



Farore Law

- Mini Guide -

SEXUAL ABUSE AND SEXUAL HARASSMENT CASES: ANONYMITY IN THE COURTS AND TRIBUNALS

The legal right to anonymity for victims of sexual abuse

Section 1 of the Sexual Offences (Amendment) Act (“**SO(A)A**”) 1992 entitles a victim of the vast majority of sexual offences to lifelong press anonymity from the moment that the allegation is made.¹ In such cases, nothing about the victim may be published if it is likely to lead members of the public to identify the victim.

Victims’ entitlement to anonymity is automatic in the majority of sexual offence cases², but the court may waive this right under the following circumstances:

- if a waiver of victim anonymity is required to induce people likely to be needed as witnesses at the trial to come forward; and that the conduct of the applicant's defence at the trial is likely to be substantially prejudiced if no waiver is granted;³
- if at trial, the judge is satisfied that to not allow the victim anonymity would impose a substantial and unreasonable restriction upon the reporting of proceedings and the trial; and that it is in the public interest to either remove or relax the restriction;⁴ and/or

¹ Section 1, SO(A)A 1992; Judicial College - Reporting Restrictions in the Criminal Courts (2016) (<https://www.judiciary.uk/wp-content/uploads/2015/07/reporting-restrictions-guide-may-2016-2.pdf>). The extent of the definition of “allegation” (namely, to whom the allegation must be made) is not specified, but in practice this usually means an allegation made to the police.

² All of which are listed in section 2, SO(A)A 1992

³ Section 3(1), SO(A)A 1992

⁴ Section 3(2), SO(A)A 1992

- if after a trial, a convicted defendant has lodged an appeal (or application for leave to appeal) against the conviction; applies to the appellate court for a direction to waive the victim's right to anonymity; satisfies the court that the direction is required to obtain evidence in support of the appeal; and the defendant is likely to suffer substantial injustice if no direction is given.⁵

The individual concerned may also choose to waive anonymity on their own initiative.

Section 5 of SO(A)A 1992 makes it an offence to breach a victim's right to anonymity under the Act. Note that a prosecution in this regard may only be brought with the consent of the Attorney General.

With regard to victims, it should not be assumed that the media understands the requirements of SO(A)A 1992. If necessary, counsel should be instructed to ask the judge to issue a reminder to the media. It is noted that where the complainant is of celebrity status and/or has ties to individuals well-known to the media, it may be necessary for counsel to request that the judge address the media in order to avoid 'jigsaw identification' (i.e. where the cross-referencing of different information produced by various news sources can lead to the identification of the individual concerned).⁶

The legal right to anonymity for witnesses in sexual abuse cases

The court may also grant lifetime anonymity (a "reporting direction") to any adult witness in relation to particular proceedings, as per section 46 of the Youth Justice and Criminal Evidence Act ("**YJCEA**") 1999. Section 45A YJCEA also allows the same for witnesses (and victims) under 18. A witness will be eligible for a reporting direction if the court is satisfied that either the witness's quality of evidence or level of co-operation is likely to be diminished as a result of fear or distress in connection with being identified by the police.^{7 8}

Procedure

It is important to note that anonymity for witnesses is not an automatic right and must be applied for (or otherwise granted by the court of its own volition). The procedure is set out in Part 6 of the Criminal Procedure Rules ("**CrimPRs**"); the party applying for anonymity must

⁵ Section 3(4), SO(A)A 1992

⁶ CPS: Rape and Sexual Offences - Chapter 20: Media Guidance for Rape Prosecutors (<https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-20-media-guidance-rape-prosecutors>)

⁷ Section 45A(5), YJCEA

⁸ Section 46(3), YJCEA

notify the court as soon as reasonably practical,⁹ in addition to all other parties involved. The court may also specify additional parties to be notified.¹⁰

The applicant must state the proposed terms of the reporting direction, and for how long it should last.¹¹ The applicant must also clarify what power the court has to make the order, and why it is necessary.¹² Further to this, it must also be explained how the witness is eligible, and how a reporting direction would be likely to improve the quality of the witness' evidence or level of co-operation given, having regard to the following factors in particular:^{13 14}

- (a) the nature and alleged circumstances of the offence;
- (b) the age of the witness;
- (c) such of the following matters as appear to the court to be relevant, namely:
 - (i) the social and cultural background and ethnic origins of the witness;
 - (ii) the domestic and employment circumstances of the witness; and
 - (iii) any religious beliefs or political opinions of the witness;
- (d) any behaviour towards the witness on the part of —
 - (i) the accused;
 - (ii) members of the family or associates of the accused; or
 - (iii) any other person who is likely to be an accused or a witness in the proceedings.

If the application for the reporting direction is on behalf of a witness (or victim) under 18, the following must be explained as part of the application:

- how the circumstances of the application meet the conditions prescribed by section 45A YJCEA, having regard to the factors which that section lists; and
- why such a reporting direction would be likely to improve the quality of any evidence given by the applicant, or the level of co-operation given by the applicant, accounting for the factors listed in section 45A YJCEA.

⁹ CrimPR 6.4(3)(a)

¹⁰ CrimPR 6.4(3)(b)

¹¹ CrimPR 6.4(3)(c)

¹² CrimPR 6.4(3)(d)

¹³ CrimPR 6.4(3)(d)

¹⁴ Sections 45A(6) [witnesses and victims under 18] and 46(3) [adult witnesses] YJCEA

If the application is on behalf of an adult, the following must also be explained as part of the application:

- how the witness is eligible for assistance, having regard to the factors listed in that section; and
- why such a reporting direction would be likely to improve the quality of any evidence given by the applicant, or the level of co-operation given by the applicant, accounting for the factors listed in section 46 YJCEA.

Cases involving sexual misconduct in the workplace/sexual harassment

Section 11 of the Employment Tribunals Act (“*ETA*”) 1996 provides for the restriction of publicity in Employment Tribunal (“*ET*”) cases involving sexual misconduct and sexual offences. In the context of the *ETA* 1996, “sexual misconduct” has an extremely wide definition that covers all manner of “adverse conduct [...] related to sex”.¹⁵

Section 11 confirms the *ET*’s power to make a reporting restrictions order in cases involving allegations of sexual misconduct, a breach of which may constitute a criminal offence.¹⁶ A reporting restrictions order has the effect of preventing the identification of any person affected by (or making) the allegation until the *ET* reaches a decision on the relevant case.¹⁷

Should this order be insufficient (given that it lasts only until a decision is made), then an order may instead be made under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.¹⁸ Practically speaking, this allows the *ET* to make a “lifetime” restricted reporting order.

Anonymity in civil law cases involving allegations of sexual abuse

The rules governing privacy and anonymity in all civil proceedings in the Court of Appeal, High Court, and County Courts are found in rule 39.2 of the Civil Procedure Rules.¹⁹ This rule states that a court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness.²⁰

¹⁵ Section 11(6), *ETA* 1996

¹⁶ Section 11(2), *ETA* 1996

¹⁷ Section 11(1), *ETA* 1996

¹⁸ Schedule 1, paragraph 50

¹⁹ As confirmed re. the High Court in *C v Secretary of State for Justice* [2016] UKSC 2, para.15

²⁰ Civil Procedure Rule 39.2(4)

When the court is asked to make an order for anonymity or any other order restraining the publication of what are normally the reportable details of a case, it should only do so after closely scrutinising the application and considering whether a degree of restraint on publication is necessary. If so, the court must then consider whether there is any less restrictive or more acceptable alternative than such an order.²¹

If the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim on the grounds of Article 8 of the European Convention on Human Rights (right to private/family life), the question will be whether there is a sufficient general public interest in not granting such an order.²²

Even if both parties in the case agree to anonymity, this fact will not absolve the court from balancing the interests at stake, particularly as such a situation will demand particular vigilance.²³ Additionally, the parties cannot waive the rights of the public.

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This content is intended only as a general guide and does not constitute, nor should be used as a substitute for, legal advice.

²¹ *JIH v News Group Newspapers Ltd* [2011] 1 WLR 1645, para. 21; confirmed by *V v T* [2014] EWHC 3432 (Ch)

²² *JIH v News Group Newspapers Ltd* [2011] 1 WLR 1645, para. 21; confirmed by *V v T* [2014] EWHC 3432 (Ch)

²³ As confirmed in *C v Secretary of State for Justice* [2016] UKSC 2, para. 19



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