary and discriminatory manner. The aim of the Code of Practice is to set out the parameters and requirements in relation to use of stop/search and question powers. Over and above the legislation, a code of practice is usually provided as an essential safeguard against any arbitrary and discriminatory exercise of power for Police Officers.

For ease of reference this consultation response will follow the same heading format of the draft Code of Practice, highlighting concerns and making recommendations.

1 General

CAJ recommends that paragraph 4.6 should include making the code available in police stations in various formats such as Braille and audio formats in line with disability accessibility provisions.² CAJ also recommends that the word ‘mentally disordered’ be removed from footnote 3 in relation to the provision of appropriate adults, and instead replace it with ‘mental illness and learning or behavioral disability’ which is more in line with international human rights disability provisions and also anticipated new capacity based legislation in Northern Ireland.

2 TSGs

CAJ is aware of Tactical Support Groups (TSG’s) being used in stop, search and question situations, and over the past year incidences of heavy handedness in stop and search have been reported to CAJ and largely relate to actions of TSG units.³ Given the concerns raised CAJ recommends explicit provision is made within the code to ensure adequate training of TSG units in exercising the powers.

3 Use of stop, search and question powers

In the draft Code paragraph 6.5, states that “Officers may ask *any* question necessary to ascertain their identity” (italics added). CAJ has concerns about the use of word *any*. Annex A ‘Summary of Police Powers’ of this draft Code

² See in general articles 2, 9 and 12 of the United Nations Convention on the Rights of Persons with Disabilities at <http://uncrpd.nileshsingit.org/uncrpd-final-text>.

³ CAJ ‘*Still Part of Life Here? A Report on the use and misuse of stop and search/question powers in Northern Ireland*’ November 2012, p 39.

of Practice, and Appendix A, 'Summary of Police Powers' of the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007, 5th report (both Annexes are identical) note that the Code interprets s21(1) use of power for ascertaining 'identity', where "people are stopped, questioned and *may* be asked for their name, date of birth and address" and "that they *may* also be asked for identification."⁴ These interpretative documents have a much tighter "Overview", which does not explicitly state or even suggest that a person being asked *any* question to ascertain identity. CAJ notes that there is no legal obligation to provide identification under this legislation, nor is there any obligation to answer unrelated questions. **CAJ recommends removal of the use of word 'any', as it allows interpretation of the legislation to be far too broad and subject to abuse, similar to issues already raised in our 'Still part of life here?' report.**⁵

3 Vehicles

Para. 6.11 outlines what may happen under s21(5) which provides that the power to stop a person includes the power to stop a vehicle. The code also states that "[I]f a person is stopped officers may question the occupant or occupants separately or jointly to establish their identity and movements."⁶ CAJ is concerned about separating occupants of a vehicle for questioning and adverse affects this may have on persons beings stopped, particularly where this may involve separating parents from children.⁷ **CAJ recommends removal of this provision. However, if this is not possible, then at a minimum we recommend that it included states that where occupants of the vehicle are children they must be allowed to stay remain with an adult being questioned.**

4 Stopping and searching persons in specified locations: authorizations

As the requirement for JSA authorizations is relatively recent use of authorization powers have yet to be fully considered by the Independent Reviewer or the Policing Board, or to feature in a court judgment.

Reflecting the provisions in the legislation Para 8.30 states, "[A]n authorization ceases to have effect at the end of 48 hours unless it is confirmed by the Secretary of State before the end of that period." Consequently this provision

⁴ '2011-2012 Report of the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007' Robert Whalley CB, p 113; Annex A 'Summary of Police Powers' in Draft Consultation Paper, Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act, December 2012.

⁵ CAJ 'Still Part of Life Here? A Report on the use and misuse of stop and search/question powers in Northern Ireland' November 2012, pp 37 & 38.

⁶ Draft Consultation Paper, Code of Practice for the Exercise of Powers in the Justice and Security (NI) Act 2007, para 6.11, Section 21: Stop and Question, 'Vehicles', Northern Ireland Office, 2012, p 8.

⁷ 'Probe after children searched by PSNI during minibus day trip' Belfast Telegraph 1 July 2011; CAJ 'Still Part of Life Here? A Report on the use and misuse of stop and search/question powers in Northern Ireland' November 2012, p 40.

allows any of the stop, search and question JSA provisions triggered in that 48 period to stand irrespective of whether the Secretary of State subsequently regards the authorization as having met the criteria in the Act.

Notwithstanding the practical requirements of an authorization system, if the authorization is in fact a safeguard there is a risk 48 hour authorizations could escape its provisions, **CAJ recommends provision in the code to monitor and remedy practices which lead to refused authorizations.**

6. Steps to be taken prior to search

Para 8.71 states that “If a person to be searched does not appear to understand what is being said the officer must take *reasonable steps* to bring the information regarding the person’s rights to his or her attention. If the person is deaf or cannot understand English and is accompanied by someone, then the officer must try to establish whether that person can interpret or otherwise help the officer to give the requirement information.”

There are a number of issues with this formulation. First we suggest that it would be preferable in the case of someone who does not appear to understand what is going on but speaks English that authorities should refer also to an appropriate adult as referenced earlier in para 4.6 above. Secondly, in the case of non-English speaking persons, the explicit requirement that an officer ‘must try’ use persons accompanying others as interpreters is problematic, given as there will be instances whereby there is a question around third party conflict of interests with regards to using friends, acquaintances or persons unknown as interpreters. Where necessary it would be more appropriate for formal telephone interpreting services to be used. **CAJ recommends amendment of this provision to remove the explicit requirement to try to use acquaintances as interpreters, and to cross reference provisions relating to appropriate adults.**

7. Stopping and Searching Persons: Records (Monitoring and Statistics - on the grounds of community background)

Non-discrimination measures are first referenced in section 5, ‘General Principles of governing the exercise of police powers under sections 21, 23, 24/schedule 3 and 26 of the 2007 Act’ of this draft Code of Practice. Specifically, paragraph 5.4 states, “[W]henver the powers are used it must be without discrimination on the grounds of religious belief or political opinion, racial group, age, marital status, sexual orientation, gender, disability or whether or not a person has dependents.”

Whilst this is welcome, in contrast to codes in Great Britain, the record keeping requirements of the Code then do not go on to require ethnic

monitoring, which in Northern Ireland would be inclusive of ‘community background’.⁸

Given both the historic and current issues around ‘suspect communities’ in Northern Ireland⁹ remarkably there is no direct monitoring of stop and search/question on grounds of ethnicity or community background. In fact under human rights law discriminatory targeting of this kind is seen as ‘racial’ or ‘ethnic profiling’.¹⁰ This type of monitoring is seen as an essential tool to prevent the use of powers in a manner, which constitutes ethnic/racial profiling, and the related targeting of persons perceived to belong to such ‘suspect communities’.

The TACT Code of Practice in Great Britain and the PACE legislation in Great Britain both contain recording provisions which ensure “[A] note of the self defined ethnicity, and, if different, the ethnicity as perceived by the officer making the search, of the person searched or the person in charge of the vehicle searched (as the case may be)...”¹¹

From a human rights perspective it should be noted that both the United Nations and Council of Europe anti-racism bodies who oversee the UK’s human rights commitments have recently made clear statements that sectarianism in Northern Ireland is to be treated as a form of racism and not as some distinct phenomenon to which international standards do not apply.¹² There has been debate as to whether it is appropriate or if there is too much sensitivity in Northern Ireland to asking individuals to record their community background. However, such concerns would appear little different to those expressed and discounted in early debates on whether it was appropriate to gather data on other aspects of ethnicity during stop and search for the purpose of preventing discrimination. A similar self defining tick box form

⁸ There are also more explicit references in the recent Northern Ireland TACT Code. This states that to avoid discrimination “*great care should be taken to ensure that the selection of people is not based solely on ethnic background, perceived religion or other protected characteristic.*” The Code also stipulates supervising officers “*must ensure there is no evidence of exercise of powers through stereotyped images or inappropriate generalisations and identify and investigate any apparent disproportionate use of the powers against “specific sections of the community.”*” Whilst an important objective, it is not clear how such a role is effectively discharged without the aid of ethnic monitoring inclusive of community background.

⁹ The term ‘suspect community’ refers to the targeting of measures against particular communities considered ‘suspect’ and coined in research by Paddy Hillyard in relation to the use of emergency legislation against Irish communities in Britain. See Hillyard, Paddy ‘*Suspect Community: People’s experience of the Prevention of Terrorism Acts in Britain*’ Pluto Press 1993.

¹⁰ The UN Committee on the Elimination of Racial Discrimination body has made clear that sectarian discrimination in Northern Ireland is to be treated as a form of racial discrimination. See “Sectarian discrimination in Northern Ireland [...] attract[s] the provisions of ICERD in the context of ‘inter-sectionality’ between religion and discrimination” Committee on the Elimination of Racial Discrimination (List of Themes on the UK) UN Doc CERD/D/GBR/18-20, paragraph 1(e).

¹¹ ‘Terrorism Act 2000, Code of Practice (England, Wales and Scotland) for the Authorisation and Exercise of Stop and Search Powers relating to Section 47A of Schedule 6B to the Terrorism Act 2000’ Home Office, 2011, paragraph 5.4.1; ‘Police and Criminal Evidence Act 1984 Code A Code of Practice for Exercise by Police Officers of Statutory Powers of Stop and Search’ Home Office 2010, paragraph 4.3(a)

¹² *Supra* note 10.

post-stop and search/question could assist in gathering such data. In the absence of this, it is not clear how the proportionality of the use of such powers is being monitored, except perhaps through the use of proxy indicators.

CAJ therefore urges the NIO to bring this Code of Practice in line with the recommendations competent international treaty bodies and require the collection and publication of monitoring of stop and search/question powers on grounds inclusive of (Protestant/ Catholic etc) community background. This could be added to para 8.75 in line with recording provisions in the other Codes of Practice.

In so far as there is information available, the use of both the JSA and TACT powers by the PSNI seems ineffective with arrest rates well under 1%. It is not clear if the arrests actually relate to 'terrorist' (scheduled) offences or other matters, including resisting the stop and search. The PSNI also does not collect figures relating to any subsequent charges or convictions, indicating that the police themselves do not actually evaluate how effective the powers are in relation to the results they produce. ***CAJ recommends that a recording provision capturing arrest powers is included in the draft code, which would require the PSNI to gather and publish such data. This may also allay fears that the JSA provisions are being targeted at suspect communities.***

Age based monitoring has also been of some concern to CAJ. Statistics provided to the Policing Board indicate over half the persons stopped and searched are under 25, and 14% of those subjected to the powers are children. It is not clear if these stops largely relate to powers under the ordinary law (PACE) or the JSA/TACT powers. CAJ urges that these statistics are broken down by power to further examine the reasons for and impact of the level of usage of stop and search/question against children and young people and whether JSA powers are being used in the manner in which they are intended. ***CAJ recommends including provision within the code to in para 8.75 require the capturing and publication of such desegregated data on grounds of age.***

Committee on the Administration of Justice (CAJ) Ltd

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