

CAJ's submission no. S342

CAJ's submission to the Criminal Records Regime Review

June 2011

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 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, Joseph Rowntree Charitable Trust and the Oak Foundation.

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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2 June 2011

Dear Mrs Mason,

Thank you for the invitation to the Committee on the Administration of Justice (CAJ) to make a submission to the **Criminal Records Regime Review**. As you will know, 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.

We recognise the difficult balancing act in protecting vulnerable children and adults from harm and the need to protect the right to privacy of an individual. The most vulnerable in society, who may not be able to express their concerns and experiences, should be protected from abuse, exploitation and harm, by both society and functioning systems of protection. Yet the criminal records regime must be proportionate, fair, independent and transparent in order to protect the rights of all of those involved. Any measures to reform this system must recognise the need to rehabilitate and re-integrate ex-offenders into the community and allow, where appropriate, access to employment and voluntary work. For example, having caused minor criminal damage to a wall as a teenager, which resulted in a criminal record, should not be a barrier to someone becoming a teacher a decade later.

It is also important to bear in mind the significance of the fact that, according to NIACRO, approximately 25,000 people have conflict-related convictions. In the context of Northern Ireland particularly, we also highlight the need for there to be an awareness of issues of discrimination and the requirements of section 75 of the Northern Ireland Act 1998.

CAJ notes the increase in demand for advice and training from NIACRO, following the introduction of Access NI in 2008, and issues including the length of time that such Access NI applications can take and the financial burden placed on charities and voluntary organisation by the process. Any review process must ensure that a new regime avoids these problems.

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The process

CAJ would like to register our disquiet that the review of the criminal records system in Northern Ireland has not been subjected to a similar in-depth review as that carried out by the Home Office with both the Vetting and Barring Scheme Remodelling Review and the wider review of the criminal records regime in England and Wales. While CAJ notes that the proposed recent changes in England and Wales will be considered “where appropriate” in Northern Ireland, we have concerns that such measures may not take into account the particular circumstances of Northern Ireland. CAJ is also concerned that this will ignore the opportunity available to the Department of Justice to carry out an in-depth review of the regime in Northern Ireland and then enable the findings to direct a more localised consultation.

The absence of details and further information contained in the consultation, in relation to the proposals, seriously hinders the ability of organisations to effectively engage with this consultation. It would also have been useful to include a brief outline of the criminal records system as it now stands and a narrative on the motivation behind the proposed changes. It is difficult to comment on a proposition if the logic behind its development is obscured.

The online survey

CAJ is confused as to why it has been decided to adopt an online questionnaire as the primary approach for this consultation. We acknowledge that it may be easier and faster for respondents to participate but it seems to limit the potential areas for discussion. We would also like to highlight our concerns at the wording of the questions and responses used in the online survey. CAJ has found that some responses seem unrelated to the questions. For instance, for Question 9, “What impact does the current Access NI regime have on your organisation?” one of the responses is, “We follow best practice in our sector”, while the other responses are more accurately concerned with proportionality and appropriateness, such as “It is an unnecessary statutory requirement”. Similarly, at Question 10, “How do you feel about the balance between public protection and individual rights in the Disclosure process?” refers to an individual’s rights; the responses then refer to individual civil liberties. The mixing of these two terms is not helpful, as they are not interchangeable. This is particularly pertinent, as the UK Government has signed a number of international human rights treaties, committing itself to protecting human rights. These provide the standards for the measurement of the Government’s human rights compliance. While individual civil liberties may overlap with human rights, the Government is not bound solely by international instruments on civil liberties.

CAJ is interested as to why, at Question 22, there is the potential for the disclosure of criminal records to be beyond criminal justice and vetting procedures. This concept is not mentioned in any of the accompanying literature. CAJ is opposed to the release of

such sensitive information beyond that necessary for the protection of others. As a result, the release should be confined to employment/volunteering only and we would welcome clarity on this point. At Question 24, with relation to overseas data, it would be useful to expand on this point and briefly outline both the current integration process and the proposed changes. CAJ believes it is important that international criminal records are fully verified before inclusion in the criminal records disclosure process.

Specific comments

We have previously voiced our concerns at the potentially disproportionate burden being placed on community and voluntary sector organisations by the cuts to government spending; please see our submission to the [Access to Justice Review](#). This has been particularly significant where the withdrawal or reduction of Government services has meant that the community and voluntary sector have been encouraged to fill the gap, with limited funds, requiring additional volunteers and employees, who may work with vulnerable adults and children, thus requiring the organisation to undertake a criminal record check. The protection of vulnerable individuals and groups via the criminal record disclosure system has a key role to play but this must be balanced with the financial burden placed on organisations by the application process. For example, an individual submitting two or more applications to Access NI for voluntary work within a short space of time currently requires that each organisation pays the full fee to Access NI.

The idea of enabling vetting disclosures to be “portable” is positive; there should be the possibility for other organisations to access disclosures. However, CAJ argues that such access should be closely monitored and that a time limit is set for when the record “expires” and another application has to be submitted. We agree with the principle that a criminal records certificate will be issued directly to the individual applicant.

While CAJ acknowledges that there may be room for non-conviction information to be disclosed in a records review, this should only be applicable if the individual is still the subject of an order, warning or caution. This should not apply if the measure has expired. These measures are not dependent upon conviction and therefore the evidence has not been tested in a court. We argue that their inclusion on the same level as criminal convictions may not be appropriate. The challenges faced by prisoners seeking entry into employment is difficult enough without adding redundant or irrelevant information which may contribute to existing prejudice against them.

CAJ advises against the inclusion of police intelligence as part of criminal records disclosures. Our reasoning is twofold. Firstly, police intelligence is not always verifiable and may not have been appropriately tested. As a result, its use in

disclosure processes may not be able to be effectively challenged by the subject of the intelligence. Arguably, the inclusion of such intelligence may also endanger the security of the source of the intelligence. Secondly, Northern Ireland has had a historically poor record on police intelligence. Although the PSNI has made significant improvements in this area, the security of such data is a source of concern. Should this proposal be pursued, it is important that there should be human rights guidance on how the decision-making process should operate. The decision-making process should be subject to review and oversight.

We also draw attention to former paramilitary prisoners, who have served their sentence and renounced violence, but who continue to face difficulties in areas such as adoption and insurance, as a result of their criminal records. We argue it is vital that this Review keeps in mind the specific circumstances of Northern Ireland and the processes required to fully integrate former paramilitary prisoners into society.

We similarly highlight the principle that employment is critical to the reduction of re-offending. As the submission by NIACRO indicates, they have found that discrimination against ex-offenders continues to exist in the employment sphere. Subsequently, we believe that where employers knowingly make unlawful criminal records check applications that the penalties and sanctions should be enforced; sending a strong message that the process should not be abused. We also draw particular attention to the expansion of employers who no longer fall within the rehabilitation of offenders' legislation, enabling the automatic discrimination of ex-offenders, from a wide range of sectors. As such, we concur with NIACRO on the need for a review of the wider legislation.

Any criminal records system should have an independent review mechanism. Individuals should be able to access, challenge and correct the information held by them, subject to external approval. We understand from NIACRO that the current processes to challenge inaccurate information have been found to be lacking.

A common sense approach, the review carried out in England and Wales, highlighted a number of issues which may have relevance in Northern Ireland, including the levels of bureaucracy involved and the confusion around the operation of the scheme by both employers and the general public. However, it is not clear how much of *A common sense approach* can be applied to Northern Ireland, considering the differences in the schemes currently in operation. As a result, CAJ is hesitant to endorse the transfer of "lessons learnt" from this review to Northern Ireland without at least an acknowledgement of the differences in both the schemes and the context. Instead, we advocate the commissioning of research on the issue of criminal records to be carried out in Northern Ireland as a matter of urgency, and prior to the introduction of any new measures.

As noted above, CAJ highlights the need to be mindful of the requirements of section 75 of the Northern Ireland Act, which prohibits discrimination on the grounds of political opinion. As was raised in the case of *McConkey and another (Appellants) v The Simon Community (Respondents) (Northern Ireland)*, there are difficulties around the issue of political opinion, where the opinion either previously or currently held espouses the use of violence. CAJ considers that this issue requires sensitive consideration by the Department of Justice, with an acknowledgement of the particular needs of (politically motivated) ex-prisoners and the protections afforded to vulnerable adults and children.

We support the submission made by NIACRO to this consultation. We highlight the levels of discrimination faced by those with a criminal record in areas such as volunteering, employment, adoption and the accessing of services. CAJ emphasises the need for a robust appeal process and the monitoring of the proposed system. As noted above, it is not clear how the proposals evolved and what evidence was submitted for the need to change the existing system. The monitoring of the new system should prevent this from becoming an issue again. Finally we hope that changes to the criminal records system will include the expunging of criminal records which reflect the decriminalisation of homosexuality in Northern Ireland.

Conclusion

This consultation has highlighted the need for any changes to the existing regime to be based on evidence. To this end, it is important that further relevant research is carried out on the current scheme in Northern Ireland so that any proposals can be more effectively evaluated. We caution against transferring recommendations from the review of the system in England and Wales to Northern Ireland without careful consideration and thorough consultation. Finally, we hope that the Department of Justice, who have previously run innovative, flexible and well-tuned consultations, will take on board our criticisms of this particular consultation process.

Sincerely,

Caroline Parkes
Criminal Justice Programme Assistant