

CAJ's submission no. S378

CAJ's Submission to the consultation on the Review of Criminal Records Regime in Northern Ireland (Part One)

March 2012

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, 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.

CAJ's Submission to Consultation on Review of Criminal Records Regime in Northern Ireland (Part One)

Committee on the Administration of Justice ('CAJ')

The Committee on the Administration of Justice ('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.

In March 2011, the UK Government's Independent Advisor for Criminality Information Management, Mrs. Sunita Mason, was appointed by the Minister for Justice, David Ford MLA, to conduct a review of the legislative framework for criminality information management in Northern Ireland ('the Review'). Part One of the Review was published in August 2011 and opened for public consultation in December 2011. Part One focuses on the disclosure of criminal records and other information prior to employment. CAJ previously made a written submission to the Review in June 2011.¹

Summary

- The Review acknowledges the importance of access to employment as a key part of rehabilitation, which CAJ welcomes;
- The Review recognises concerns expressed that those with criminal records arising from the conflict in Northern Ireland are routinely denied employment. However the Review does not make substantive recommendations regarding such convictions. CAJ would urge that this issue be given consideration.
- CAJ welcomes recommendations to enforce sanctions against employers making unnecessary or illegal criminal records checks, to make such checks portable and to provide a single certificate to the applicant, rather than providing certificates to the applicant and employer at the same time. However CAJ still believes that an independent review mechanism is necessary for criminal record checks;

¹ CAJ's submission no. S324 'CAJ's submission to the Criminal Records Regime Review' June 2011.

- CAJ understands the rationale behind the Review’s recommendation to continue the use of police intelligence in enhanced criminal records checks, which is the need to protect vulnerable adults and children. This need however must be balanced against the rights of the individual in a proportionate way. We would reiterate our concerns that police intelligence is not always verifiable and has not been appropriately tested;
- CAJ supports the establishment of an independent review body where there is a dispute in relation to the disclosure of police intelligence;
- CAJ does not believe that the recommendation that information surrounding diversionary disposals relating to adults should always be disclosed strikes the appropriate balance between public protection and the rights of the individual.

Background to Part One

CAJ welcomes the acknowledgment contained within the Review that:

Employment is widely recognised as a key part of rehabilitation and those who have offended should be afforded every opportunity to obtain suitable re-employment.²

In our initial submission, CAJ highlighted the need to rehabilitate and re-integrate ex-offenders into the community and allow access to employment where appropriate. We were also conscious that these needs must be balanced against the need to protect children and vulnerable adults from harm. However we do not believe that the Review always strikes the appropriate balance between the rights of the individual and the need to ensure public protection.

CAJ also advised in our initial submission of the importance of bearing in mind the legacy of conflict in relation to criminal records, particularly with regard to former paramilitary prisoners. The Review acknowledges this issue and relates concerns expressed that those with criminal records arising from the conflict are routinely denied employment. However, aside from suggesting that existing guidance published by the Office of the First Minister and deputy first Minister (OFMdFM) should be given more prominence, the Review does not recommend broader changes to the status of such convictions, instead suggesting that others may want to reflect on this matter (p. 17).

² ‘A Managed Approach’ A Review of the Criminal Records Regime in Northern Ireland by Sunita Mason, Independent Advisor for Criminality Information in England and Wales, p. 13

In doing so, CAJ would remind government of the overarching commitments made under the Belfast/Good Friday Agreement to continue to:

...recognise the importance of measures to facilitate the reintegration of prisoners into the community by providing support both prior to and after release, including assistance directed towards availing of employment opportunities, retraining and/or re-skilling, and further education.³

In our consultation response to the recommendations of the Consultative Group on the Past⁴, CAJ supported the recommendation to statutorily prevent discrimination against those with conflict-related convictions. We would urge that the issues surrounding conflict-related convictions and the denial of employment be given serious consideration in order to fulfill the commitments made under the Belfast/Good Friday Agreement.

Employment vetting

The Review poses the question of whether employment vetting systems that involve Access NI can be scaled back, made more proportionate and still provide protection to the public (p. 21). In our initial submission, CAJ highlighted issues such as the length of time an Access NI application can take and the financial burden placed on charities and voluntary organizations by the process. We urged that any new regime should seek to avoid these problems.

The Review advocates a sensible balance as being the best approach (p. 21). The Review highlights the problem of employment checks being made which are not necessary or even lawful (p. 22). In our initial submission, CAJ stated that where employers make unlawful criminal records check applications, penalties and sanctions should be enforced, sending out the message that the process should not be abused. CAJ therefore supports the Review's recommendations in this regard (p. 23).

CAJ has previously welcomed the idea of portable disclosures of criminal records, which would allow other organizations to access a disclosure. The Review recommends the introduction of a system of portable disclosures, which would allow individuals to take their criminal record check from one job or volunteering position to another, without having to apply for an updated check. The employer or organization could then check this disclosure online, to see whether the information in the check has altered (p. 30 – 32).

³ Agreement reached in Multi-Party Negotiations, Annex B, prisoners, paragraph 5.

⁴ CAJ's submission no. S240 Submission from CAJ to the government consultation on 'Dealing with the Past in Northern Ireland: The recommendations of the Consultative Group on the Past' September 2009.

CAJ welcomes this recommendation as having the potential to help to ease the problems of delays in processing Access NI applications, of having to engage in multiple applications for a criminal records check within a short space of time, and of the cost associated with multiple applications. However we agree with the Review that a portable system must be robust and rigorous in order to remove any possibility of fraud and to encourage confidence in employers and the general public (p. 31).

CAJ also welcomes the proposal that a single criminal records certificate be issued to the applicant, rather than two certificates, one of which goes to the applicant and one to the employer or organization (p. 32). As the Review rightly acknowledges, the current system of issuing two certificates does not give the applicant the opportunity to challenge information contained within a certificate. This places the applicant in the invidious position of having to both challenge the certificate and convince the employer that the information contained within it is incorrect at the same time.

CAJ stated in our initial submission that the criminal records system should have an independent review mechanism, allowing individuals to challenge information held on them. Whilst the introduction of portable disclosures and a single certificate could effect positive changes to the system, we still believe that an independent review mechanism is necessary. Under the portable disclosure proposals, if an employer or organization were to conduct an online check of the disclosure to see whether the information in the check has altered and then access new information that the applicant disputes, this raises the same problem as can currently occur upon issuing two certificates. The applicant would still have to challenge the information and convince the employer or organization that the information is inaccurate. Whilst the issuing of a single certificate initially would mean that an employer or organization cannot view information that an applicant wishes to challenge, an independent and impartial review mechanism is the most appropriate avenue for such a challenge. CAJ would urge that the current mechanisms for reviewing information in relation to individuals be fully examined during Part Two of the Review process.

Police intelligence

CAJ has previously advised against the inclusion of police intelligence as part of criminal records disclosures. We expressed concern that police intelligence is not always verifiable and has not been appropriately tested. Therefore its inclusion in disclosure may not be subject to effective challenge by the applicant.

The Review recommends the continued use of police intelligence in enhanced criminal records checks, which relate to those seeking to work with vulnerable adults and children. CAJ appreciates the rationale behind this recommendation which is the need to protect vulnerable adults and children. This need however must be balanced against the rights of the individual in a proportionate way. This means that interference with the rights of the individual must be lawful and necessary in order to protect vulnerable children and adults. We appreciate the reference within the Review to the Quality Assurance Framework (QAF) that is used by all police forces across the United Kingdom in deciding whether information might be relevant and ought to be disclosed.⁵ The Review states that:

Information held will only be released if it is deemed to be in the public interest and after the individual's human rights have been considered...QAF has been tested against appropriate human rights legislation and case law.⁶

The Review also expresses satisfaction at how the Police Service for Northern Ireland (PSNI) considers whether information should be disclosed, by seeking legal advice on human rights grounds and considering precedent (p. 41). Whilst these are reassuring sentiments, CAJ would echo the concerns expressed in the Review about the particular connotations of police intelligence in Northern Ireland, given the legacy of conflict, where information gathered for one purpose could now be used to deny access to jobs (p. 41). Whilst CAJ appreciates that the Review could find no evidence of information being used this way, we do not think that the potential for this to occur should be underestimated.

The Review does recommend that the test for deciding whether information is relevant should be changed from considering whether the information 'might' be relevant, to considering whether the police 'reasonably believe the information to be relevant' (p. 42). The Review explains that:

This means that the police would have to be satisfied that the information was relevant to the sector and that it demonstrates the individual poses a significant potential risk to children or vulnerable adults.⁷

Whilst CAJ does not support the disclosure of police intelligence in general terms, if disclosure of intelligence is to remain, we would welcome a more stringent test for deciding whether intelligence is relevant. Similarly we would welcome consideration of a statute based Code of Practice for considering relevancy, as recommended by the Review, and agree that this should be made publically available.

⁵ This is the test under s. 113B of the Police Act 1997 for deciding whether police intelligence should be disclosed in an application for an enhanced criminal records check.

⁶ As above, p. 40

⁷ As above, p. 42

CAJ also supports the recommendation that police intelligence be set out on the face of the certificate. This would also set out why the information is relevant and how it has been concluded that it should be released (p. 43). However we would urge that this information be sufficiently detailed to allow an effective challenge of it by the individual. Whilst CAJ appreciates that police intelligence can often be grounded on the use of covert or confidential sources, whose own safety may be jeopardized by disclosure of their identities, the rights of these sources must not unduly compromise the rights of the individual to effectively challenge the police intelligence. CAJ draws attention to the ruling of the European Court of Human Rights in *Tinnelly & Sons Ltd and others v United Kingdom*⁸ where the actions of the Secretary of State in issuing a national security certificate to block claims of discrimination in the employment context, without disclosing the reasons for issuing such certificates, was found to breach article 6(1) of the European Convention on Human Rights. This was because the lack of disclosure of reasons for the decision meant there could be no independent scrutiny of it.

CAJ would also object to the approach taken by the Review here and the language used. The review suggests that the police should in relation to the applicant set out:

what they have done that the employer needs to know..⁹

CAJ believes that this displays a lack of regard for the fact that police intelligence is not always verifiable and has not been properly tested. It should not therefore be presumed that police intelligence represents fact or that it proves an individual has 'done' anything.

In relation to the recommendation that the police intelligence be set out on the face of the certificate, CAJ would welcome clarity as to whether it is proposed that a single certificate will also be issued to the applicant in these circumstances. This would appear to be the case given the comment made that under the current regime, the applicant may not be aware of police intelligence and will have no chance to challenge it before it is seen by an employer (p. 33). Issuing one certificate would allow individuals subject to enhanced criminal records checks an opportunity to respond to the intelligence before an employer sees the information. This could help to minimize the potentially devastating effect of a potential employer or organization seeing information that is subsequently found to have been inaccurate.

CAJ welcomes the recommendation to repeal the power to provide 'additional information' to employers, which is police intelligence that the applicant is not made aware of, such as an ongoing police investigation (p. 44). We agree with the

⁸ *Tinnelly & Sons Ltd and others v United Kingdom* (App. no. 20390/92, 21322/93)

⁹ As above, p. 43

Review's conclusion that this procedure is not human rights compliant as an individual cannot challenge information they are not aware of.

Complaints about police intelligence

The Review notes that during 2010/11, 23 complaints were made to Access NI regarding police intelligence. 12 of these led to intelligence being removed or amended. The Review notes:

The reason there are so few challenges might simply be that the information revealed is accurate and proportionate; equally it may be that individuals do not know how to go about the process of challenging the information. Indeed it may be that by the time the individual sees the information, it has already gone to the employer who has decided not to employ them and the damage has been done.¹⁰

CAJ would urge that more be done to promote and explain the complaints process in relation to police intelligence. This, in combination with providing a single certificate to the applicant instead of the employer or organization, will help to safeguard the applicant's right to challenge the information.

The Review also notes that the process by which complaints are handled involves the PSNI reviewing a decision they have already made. The Review therefore recommends the establishment of an independent review of any disputed information disclosed on a certificate (p. 45). Of the practical options suggested to achieve this, CAJ would support the establishment of an independent review body, rather than a review undertaken by a different PSNI officer, or the Chief Officer in another police force. We believe this option would be most consistent with the requirement under article 6 of the ECHR that a tribunal be independent and impartial.

Disclosure of diversionary disposals

In our initial submission CAJ acknowledged that there may be room for non-conviction information to be disclosed, if the individual is still the subject of the order, warning or caution. The Review recommends that information relating to diversionary disposals, such as an informed warning, caution or diversionary youth conference should always be disclosed on standard and enhanced checks (p. 50).

¹⁰ As above, p. 45

CAJ does not believe that this recommendation strikes the appropriate balance between public protection and the rights of the individual. An informed warning or caution that is administered to an adult is not a criminal conviction, but forms part of a person's criminal record for a set period of time.¹¹ In line with our initial submission to the Review, CAJ believes that the appropriate balance would be struck by only disclosing this information where it still forms part of the individual's criminal record. To impose an arbitrary policy on all adults that such information should always be disclosed is a potentially disproportionate response. It is also potentially contradictory with the recommendation that the Department of Justice (DoJ) bring forward proposals to filter out old and minor information, such as cautions (p. 53).

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¹¹ In the case of an informed warning it forms part of an adults criminal record for 1 year. A caution forms part of the criminal record for 5 years.