JUDICIAL STUDIES BOARD FOR NI

GUIDE ON REPORTING RESTRICTIONS IN THE CRIMINAL COURTS

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REPORTING RESTRICTIONS GUIDE

CONTENTS

Introduction

Media and Public Access to Proceedings in the Magistrates' Court and Crown Court – Advice and Guidance for DJ(MC)s and Crown Court Judges

In recognition of the open justice principle, the general rule is that justice should be administered in public. To this end:

- **PROCEEDINGS MUST BE HELD IN PUBLIC.**
- **EVIDENCE MUST BE COMMUNICATED PUBLICLY.**
- **FAIR, ACCURATE AND CONTEMPORANEOUS MEDIA REPORTING OF PROCEEDINGS SHOULD NOT BE PREVENTED BY ANY ACTION OF THE COURT UNLESS STRICTLY NECESSARY.**

Therefore, unless there are exceptional circumstances laid down by statute law and/or common law the court **must not**:

- **ORDER OR ALLOW THE EXCLUSION OF THE PRESS OR PUBLIC FROM COURT FOR ANY PART OF THE PROCEEDINGS.**
- **PERMIT THE WITHHOLDING OF INFORMATION FROM THE OPEN COURT PROCEEDINGS.**
- **IMPOSE PERMANENT OR TEMPORARY BANS ON REPORTING OF THE PROCEEDINGS OR ANY PART OF THEM INCLUDING ANYTHING THAT PREVENTS THE PROPER IDENTIFICATION, BY NAME AND ADDRESS, OF THOSE APPEARING OR MENTIONED IN THE COURSE OF PROCEEDINGS.**

The courts and Parliament have given particular rights to the press to give effect to the open justice principle, so that they can report court proceedings to the wider public, even if the public is excluded.

Guidance follows on the recommended approach to take when making decisions to exclude the media or prevent it from reporting proceedings in the courts. The guidance takes the form of an easy reference checklist for use in court.

Throughout this document reference is made to 'the media'. This includes the press, radio, television, press agencies and online media. In general terms, the automatic and discretionary reporting restrictions described in this guidance apply both to traditional media such as newspapers and broadcasters and to online media and individual users of social media websites such as Twitter and Facebook. Members of the public are also bound by, and must comply with, these restrictions on publication/reporting.

A structured approach for judges

If the court is asked to exclude the media or prevent it from reporting anything, however informally, do not agree to do so without first checking whether the law permits the court to do so. Then consider whether the court ought to do so. Invite submissions from the media or their legal representatives.

The prime concern is the interests of justice.

Checklists

1. Check the legal basis for the proposed restriction.

Is there any statutory power which allows departure from the open justice principle? What is the precise wording of the statute? Is it relevant to the particular case?

Or is the applicant suggesting that the power for the requested departure from the open justice principle is derived from common law and the court's inherent jurisdiction to regulate its own proceedings? If so, does the case law actually support that contention?

2. Is action necessary in the interests of justice?

Is action necessary in the interests of justice? Automatic restrictions upon reporting might already apply, or there may be restrictions on reporting imposed by the media's codes, or as a result of an agreed approach.

The burden lies on the party seeking a derogation from open justice to persuade the court that it is necessary on the basis of clear and cogent evidence. Has the applicant produced clear and cogent evidence in support of the application?

Is any derogation from the open justice principle really necessary? Always consider whether there are any less restrictive alternatives available.

3. Proportionality - If restrictions are necessary how far should they go?

Where the court is satisfied that a reporting restriction pursues a legitimate aim and is truly necessary, it must consider carefully the terms of any order. The principle of proportionality requires that any order must be narrowly tailored to the specific objective the court has in mind and must go no further than is necessary to achieve that objective. Over-broad orders are liable to be successfully challenged before a reviewing or appellate court.

4. Invite media representations.

Invite oral or written representations by the media or their representatives, as well as legal submissions on the applicable law from the prosecution, in addition to any legal submissions and any evidence which the law might require in support of an application for reporting restrictions from a party.

Before imposing any reporting restriction or restriction on public access to proceedings the court should ensure that each party and any other person directly affected (such as the media) is present or has had an opportunity to attend or to make representations.

Where, exceptionally, the court makes an order where advance notice has not been given, the court should invite the media to make representations as soon as possible.

5. As soon as possible after oral announcement of the order in court, the order should be committed to writing.

If an order is made, the court must make it clear in court that a formal order has been made and state both the legal authority for making the order and its precise terms. It may be helpful to suggest at the same time that the court would be prepared to discuss any problems arising from the order with the media in open court, if they are raised.

The reporting restrictions order should be in precise terms, giving its legal basis, its precise scope, its duration and when it will cease to have effect, if appropriate. The reasons for making the order should always be recorded in the court record. The written Order drawn up by the Court Clerk should be checked and approved by the Judge.

6. Notifying the media.

The Private Office within the Office of the Lord Chief Justice (OLCJ) has appropriate procedures for notifying the media that an order has been made and for handling media enquiries.

7. Review.

The court should hear media representations against the imposition of any order under consideration or as to the lifting or variation of any reporting restriction as soon as possible.

1. The open justice principle

The general rule is that the administration of justice must be done in public, the public and the media have a right to attend all court hearings and the media are able to report those proceedings fully and contemporaneously. The public has the right to know what takes place in the criminal courts and the media in court acts as the eyes and ears of the public, enabling it to follow court proceedings and to be better informed about criminal justice issues.

The open justice principle is central to the rule of law. Open justice helps to ensure that trials are properly conducted. It puts pressure on witnesses to tell the truth. It can result in new witnesses coming forward. It provides public scrutiny of the trial process, maintains the public's confidence in the administration of justice and makes inaccurate and uninformed comment about proceedings less likely. Open court proceedings and the publicity given to criminal trials are vital to the deterrent purpose behind criminal justice. Any departure from the open justice principle must be established as necessary in order to be justified.

Parliament has recognised the importance of contemporaneous media reports of legal proceedings by giving protection from liability for contempt of court and defamation to fair, accurate and contemporaneous reports of court proceedings.[1] The important role of the media as a public watchdog is also recognised under the right to freedom of expression guaranteed by Article 10 of the European Convention of Human Rights.

As public authorities under the Human Rights Act, courts must act compatibly with Convention rights, including the right to freedom of expression under Article 10 ECHR and the right to a public hearing under Article 6 ECHR. While Article 10 and Article 6 are qualified rights permitting of exceptions, any restriction on the public's right to attend court proceedings and the media's ability to report them must fulfil a legitimate aim under these provisions and be necessary, proportionate and convincingly established. It is for the party seeking to derogate from the principle of open justice to produce clear and cogent evidence in support of the derogation.

THE OPEN JUSTICE PRINCIPLE - SUMMARY

- **THE GENERAL RULE IS THAT THE ADMINISTRATION OF JUSTICE MUST BE DONE IN PUBLIC. THE PUBLIC AND THE MEDIA HAVE THE RIGHT TO ATTEND ALL COURT HEARINGS AND THE MEDIA ARE ABLE TO REPORT THOSE PROCEEDINGS FULLY AND CONTEMPORANEOUSLY**
- **ANY RESTRICTION ON THESE USUAL RULES WILL BE EXCEPTIONAL. IT MUST BE BASED ON NECESSITY**
- **THE BURDEN IS ON THE PARTY SEEKING THE RESTRICTION TO ESTABLISH THAT IT IS NECESSARY ON THE BASIS OF CLEAR AND COGENT EVIDENCE**
- **THE TERMS OF ANY ORDER MUST BE PROPORTIONATE – GOING NO FURTHER THAN IS NECESSARY TO MEET THE RELEVANT OBJECTIVE**

[1] s.4(1) Contempt of Court Act 1981; s.14 Defamation Act 1996

Since Article 10 Freedom of Expression rights of the media will be engaged courts should hear the media's representations in relation to a proposed reporting restriction or restriction on public access to proceedings before making any order. Exceptionally this may not be possible where an unexpected issue arises; in such circumstances the media should be invited to make representations at the first available opportunity.

2. Hearings from which the public may be excluded

2.1 Trials in private: all criminal courts

In accordance with the open justice principle, the general rule is that all court proceedings must be held in open court to which the public and the media have access. The common law attaches a very high degree of importance to the hearing of cases in open court and under Article 6 ECHR the right to a public hearing and to public pronouncement of judgment are protected as part of a defendant's right to a fair trial.

The court has an inherent power to regulate its own proceedings, however, and may hear a trial or part of a trial in private in exceptional circumstances. The only exception to the open justice principle at common law justifying hearings in private is where the hearing of the case in public would frustrate or render impractical the administration of justice.[2] The test is one of necessity. The fact, for example, that hearing evidence in open court will cause embarrassment to witnesses does not meet the test for necessity.[3] Neither is it a sufficient basis for a hearing in private that allegations will be aired which will be damaging to the reputation of individuals.[4] The interests of justice could never justify excluding the media and public if the consequence would be that a trial was unfair.[5]

Statutory provisions enable the Crown Court to sit in camera and in chambers in certain circumstances, for example, under section 75 of the Serious Organised Crime and Police Act 2005 when the court is reviewing a sentence in relation to assistance by the defendant. The Crown Court Rules (Northern Ireland) 1979 as amended (see Rule 44A Crown Court Rules (Northern Ireland) 1979) prescribe the formal procedure for application for a trial to be held in camera, for reasons of national security[6] or protection of the identity of a witness or another. The media may make representations and can formally appeal Crown Court orders restricting or preventing reports or restricting public access under section 159 Criminal Justice Act 1988. The Court of Appeal for Northern Ireland has determined that a right to challenge the Crown Court's discharge or refusal of a reporting restrictions order by the person who was/hoped to be the subject of the order should be read into section 159 to

[2] *AG* v. *Leveller Magazine Ltd* [1979] AC 440, *per* Lord Diplock p.450C; R et al. v. *Times Newspapers* et al. [2008] EWCA Crim 2396.

[3] *Scott* v. *Scott* [1913] AC 417

[4] *Global Torch Ltd* v. *Apex Global Management Ltd* [2013] EWCA Civ 819. The court held that hearings in public were integral to open justice and that open justice, Article 10 and Article 6 ECHR would generally trump the Article 8 rights to reputation of parties and witnesses in a civil case. The same considerations in favour of open justice would carry even greater weight in a criminal case.

[5] R v. *Wang Yam* [2008] EWCA Crim 269

[6] See Re *Ministry of Defence* [1994] NI 279: the Court balances the competing interests. A public interest immunity certificate is the correct way to proceed in cases of national security. A Court faced with a certificate will balance competing interests: *Doherty* v. *MOD* [1991] 1 NIJB 68. A distinct power exists to allow a witness to testify without being named: In re *Jordan* [1995] NI 308.

make it compliant with Article 6 ECHR.[7]

Hearing a case in private has a severe impact upon the general public's right to know about court proceedings, permanently depriving it of the information heard in private. It follows that if the court can prevent the anticipated prejudice to the trial process by adopting a lesser measure *e.g.* a discretionary reporting restriction such as a postponement order under s.4(2) Contempt of Court Act, it should adopt that course. In making an application for a case to be heard in secret, a party will need to persuade the court that no measures other than trial in private will suffice.

Often the adoption of practical measures, by means of a Witness Anonymity Order under the Coroners & Justice Act 2009, Part 3 Chapter 2 , such as allowing a witness to give evidence from behind a screen or ordering that a witness shall be identified by a cipher (*e.g.* 'witness J'), and prohibiting publication of the witness's true name by an appropriate direction under s.11 Contempt of Court Act 1981 (see below at 4.4) will remove the need to exclude the public. Another possibility, where only a small part of the witness's evidence is sensitive, is to allow that part to be written down and not shown to the public or media in court. However, measures such as these are also exceptional and stringent tests must be satisfied before they are adopted.

The necessity test requires that even where a court concludes that part of a trial should be heard in private, it must give careful consideration as to whether other parts of the same case can be heard in public and must adjourn into open court as soon as exclusion of the public ceases to be necessary.

Circumstances which may justify hearing a case in private include situations where the nature of the evidence, if made public, would cause harm to national security *e.g.* by disclosing sensitive operational techniques or identifying a person whose identity for strong public interest reasons should be protected such as an undercover police officer. The application to proceed in private should be supported by relevant evidence and the test to be applied in all cases is whether proceeding in private is necessary to avoid the administration of justice from being frustrated or rendered impractical. Disorder in court may also justify a direction that the public gallery be cleared. Again the exceptional measure should be no greater than necessary. Representatives of the media (who are unlikely to have participated in the disorder) should normally be allowed to remain.

The Court shall exclude the public during the testimony of witnesses aged under 18 where the child's evidence is likely to involve matter of an indecent or immoral nature – see Article 21 Criminal Justice (Children) (NI) Order 1998. (In the analogous provision for England & Wales *bona fide* representatives of the media are expressly exempted from such exclusion and further the court has discretion whether to exclude the public when the test is met rather than being obliged to do so as in this jurisdiction – see section 37, Children and Young Persons Act 1933.) At common law, the court can exclude the public but allow media representatives to remain when considering exhibits in obscenity trials.

Article 13 of the Criminal Evidence (NI) Order 1999 permits the court to exclude persons of any description from the court during the evidence of a child or vulnerable adult witness in cases relating to a sexual offence or where there are grounds for believing that the witness has been or may be intimidated. If the media are to be excluded, one nominated representative must be permitted to

[7] See R v. *McGeehan* [2004] NICA 5 *per* Morgan LCJ at paragraph [24]

remain.

Under the Serious Organised Crime and Police Act 2005 a court may review the sentence of a defendant who has assisted the police, or previously obtained a reduced sentence having agreed to assist the police but reneged on the agreement. Pursuant to s.75 of the Act the court may exclude the public and media from such proceedings, where satisfied that this is necessary to protect any person and is in the interests of justice.

Article 44(19) of the Police and Criminal Evidence (NI) Order 1989 provides that a magistrates' court hearing a complaint in support of a warrant for further detention shall not sit in open court.

Section 8(4) of the Official Secrets Act 1920 provides for a prosecution application to exclude the public in relevant proceedings. The application does not need to be supported by evidence. The Court is deemed to have a wide measure of control: *Attorney General* v. *Leveller Magazine Ltd* [1979] A.C. 440.

The Administration of Justice Act 1960 s.12 defines a number of specific situations where publication of information about proceedings in private of itself constitutes a contempt of court *e.g.* in matters relating to national security. In all other cases, to publish what has occurred in private is not a breach of confidence or a contempt of court unless it causes a substantial risk of serious prejudice to the administration of justice.

Decisions of magistrates' courts to hear trials in private may be challenged in judicial review proceedings.

2.2 Youth Courts and Magistrates' Courts

Article 27 of the Criminal Justice (Children) (NI) Order 1998 provides that no person shall be present at any sitting of a youth court except:

(a) members and officers of the court;
(b) parties to the case before the court, their solicitors and counsel, and witnesses and other persons directly concerned in that case;
(c) the parents or guardians of the child;
(d) representatives of newspapers or news agencies;
(e) such other persons as the court may authorise to be present.

HEARINGS FROM WHICH THE PUBLIC MAY BE EXCLUDED:

- **THE GENERAL RULE IS THAT ALL COURT PROCEEDINGS MUST BE HELD IN OPEN COURT TO WHICH THE PUBLIC AND THE MEDIA HAVE ACCESS**

- **THE COURT MAY HEAR TRIALS IN PRIVATE IN EXCEPTIONAL CIRCUMSTANCES WHERE DOING SO IS NECESSARY TO PREVENT THE ADMINISTRATION OF JUSTICE FROM BEING FRUSTRATED OR RENDERED IMPRACTICAL**

- **WHERE LESSER MEASURES SUCH AS DISCRETIONARY REPORTING RESTRICTIONS WOULD PREVENT PREJUDICE TO THE ADMINISTRATION OF JUSTICE, THOSE**

MEASURES SHOULD BE ADOPTED

- **WHERE IT IS NECESSARY TO HEAR PARTS OF A CASE IN PRIVATE THE COURT SHOULD ADJOURN TO OPEN COURT AS SOON AS IT IS NO LONGER NECESSARY FOR THE PUBLIC TO BE EXCLUDED**

- **THE EMBARRASSMENT CAUSED TO WITNESSES FROM GIVING EVIDENCE IN OPEN COURT DOES NOT MEET THE NECESSITY TEST**

- **THERE IS A STATUTORY EXCEPTION TO THE OPEN JUSTICE PRINCIPLE FOR PROCEEDINGS IN THE YOUTH COURT, WHICH MEMBERS OF THE PUBLIC ARE PROHIBITED FROM ATTENDING**

3. Automatic reporting restrictions

There are a number of automatic reporting restrictions which are statutory exceptions to the open justice principle. The existence of an automatic restriction may make any further discretionary restrictions unnecessary *e.g.* there is no need to make a discretionary order in respect of a child complainant of a sexual offence because the automatic restrictions as to the identity of any complainant of a sexual offence apply. It may be of assistance in some cases for the judge to remind the media of any automatic restriction and to consider whether any guidance will assist the media to keep within such automatic restrictions. Such guidance from the judge is not binding. The statutory provisions give the courts the power to lift or vary the automatic restrictions in specified circumstances if asked to do so by a party or the media or on the court's own initiative.

3.1 The strict liability rule

The Contempt of Court Act 1981 provides the framework for all reporting of criminal proceedings in Northern Ireland. Sections 1 and 2 of the Act create the strict liability rule, which makes it a contempt of court to publish anything to the public which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced, even if there is no intent to cause such prejudice. In practice this means that ignorance of the law or of the existence of a reporting restriction or its terms is no defence if contempt is committed.

The strict liability rule applies to all publications, which is defined very widely as including 'any speech, writing, programme included in a programme service or other communication in whatever form, which is addressed to the public at large'. Accordingly the strict liability rule is not only of relevance to newspapers and broadcasters but also applies to online media and individual users of social media websites. The strict liability rule only applies once proceedings are 'active', which means that the relevant initial step must have been taken, such as placing a suspect under arrest.

There are three specific defences under the Act. The most important in practice is the defence provided by section 4 of "a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith". Section 5 of the Act creates a defence which protects publications relating to discussions in good faith of public affairs or matters of general public interest, providing that the risk of prejudice to particular legal proceedings is merely incidental to the discussion. In addition, there is a defence under section 3 for publishers and distributors who can show that they took reasonable care and did not know or have reason to suspect that proceedings

were active (publishers) or that a publication contained matter in breach of the strict liability rule (distributors).

The existence of the strict liability rule is in itself a significant safeguard as it places the media in jeopardy of being in contempt of court when reporting criminal proceedings unless that reporting is fair and accurate and published in good faith. It is important for courts to bear this in mind, particularly when a party seeking discretionary reporting restrictions seeks to argue that absent such additional restrictions media reporting is likely to be inaccurate, biased or otherwise prejudicial. The correct approach is for the court to proceed on the basis that such reporting is not likely and to trust the media to fulfil their responsibilities to report proceedings accurately and make sensible judgments about publications which may cause prejudice.

3.2 Complainants in relation to sexual offences

Complainants in a wide range of sexual offences are afforded lifetime anonymity in respect of the alleged sexual offending under the Sexual Offences (Amendment) Act 1992.

The 1992 Act imposes a lifetime ban on reporting any matter likely to identify a complainant alleging she/he is the victim of a sexual offence, from the time that such an allegation has been made and continuing after a person has been charged with the offence and after conclusion of the trial. The prohibition imposed by s.1 applies to 'any publication' and therefore includes traditional media as well as online media and individual users of social media websites, who have been prosecuted and convicted under this provision.[8]

The offences to which the prohibition applies are set out in section 2(3) of the 1992 Act but these include rape, indecent assault, indecency towards children and the vast majority[9] of other sexual offences.

There is no power under the 1992 Act to restrict the naming of a defendant in a sex case. Complainants enjoy the protection provided by s.1 of the 1992 Act and it is for the media to form their own judgment as to whether the naming of a defendant in a sex case would of itself be likely to identify the victim of the offence.[10] The same must be true for witnesses other than complainants in sex cases.

A defendant in a sex case may apply for the restriction to be lifted if that is required to induce potential witnesses to come forward and the conduct of the defence is likely to be substantially prejudiced if no such direction is given.

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[8] Thus a social media user was successfully prosecuted for having disclosed the identity of the complainant in the 'Rugby Rape Trial' involving Paddy Jackson and Stuart Olding. See BBC report here. Similarly, individuals who posted on social network websites revealing the identity of the complainant in the rape trial of former footballer Ched Evans were convicted of offences under this provision. See a *Guardian* report here.

[9] However, not quite all sexual offences are covered by the 1992 Act, *e.g.* disclosing private sexual photographs or possessing indecent images are not covered, which is why it is important to check the list in the up-to-date legislation – which is subject to amendment – to be sure that the offence or offences in question will give rise to an automatic reporting restriction.

[10] R *(Press Association)* v. *Cambridge Crown Court* [2012] EWCA Crim 2434, paragraphs [15] - [17].

There are three main exceptions to the anonymity rule. First, section 5(2) effectively provides that a complainant may waive the entitlement to anonymity by giving written consent to being identified (if they are 16 or older) thereby providing a defence to identification in that scenario. However, some care should be taken by the media regarding such a waiver in situations where there is more than one complainant lest the identification of the complainant who has waived his/her rights to anonymity should also serve to identify other complainants who have not agreed to the lifting of the restriction as regards their identity. Often in cases where there are multiple victims of sexual assault there will be a family or other close connection between them.

Secondly, by section 1(4) the media are not prohibited from reporting the complainant's identity in the event of criminal proceedings other than the actual trial or appeal in relation to the sexual offence. This essentially caters for where the complainant is prosecuted for perjury or wasting police time in subsequent proceedings.[11]

Thirdly, the court may by virtue of section 3(2) lift the restriction to persuade defence witnesses to come forward, or where the court is satisfied that it is a substantial and unreasonable restriction on the reporting of the trial and that it is in the public interest for it to be lifted. Section 3(3) means that this last condition cannot be satisfied simply as a result of the defendant's acquittal or any other outcome of the trial.

3.3 Complainants in relation to the offence of Female Genital Mutilation

Schedule 1 to the Female Genital Mutilation Act 2003 was inserted by section 71 of the Serious Crime Act 2015 on 3 May 2015, to provide for a new automatic reporting restriction for victims of female genital mutilation (FGM). The reporting restriction applies from the moment that an allegation has been made that a FGM offence has been committed against a person and imposes a lifetime ban on identifying that person as being an alleged victim of FGM.

The court has the power to relax or remove the restriction if satisfied that the restriction would cause substantial prejudice to the conduct of a person's defence at a trial of a FGM offence, or if the restriction imposes a substantial and unreasonable restriction on the reporting of the proceedings and it is in the public interest to do so.

3.4 Committal proceedings & rulings at pre-trial hearings

Under Article 44(1) of the Magistrates' Courts (Northern Ireland) Order 1981 where at a preliminary investigation or inquiry an opening statement is made on behalf of the prosecution, that statement must not be printed, published or included in a relevant programme.

[While it is not an automatic restriction it is perhaps also appropriate to note here that Article 44(2) of the Magistrates' Courts (Northern Ireland) Order 1981 provides that where at a preliminary investigation or inquiry objection is taken as to the admissibility of any evidence the court has a discretion, 'if satisfied that the objection is made in good faith,' to order that such evidence and any discussion of it shall not be printed *etcetera* and, if it appears to the court that publication of any part of the evidence adduced

[11] The dropping of a sexual offence charge/complaint would not of itself have the effect of lifting the complainant's lifetime anonymity.

before it (whether or not objection has been made) would prejudice the trial of the accused, it may in its discretion order that that part of the evidence shall not be printed *etcetera*].

Automatic restrictions under sections 41 and 42 of the Criminal Procedure and Investigations Act 1996 prevent reporting of all rulings made at pre-trial hearings together with orders for discharge and variation of such rulings and application proceedings for rulings and orders. This applies to pre-trial rulings relating to trials on indictment which have been made been committal and the start of the trial.

The restrictions apply until the trial of all defendants in the case has concluded. However, the restrictions can be lifted in whole or in part, provided that the court is satisfied, after hearing the representations of all the accused where any of them object, that it is in the interests of justice to do so.

3.5 Preparatory hearings

Reporting restrictions are imposed in respect of preparatory Crown Court hearings in cases of serious fraud: Article 10 of the Criminal Justice (Serious Fraud) (NI) Order 1988 is the local equivalent to section 11 of the Criminal Justice Act 1987. Breach is a summary offence punishable by fine.

The trial judge may lift the restrictions on the application of any person before the conclusion of the trial if satisfied, after hearing any representations from the accused, that it is in the interests of justice to do so. The restrictions will continue to apply, however, to any representations that were made by the accused in relation to the lifting of the restrictions.

3.6 Dismissal proceedings where there has been no committal

Similar restrictions apply to unsuccessful applications for dismissal in cases for trial in the Crown Court where there has been no committal proceeding. These cover serious fraud cases (Article 10 of the Criminal Justice (Serious Fraud) (NI) Order 1988).

Similarly, by paragraph 5 of Schedule 1 to the Children's Evidence (Northern Ireland) Order 1995, except by order of the judge it is unlawful to report an unsuccessful dismissal application in certain cases involving children where a notice of transfer has been given.

3.7 Prosecution appeals against rulings

In Crown Court, Court of Appeal and Supreme Court proceedings, automatic reporting restrictions apply when the prosecution informs the court of its intention to appeal against the court's rulings and to the court's subsequent decision as to whether to expedite the prosecution appeal, or adjourn, or discharge the jury. The restrictions prevent the publication of anything other than certain specified factual information (identification of court, judge, defendant, witnesses, lawyers, offence, bail, legal aid, place and date of adjourned proceedings *etcetera*). Subject to consideration of the (unreportable) objections of defendant(s), the courts may order that the restrictions do not apply to any extent, if it is in the interests of justice to do so, otherwise the restrictions automatically lapse at the conclusion of the trial(s) (Article 30(1) of the Criminal Justice (Northern Ireland) Order 2004).

3.8 Youth Court proceedings

Although the media are entitled to attend Youth Court proceedings, they are prohibited from

publishing the name, address or school or any other matter that is likely to identify a person under 18 as being "concerned in the proceedings" before the Youth Court or on appeal from the Youth Court (Article 22(2) of the Criminal Justice (Children) (NI) Order 1998). A child or young person is 'concerned in the proceedings' if he/she is a victim, witness or defendant.

These automatic reporting restrictions may be dispensed with to such an extent as may be specified by order either of the court or the Secretary of State if satisfied that it is in the interests of justice to do so.

By Article 22(3) of the 1998 Order where a child has been found guilty the court, if satisfied that it is in the public interest, may make an order dispensing with the prohibitions in 22(2) to such extent as may be specified in the order in relation to various matters in the trial. The court must, however, offer the parties an opportunity to make representations and take these into account before lifting the restrictions.

There are three exceptional situations in which these automatic reporting restrictions may be lifted. First, the court may lift the restriction if satisfied that it is appropriate to do so for avoiding injustice to the child. Secondly, the court may lift the restriction to assist in the search for a missing, convicted or alleged young offender who has been charged with, or convicted of, a violent or sexual offence (or one punishable with a prison sentence of 14 years or more in the case of a 21-year-old offender). Thirdly, the restriction may be lifted in relation to a child or young person who has been convicted, if the court is satisfied that it is in the public interest to do so.

When deciding whether to lift the automatic reporting restriction following conviction, particular considerations relevant to offenders under 18 must be balanced against the open justice principle. The particular considerations relevant to offenders under 18 include the:

- Duty to have regard to the principle aim of the youth justice system to prevent offending by children as required by s.53(1) of the Justice (NI) Act 2002;
- Obligation to have regard to the welfare of the child as required by s.53(3) of the Justice (NI) Act 2002;
- Right to privacy under Article 8 ECHR (as interpreted through international instruments such as the UN Convention on the Rights of the Child[12] and the Beijing Rules[13]); and
- Jurisprudence requiring the 'best interests of the child' to be 'a primary consideration' (though not necessarily one that prevails over all other considerations) in accordance with Article 3 of the UN Convention on the Rights of the Child.[14]

[12] The UN Convention on the Rights of the Child 1989 has been ratified by the United Kingdom and applies to all children under the age of 18. Article 40(2)(b)(vii) entitles every child 'accused of having infringed the penal law… [t]o have his or her privacy fully protected at all stages of the proceedings.'

[13] The UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 ('the Beijing Rules') are not binding. Rule 8 invites States to protect the privacy of defendants and offenders under 18. In particular, rule 8.1 indicates the 'juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling' and rule 8.2 indicates 'no information that may lead to the identification of a juvenile shall be published'

[14] *McKerry* v. *Teesdale and Wear Valley Justices* [2000] EWCA Crim 3553, *per* Lord Bingham CJ at paragraph [13] ; and *ZH (Tanzania)* v. *Secretary of State for the Home Department* [2011] UKSC 4 *per* Lord Kerr at paragraph [46]

It is wrong for the court to dispense with a juvenile's prima facie right to anonymity as an additional punishment, or by way of 'naming and shaming'. The welfare of the child must be given very great weight and it will rarely be the case that it is in the public interest to dispense with the reporting restrictions. Where it decides to lift the reporting restrictions, the court must clearly identify the specific public interest which justifies that course.

3.9 Special measures and other directions

Section 47 of the Youth Justice and Criminal Evidence Act 1999 prohibits the reporting of special measures directions, directions relating to the use of Live Link for an accused and directions prohibiting an accused from cross-examining a witness in person.

These automatic restrictions may be lifted by the Court and lapse automatically when proceedings against the accused are determined or abandoned.

AUTOMATIC REPORTING RESTRICTIONS

- **THERE ARE SEVERAL AUTOMATIC REPORTING RESTRICTIONS WHICH ARE STATUTORY EXCEPTIONS TO THE OPEN JUSTICE PRINCIPLE**
- **VICTIMS OF SEXUAL OFFENCES ARE GIVEN LIFETIME ANONYMITY WHICH DOES NOT APPLY IF THEY CONSENT IN WRITING TO THEIR IDENTITY BEING PUBLISHED. THEIR ANONYMITY CAN ALSO BE LIFTED BY THE COURT IN OTHER LIMITED CIRCUMSTANCES.**
- **AN OPENING STATEMENT MADE ON BEHALF OF THE PROSECUTION IN COMMITTAL PROCEEDINGS MUST NOT BE PRINTED, PUBLISHED OR INCLUDED IN A RELEVANT PROGRAMME**
- **REPORTS OF PRE-TRIAL HEARINGS IN THE CROWN COURT CANNOT GENERALLY BE PUBLISHED UNTIL AFTER THE TRIAL IS OVER.**
- **REPORTS OF PREPARATORY HEARINGS IN THE CROWN COURT IN LONG, COMPLEX OR SERIOUS CASES, COMPLEX FRAUD CASES AND UNSUCCESSFUL DISMISSAL APPLICATIONS ARE ALSO PROHIBITED (APART FROM A LIMITED RANGE OF FACTUAL MATTERS) UNTIL THE TRIAL IS OVER.**
- **THESE RESTRICTIONS ON PRE-TRIAL PROCEEDINGS LAPSE AT THE CONCLUSION OF THE TRIAL AND MAY BE LIFTED EARLIER WHERE THE COURT IS SATISFIED THAT IT IS IN THE INTERESTS OF JUSTICE TO DO SO.**
- **REPORTS OF SPECIAL MEASURES DIRECTIONS AND DIRECTIONS PROHIBITING THE ACCUSED FROM CONDUCTING CROSS –EXAMINATION CANNOT BE PUBLISHED UNTIL THE TRIAL(S) OF ALL ACCUSED ARE OVER, UNLESS THE COURT ORDERS OTHERWISE.**
- **REPORTS OF THE PROSECUTION'S NOTICES OF APPEAL AGAINST RULINGS AND THE COURTS' DECISIONS ON WHETHER TO EXPEDITE THE APPEAL, OR, IF NOT, TO**

ADJOURN THE PROCEEDINGS OR DISCHARGE THE JURY, CANNOT BE PUBLISHED (APART FROM A LIMITED RANGE OF FACTUAL MATTERS) UNTIL THE TRIAL(S) OF (ALL) THE ACCUSED IS/ARE OVER, UNLESS THE COURT ORDERS OTHERWISE.

- **THE MEDIA IS PROHIBITED FROM PUBLISHING THE NAME, ADDRESS OR SCHOOL OR ANY MATTER LIKELY TO IDENTIFY A CHILD OR YOUNG PERSON INVOLVED IN YOUTH COURT PROCEEDINGS WHETHER AS A VICTIM, WITNESS OR DEFENDANT**

- **THE YOUTH COURT MAY LIFT THE RESTRICTION IN SPECIFIED CIRCUMSTANCES INCLUDING WHERE THE CHILD OR YOUNG PERSON IS CONVICTED OF AN OFFENCE AND THE COURT CONSIDERS THAT IT IS IN THE INTERESTS OF JUSTICE TO DO SO**

- **THE COURT MUST GIVE GREAT WEIGHT TO THE WELFARE OF THE CHILD AND IT IS WRONG TO DISPENSE WITH THE AUTOMATIC ANONYMITY FOR A JUVENILE AS AN ADDITIONAL PUNISHMENT, OR BY WAY OF "NAMING AND SHAMING".**

4. Discretionary reporting restrictions

4.1 Procedural safeguards common to all discretionary reporting restrictions

Before imposing a discretionary reporting restriction, courts should check that no automatic reporting restriction already applies which would make a discretionary restriction unnecessary. It should be noted in particular that the Court of Appeal (E&W)[15] has reiterated that the automatic restriction in section 1(2) of the Sexual Offences (Amendment) Act 1992 is purely directed at preserving the anonymity of the complainant and it does not give the court power to restrict reporting of the defendant's identity. Where anything which might be reported about the defendant could have the effect of identifying the complainant it is for the press to refrain from publishing those details on pain of prosecution.

Where a discretionary restriction is potentially available, courts must ensure that they apply the restriction with care, checking that the relevant statutory conditions have been met. Where the statutory conditions are met, the court must make a judgment, balancing the need for the proposed restriction against the public interest in open justice and freedom of expression. In all cases, courts must be satisfied that the need for the proposed restriction has been convincingly established by clear and cogent evidence and that the terms of the proposed order go no further than is necessary to meet the statutory objective.

The imposition of a reporting restriction directly engages the media's interests, affecting their ability to report on matters of public interest. For this reason the court should not impose any reporting restrictions without first giving the media an opportunity to attend or to make representations, or, if the Court is persuaded that there is an urgent need for at least a temporary restraint by way of an interim order, as soon as practicable after such an order has been made. The media bring a different perspective from that of the parties to the proceedings. They have a particular expertise in reporting restrictions and are well placed to represent the wider public interest in open justice on behalf of the general public. Because of the importance attached to contemporaneous court reporting and the

[15] In R *(Press Association)* v. *Cambridge Crown Court* [2012] EWCA Crim 2434

perishable nature of news, courts should act swiftly to give the media the opportunity to make representations.

Any reporting restriction imposes potential criminal liability on media organisations, journalists or editors who breach it. For this reason, it is essential that any reporting restriction should be reduced to writing as soon as possible, clear and precise in its terms and drawn up as a court order as soon as practicable. OLCJ reviews Reporting Restrictions and Anonymity Orders on a daily basis and, where appropriate, issues an email notification to a selected group of media representatives which was agreed by the NI Editor's Liaison Group. Court staff should respond positively to media organisations' requests for assistance in relation to the existence or terms of reporting restriction orders and refer any queries to the NICTS Press Team accordingly.

PROCEDURAL SAFEGUARDS

- **WHERE AUTOMATIC REPORTING RESTRICTIONS ALREADY PROVIDE PROTECTION IT IS GENERALLY NOT NECESSARY TO IMPOSE ADDITIONAL DISCRETIONARY RESTRICTIONS**

- **CARE MUST BE TAKEN TO ENSURE THAT THE STATUTORY CONDITIONS FOR IMPOSING A DISCRETIONARY REPORTING RESTRICTION ARE MET**

- **WHERE THE STATUTORY CONDITIONS ARE MET, THE COURT MUST MAKE A JUDGMENT BALANCING THE NEED FOR THE REPORTING RESTRICTION AGAINST THE PUBLIC INTEREST IN OPEN JUSTICE AND FREEDOM OF EXPRESSION**

- **THE NEED FOR ANY ORDER MUST BE JUSTIFIED BY CLEAR AND COGENT EVIDENCE AND THE TERMS OF ANY ORDER MUST BE PROPORTIONATE, GOING NO FURTHER THAN IS NECESSARY TO MEET THE STATUTORY OBJECTIVE**

- **THE MEDIA MUST BE GIVEN AN OPPORTUNITY TO MAKE REPRESENTATIONS ABOUT DISCRETIONARY REPORTING RESTRICTIONS**

- **ORDERS SHOULD BE PUT IN WRITING AS SOON AS POSSIBLE**

- **THE MEDIA SHOULD BE PUT ON NOTICE OF THE EXISTENCE AND TERMS OF THE ORDER**

4.2 Protection of under-18s

Article 22(1) of the Criminal Justice (Children) (NI) Order 1998 provides that where a child (which, for these purposes, is now a person under 18) 'is concerned in' any criminal proceedings the Court 'may direct' that no report shall be published which reveals the name, address or school of the child or particulars likely to lead to the child's identification, and no picture of the child shall be published, except by direction of the Court. Breach is a summary offence punishable by a fine. A Divisional Court in England & Wales found, *per* Sir Brian Leveson P, in *JC & RT* v. *The Central Criminal Court* [2014] EWHC 1041 (QB) that an order made by any court under the similarly worded provision in that jurisdiction, *i.e.*

section 39 of the Children & Young Persons Act 1933 (since superseded by section 45 of the Youth Justice and Criminal Evidence Act 1999), cannot extend to reports of the proceedings after the subject of the order has reached the age of majority at 18.

N.B. a useful guide to the correct interpretation of the Article 22 phrase 'is concerned in *etcetera*' is the House of Lords decision: *In re S (a child)* [2004] UKHL 47. The judgment is helpful in that it not only addresses the construction of the relevant legislative provision (as contained in an analogous English provision) but considers generally the interplay between open justice and the need for protection of individuals by way of reporting restrictions and then goes on to consider the issue from a human rights perspective seeking to balance the competing claims of Article 8 and Article 10. In this case the application was by a minor for an injunction banning the reporting of the identity of his mother (as this would in turn identify him) who stood accused of murdering his sibling by means of acute salt poisoning.

Lord Steyn in upholding the first instance decision of the judge who refused to grant such an injunction said as follows: 'In my view the judge analysed the case correctly under the ECHR. Given the weight traditionally given to the importance of open reporting of criminal proceedings it was in my view appropriate for him, in carrying out the balance required by the ECHR, to *begin by acknowledging the force of the argument under article 10 before considering whether the right of the child under article 8 was sufficient to outweigh it*.' [Emphasis supplied]

Criminal proceedings commence when a defendant is charged – there is therefore no power to impose an Article 22(1) order to protect the identity of a person who has been arrested but has not yet been charged.

The order should spell out what is prohibited and should track the language of the legislation. It could be less extensive, but it cannot be wider. Thus there is no power to prohibit the publication of the names of adults involved in the proceedings or other children or young persons not involved in the proceedings as witnesses, defendants or victims.[16] The court may, however, give guidance to the media if it considers that the naming of an adult defendant would be likely to identify a child. Such guidance is not binding. The media may, for instance, be able to name a defendant without infringing the order, if the relationship of the victim to the defendant is omitted or the nature of the offence is blurred (*e.g.* using the wording 'a sexual offence' rather than 'incest'). See *infra* on 'jigsaw identification'.

There must be a good reason, apart from age alone, for imposing an Article 22(1) order. There is a clear distinction between the automatic ban on identification of children in Youth Court proceedings under Article 22(2) and the discretion to impose an order under Article 22(1). The onus lies on the party contending for the order to satisfy the court that there is a good reason to impose it. In considering the analogous statutory provision in England & Wales appellate courts there have emphasised that Parliament intended to preserve the distinction between juveniles in Youth Court proceedings and in the adult courts.[17]

In deciding whether to impose an order under Article 22(1), the judge must balance the interests of the public in the full reporting of criminal proceedings against the desirability of not causing harm to a

[16] Ex parte *Godwin* [1992] QB 190

[17] *E.g.* see R v. *Central Criminal Court* ex parte *W, B and C* [2001] 1 Cr.App.R. 2

child concerned in the proceedings.[18] The court is required to have regard to the welfare of the child. Where the child is an accused person the court should give considerable weight to the age of the defendant and to the potential damage to any young person of public identification as a criminal before having the burden or benefit of adulthood.[19] That the child's identity is already known to people in the community is not necessarily a good reason for allowing publication of that identity.[20]

Any order made must comply with Article 10 ECHR – it must be necessary, proportionate and there must be a pressing social need for it.[21]

Courts may review an order at any time and frequently are invited to do so where a defendant named in an order has been convicted at trial. The courts have recognised that in considering whether to lift an order the welfare of the child must be taken into account, but the weight to be given to that interest changes where there has been a conviction, particularly in a serious case; there is a legitimate public interest in knowing the outcome of proceedings in court and the potential deterrent effect in respect of the conduct of others in the stigma accompanying the identification of those guilty of serious crimes.[22]

It would seem that an Article 22(1) order automatically lapses when the person reaches the age of 18 (as he or she is no longer a child) and cannot extend to reports of the proceedings after that point.

If a reporting restriction is imposed, the judge should make it clear in court that a formal order has been made. The order should use the words of Article 22(1) and identify the child or children involved with clarity. A written copy should be drawn up as soon as possible after the order has been made orally and made available for inspection and communicated to those not present when the order was made. Court staff should assist media inquiries in relation to the order and refer any queries to the NICTS Press Team accordingly.

PROTECTION OF UNDER-18S

- **UNDER ARTICLE 22(1) OF THE CRIMINAL JUSTICE (CHILDREN) (NI) ORDER 1998 A COURT MAY DIRECT THAT THE MEDIA CANNOT IDENTIFY AN UNDER-18 CONCERNED IN CRIMINAL PROCEEDINGS AS A VICTIM, WITNESS OR DEFENDANT**
- **THE CHILD CONCERNED MUST STILL BE ALIVE**
- **THE COURT MUST HAVE REGARD TO THE WELFARE OF THE CHILD**
- **THE COURT MAY ORDER THAT THE MEDIA CANNOT PUBLISH HIS NAME, ADDRESS, SCHOOL OR PICTURE OR ANY DETAIL LIKELY TO LEAD TO HIS IDENTIFICATION AS A CHILD INVOLVED IN THE PROCEEDINGS**

[18] Ex parte *Crook* [1995] 1 WLR 139

[19] R v. *Inner London Crown Court* ex parte *B* [1996] COD 17

[20] R *(Y)* v. *Aylesbury Crown Court* [2012] EWHC 1140 (Admin)

[21] See In re *S (a child)* [2004] UKHL 47 already noted *supra*

[22] R v. *Central Criminal Court* ex parte *S* [1999] 1 FLR 480, DC

- **THERE MUST BE A GOOD REASON FOR IMPOSING AN ORDER UNDER ARTICLE 22(1) AND THE BURDEN LIES ON THE PARTY CONTENDING IN FAVOUR OF THE ORDER**

- **IN EXERCISING ITS DISCRETION, THE COURT MUST BALANCE THE PUBLIC INTEREST IN OPEN JUSTICE AGAINST THE WELFARE OF THE CHILD OR YOUNG PERSON**

- **ORDERS SHOULD REFLECT THE TERMS OF ARTICLE 22(1) AND THERE IS NO POWER TO NAME AN ADULT IN AN ARTICLE 22(1) ORDER OR A CHILD WHO IS NOT A VICTIM, WITNESS OR DEFENDANT**

- **WHERE AN UNDER-18 NAMED IN AN ARTICLE 22(1) ORDER HAS BEEN CONVICTED OF A SERIOUS CRIME, THE PUBLIC INTEREST IN KNOWING THE IDENTITY OF THE CONVICTED PERSON AND THE NEED FOR DETERRENCE GENERALLY FAVOUR LIFTING THE ORDER**

4.3 Protection of adult victims and witnesses

Section 46 of the Youth Justice and Criminal Evidence Act 1999 gives the court power to restrict reporting about certain adult witnesses (including the complainant) – though not the accused – in criminal proceedings on the application of any party to those proceedings.

The Court may make a reporting direction that no matter relating to the witness shall during his life-time be included in a publication if it is likely to lead members of the public to identify him as being a witness in the proceedings. Again, publication of the name, address, educational establishment, workplace or a still or moving picture of the witness is not of itself an offence, unless its inclusion is likely to lead to his identification as a witness by the public in the criminal proceedings. A section 46 order may also restrict the identification of children where it would lead to the identification of the adult in question.

An adult witness is eligible for protection if the quality of his evidence or his co-operation with the preparation of the case is likely to be diminished by reason of fear or distress in connection with identification by the public as a witness. The applicant for an order under section 46 should explain why a reporting direction would improve the quality of the witness' evidence or level of cooperation.

Quality of evidence relates to its quality in terms of completeness, coherence and accuracy. Factors which the court must take into consideration include the nature and circumstances of the offence, the age of the witness, any behaviour towards the witness by the defendant or his family or associates and the views of the witness (section 46(4)).

The court must also consider whether the making of a reporting direction would be in the interests of justice and consider the public interest in avoiding the imposition of a substantial and unreasonable restriction on the reporting of proceedings (section 46(8)).

The court may give a direction at any time dispensing with the restrictions if satisfied either that it is in the interests of justice or that the restrictions impose a substantial and unreasonable restriction on the reporting of the proceedings and that it is in the public interest. Such directions are referred to as

"excepting directions". The fact that the proceedings have been determined in a particular way or abandoned is not a sufficient reason in and of itself to dispense with the restrictions, but will often be a relevant consideration.

Section 52 of the Youth Justice and Criminal Evidence Act 1999 sets out some of the matters to which the court should have regard in determining the public interest, including the interest in open reporting of crime, human health and safety, exposure of miscarriages of justice, as well as the welfare and views of the 'protected person', or an 'appropriate person' with parental responsibility (as defined).

The subject of a section 46 anonymity direction can also waive his/her anonymity, or in the case of an under-16 year old, their parent or guardian (including a local authority) may waive the young person's anonymity, by giving written consent to the inclusion of any identifying material otherwise prohibited (subject to safeguards that it was not obtained by interference with the peace and comfort of that person).

The media have a right of appeal against section 46 orders made in the Crown Court under section 159 of the Criminal Justice Act 1998 even where the restriction on reporting is confined to photographs or film.[23]

A court which reviews the sentence of a defendant who has assisted the police, or failed to assist the police after having agreed to do so (under section 74 of the Serious Organised Crime and Police Act 2005 ('SOCPA')) may, by section 75(2)(b) of SOCPA, impose a reporting restriction prohibiting the publication of any matter relating to the proceedings including the fact that the reference has been made. The court may make such an order only to the extent that such an order is necessary to protect any person and is in the interests of justice (section 75(3)).

PROTECTION OF ADULT VICTIMS AND WITNESSES

- **UNDER S.46 OF THE YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT A COURT MAY PROHIBIT THE PUBLICATION OF MATTERS LIKELY TO IDENTIFY AN ADULT WITNESS IN CRIMINAL PROCEEDINGS (OTHER THAN THE ACCUSED) DURING HIS LIFETIME**

- **THE COURT MUST BE SATISFIED THAT THE QUALITY OF HIS EVIDENCE OR HIS CO-OPERATION WITH THE PREPARATION OF THE CASE IS LIKELY TO BE DIMINISHED BY REASON OF FEAR OR DISTRESS IN CONNECTION WITH IDENTIFICATION BY THE PUBLIC AS A WITNESS**

- **IN EXERCISING ITS DISCRETION, THE COURT MUST BALANCE THE INTERESTS OF JUSTICE AGAINST THE PUBLIC INTEREST IN NOT IMPOSING A SUBSTANTIAL AND UNREASONABLE RESTRICTION ON REPORTING OF THE PROCEEDINGS**

- **EXCEPTING DIRECTIONS MAY BE GIVEN, OR THE ORDER REVOKED OR VARIED AT ANY STAGE OF THE PROCEEDINGS, OR WRITTEN CONSENT TO IDENTIFICATION MAY BE GIVEN BY THE SUBJECT OR, IF UNDER 16, BY THEIR PARENT OR GUARDIAN.**

[23] *ITN News* v. R [2013]EWCA Crim 773, paragraph [29]

4.4 Names and other matters withheld in court

Where a court exercises its powers to allow a name or any other matter to be withheld from the public in criminal proceedings, the court may make such directions as are necessary under Section 11 of the Contempt of Court Act 1981 prohibiting the publication of that name or matter in connection with the proceedings.

Section 11 can only be invoked where the court allows a name or matter to be withheld from being mentioned in open court. It follows that there is no power to prohibit publication of any name or other matter which has been given in open court in the proceedings.[24] For this reason, applications for an order under s.11 may be heard in private provided there is good reason for doing so.[25]

Section 11 does not itself give the court power to withhold a name or other matter from the public. The power to do this must exist either at common law or derive from some other statutory provision.

Consistent with the requirement to protect the open justice principle and freedom of expression, courts should only make an order under s.11 where the nature or circumstances of the proceedings are such that hearing all evidence in open court would frustrate or render impractical the administration of justice.[26] It follows that a defendant in a criminal trial must be named save in rare circumstances.[27] It is not appropriate therefore to invoke the s.11 power to withhold matters for the benefit of a defendant's feelings or comfort[28] or to prevent financial damage or damage to reputation resulting from proceedings concerning a person's business.[29] Nor can the power be invoked to prevent identification and embarrassment of the defendant's children, because of the defendant's public profile.[30]

Where the ground for seeking a s.11 order is that the identification of a witness or a defendant will expose that person to a real and immediate risk to his life engaging the state's duty to protect life under Article 2 ECHR,[31] the court will consider whether the fear is objectively well-founded.[32] In practical terms, the applicant will have to provide clear and cogent evidence to show that publication of his name will create or materially increase a risk of death or serious injury.[33]

In rare circumstances, the right to private and family life under Article 8 ECHR may mean that normal media reporting has to be curtailed, but injunctions to cover these cases are dealt with by the High Court rather than the criminal courts.[34]

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[24] Re *Trinity Mirror* [2008] EWCA Crim 50

[25] *Carlin's Application* [2013] NIQB 144, *per* Morgan LCJ at paragraph [4]

[26] *AG* v. *Leveller Magazine Ltd* [1979] AC 440

[27] R v. *Marine A and Others* [2013] EWCA Crim 2367 at paragraph [84]

[28] *Evesham Justices*, ex parte *McDonagh* [1988] QB 553

[29] R v. *Dover Justices*, ex parte *Dover District Council* [1992] 156 JP 433

[30] *C v. CPS* [2008] EWHC 854 (Admin), *R v. Marine A and Others* [2013] EWCA Crim 2367

[31] *Osman v. United Kingdom* [1998] 29 EHRR 245, paragraph [116]

[32] Re *Officer L* [2007] UKHL 36

[33] R *(M)* v. *Parole Board* [2013] EWHC 1360 (Admin)

[34] Re *Trinity Mirror* [2008] EWCA Crim 50 (Also any such injunction ought not to restrain the publication of the defendant's name or nature of his/her conviction, on the basis that his/her children would thereby be harmed.)

The court is required to hear representations from the media about making orders under section 11. In cases of urgency, a temporary order should be made and the media should be invited to attend on the next convenient date. The media have a right of appeal against section 11 orders made in the Crown Court under section 159 of the Criminal Justice Act 1998 and may challenge orders made in the Magistrates' Courts in judicial review proceedings. A defendant does not have a right of appeal under section 159 against an order refusing to restrict reporting of his identity, but such an order may be challenged by way of judicial review.[35]

NAMES AND OTHER MATTERS WITHHELD IN COURT

- **WHERE A COURT EXERCISES A COMMON LAW OR STATUTORY POWER TO WITHHOLD A NAME OR OTHER MATTER FROM BEING GIVEN IN EVIDENCE IN OPEN COURT, IT MAY PROHIBIT PUBLICATION OF THAT NAME OR MATTER UNDER S.11 CONTEMPT OF COURT ACT 1981**

- **THE COURT MAY ONLY EXERCISE ITS POWER TO PROHIBIT PUBLICATION UNDER S.11 WHERE IT HAS DELIBERATELY WITHHELD THAT INFORMATION FROM BEING GIVEN IN OPEN COURT**

- **IN ORDER TO HAVE A COMMON LAW POWER TO WITHHOLD MATERIAL FROM THE PUBLIC IN COURT, IT MUST BE SATISFIED THAT, IF THE NAME OR MATTER WAS TO BE HEARD IN OPEN COURT, IT WOULD FRUSTRATE OR RENDER IMPRACTICAL THE ADMINISTRATION OF JUSTICE AND THAT THE ORDER IS NECESSARY TAKING INTO ACCOUNT THE PUBLIC INTEREST IN OPEN JUSTICE**

- **ALTERNATIVELY, THERE MUST BE SOME OTHER POWER TO WITHHOLD THE NAME OR OTHER MATERIAL FROM THE PUBLIC IN COURT. SECTION 11 DOES NOT GIVE THAT POWER**

4.5 Postponement of fair and accurate reports

Under section 4(2) of the Contempt of Court Act 1981 the court may order the postponement of publication of a fair, accurate and contemporaneous report of its proceedings where that is necessary to avoid a substantial risk of prejudice to the administration of justice in those or other proceedings.

It is now clear that the court has no *inherent* or *common law* power to postpone the publication of a report of proceedings conducted in open court.[36] It follows that unless there is a postponement power, which may properly be exercised under section 4(2), there is no power to order the postponement of reporting.

It is normally contempt of court under the 'strict liability rule' to publish anything which creates a substantial risk of serious prejudice to the administration of justice – see section 2 of the 1981 Act. However, ordinarily fair, accurate and contemporaneous reports of legal proceedings held in public

[35] As happened in R v. *Marine A and Others* [2013] EWCA Crim 2367

[36] *Independent Publishing Co Ltd v. AG of Trinidad and Tobago* [2004] UKPC 26

which are published in good faith will not breach the strict liability rule – see section 4(1) of the Act.

The power to make postponement orders recognises that there may need to be exceptions to the general defence under section 4(1). Matters may be discussed in open court, but in the absence of the jury which, if published before the end of the case, could prejudice the proceedings. There can also be circumstances where two or more trials are due to take place which are closely connected and where publication of reports of trial 1 could cause a substantial risk of prejudice to trial 2.

The subject matter of a postponement order under section 4(2) is fair, accurate, good faith and contemporaneous reports of the proceedings. Trial judges have no power under section 4(2) to postpone publication of any other reports *e.g.* in relation to matters not admitted into evidence or prejudicial comment in relation to the proceedings.[37] Likewise, courts have no power under section 4(2) to prevent publication of material that is already in the public domain. Such publications may incur liability for contempt of court under the strict liability rule and the media bears the responsibility for exercising its judgment in such cases.[38]

Where a court is exercising its discretion as to whether to make a section 4(2) postponement order the test to be applied has three stages:[39]

1. The first question is whether reporting of the proceedings would give rise to a substantial risk of prejudice to the administration of justice. If not, that is the end of the matter.

2. If there is a substantial risk of such prejudice, the court must ask whether a section 4(2) order would eliminate that risk. If not, there could be no necessity to impose a ban. Even if a judge is satisfied that the order would achieve the objective, she/he should still ask whether the risk can be overcome by less restrictive means. If so, a section 4(2) order could not be said to be necessary.

3. If the judge is satisfied that the order is necessary, she/he has a discretion and must balance the competing public interests between protecting the administration of justice and ensuring open justice and the fullest possible reporting of criminal trials. An order under section 4(2) should be regarded as a last resort.[40]

As orders must be proportionate in order to comply with Article 10 ECHR, the court must limit the order to those specific matters that create a substantial risk of prejudice to the administration of justice if published contemporaneously. As section 4(2) is a postponement power, the order should normally identify the specific event or time when the order will come to an end.

The reference in section 4(2) to avoiding a substantial risk of prejudice to the administration of justice referred to the protection of the public interest in the administration of justice rather than the private welfare of those caught up in that administration. Where a defendant argued that the scandalous nature of the allegations would result in members of the public attacking him, he was not entitled to a section 4(2) order as attacks upon the accused by ill-intentioned persons were not to be

[37] Re *B* [2006] EWCA Crim 2692

[38] *Ibid.*

[39] R v. *Telegraph Group plc & Others* [2001] EWCA Crim 1075

[40] *Application for leave to appeal by MGN Limited* [2011] EWCA Crim 100

regarded as a natural consequence of the publication of the proceedings and such dangers should not cause the court to depart from well-established principles.[41] Besides, section 4(2) only allows a court to *postpone* reporting, not to ban it indefinitely.[42] It is rarely appropriate to use s.4(2) to alleviate the difficulties of witnesses giving evidence, when there are other statutory measures designed for that purpose.[43]

Section 4(2) is regularly invoked in cases involving sequential trials. The aim in those cases is to postpone the reporting of specific parts of the evidence in the first trial to prevent prejudice to the defendants in the second trial. It is generally not appropriate to invoke this power in relation to matters that form part of the evidence in both trials because in those cases prejudice is unlikely to arise. Section 4(2) may also be invoked when a retrial is ordered by the Court of Appeal.

Before imposing an order in the context of sequential trials, the judge must be satisfied that there is a substantial risk of prejudice arising from contemporaneous reports of the first trial sufficient to outweigh the strong public interest in the full and contemporaneous reporting of criminal proceedings. The judge must also bear in mind that the staying power of news reports is very limited. In addition, it has often been said that normally juries can be trusted to follow conscientiously the directions of trial judges to decide cases on the evidence which they have heard in court and to ignore anything they may have read or viewed in the media.[44]

In Re *B* [2006] EWCA Crim 2692, the Court of Appeal in England & Wales emphasised that 'the responsibility for avoiding the publication of material which may prejudice the outcome of a trial rests fairly and squarely on those responsible for the publication. In our view, broadcasting authorities and newspaper editors should be trusted to fulfil their responsibilities accurately to inform the public of court proceedings, and to exercise sensible judgment about the publication of comment which may interfere with the administration of justice. The media has access to the best legal advice; they have their own personal judgments to make. The risk of being in contempt of court for damaging the interests of justice is not one any responsible editor would wish to take. In itself that is an important safeguard, and it should not be overlooked because there are occasions when there is widespread and ill-judged publicity in some parts of the media.'

POSTPONEMENT OF FAIR AND ACCURATE REPORTS

- **UNDER S.4(2) OF THE CONTEMPT OF COURT ACT 1981 THE COURT MAY POSTPONE PUBLICATION OF A FAIR, ACCURATE AND CONTEMPORANEOUS REPORT OF ITS PROCEEDINGS WHERE THAT IS NECESSARY TO AVOID A SUBSTANTIAL RISK OF PREJUDICE TO THE ADMINISTRATION OF JUSTICE IN THOSE OR OTHER PROCEEDINGS**

- **THE POWER IS STRICTLY LIMITED TO FAIR, ACCURATE AND CONTEMPORANEOUS REPORTS OF THE PROCEEDINGS**

- **THE COURT MUST BE SATISFIED THAT A SUBSTANTIAL RISK OF PREJUDICE**

[41] Re *Belfast Telegraph Newspapers Ltd.'s Application* [1997] NI 309
[42] Re *Times Newspapers Ltd* [2007] EWCA Crim 1925
[43] *Application for leave to appeal by MGN Ltd* [2011] EWCA Crim 100
[44] Re *B* [2006] EWCA Crim 2692

WOULD ARISE FROM SUCH REPORTS

- **IF THE CONCERN IS POTENTIAL PREJUDICE TO A FUTURE TRIAL, IN MAKING THAT JUDGMENT, THE COURT WILL BEAR IN MIND THE TENDENCY FOR NEWS REPORTS TO FADE FROM PUBLIC CONSCIOUSNESS AND THE CONSCIENTIOUSNESS WITH WHICH IT CAN NORMALLY BE EXPECTED THAT THE JURY IN THE SUBSEQUENT CASE WILL FOLLOW THE TRIAL JUDGE'S DIRECTIONS TO REACH THEIR DECISION EXCLUSIVELY ON THE BASIS OF EVIDENCE GIVEN IN THAT CASE**

- **BEFORE MAKING A S.4(2) ORDER, THE COURT MUST BE SATISFIED THAT THE ORDER WOULD ELIMINATE THE RISK OF PREJUDICE AND THAT THERE IS NO LESS RESTRICTIVE MEASURE THAT COULD BE EMPLOYED**

- **IF SATISFIED OF THESE MATTERS, THE COURT MUST EXERCISE ITS DISCRETION BALANCING THE RISK OF PREJUDICE TO THE ADMINISTRATION OF JUSTICE AGAINST THE STRONG PUBLIC INTEREST IN THE FULL REPORTING OF CRIMINAL TRIALS**

4.6 Postponement of derogatory remarks made in mitigation

Section 58 of the Criminal Procedure and Investigations Act 1996 gives courts the power to postpone reports of derogatory assertions about named or identified persons that have been made in mitigation. The court must have substantial grounds for believing that the assertion is derogatory and false or that the facts asserted are irrelevant to the sentence.

This power may be exercised when a court is determining sentence following conviction, when a Magistrates' Court is determining whether an accused should be committed to a Crown Court for sentence and when a court is considering whether to give permission to appeal against a sentence or hearing an appeal against, or reviewing, a sentence. An interim order can be made as soon as the assertion has been made if there is a real possibility that a final order will be made. A final order (maximum duration 12 months) must be made as soon as reasonably practicable after the sentence is passed.

An order must not be made in relation to an assertion if it appears to the court that the assertion was previously made at the trial at which the person was convicted of the offence or during any other proceedings relating to the offence.

Such orders may be revoked at any time and orders made after the handing down of a sentence automatically cease to have effect after 12 months.

POSTPONEMENT OF DEROGATORY REMARKS IN MITIGATION

- **SECTION 58 OF THE CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996 GIVES COURTS THE POWER TO POSTPONE REPORTS OF CERTAIN ASSERTIONS ABOUT NAMED OR IDENTIFIED PERSONS THAT HAVE BEEN MADE IN MITIGATION**

- **THE COURT MUST HAVE SUBSTANTIAL GROUNDS FOR BELIEVING THAT THE**

ASSERTION IS DEROGATORY AND FALSE OR THAT THE FACTS ASSERTED ARE IRRELEVANT TO THE SENTENCE

- **ORDERS MUST NOT BE MADE IN RELATION TO ASSERTIONS THAT WERE MADE DURING THE TRIAL OR ANY OTHER PROCEEDINGS RELATING TO THE OFFENCE**

5. Additional matters relating to court reporting

5.1 The availability of court lists, court registers and reporting restrictions

Media Court Lists Online

Media Court Lists Online (MCLO) is an online service available to accredited journalists to obtain access to information on criminal courts for the next seven days ahead. In order to access this service, journalists must sign up and agree to a Memorandum of Understanding which sets out the arrangements by which the Northern Ireland Courts and Tribunals Service ('NICTS') will provide media court lists to subscribers.

Media Court Lists are updated on a daily basis at 22:00.

If there is a Reporting Restriction Order (RRO) on a case, the MCLO entry will state REPORTING RESTRICTION alongside the defendant's details. Journalists can obtain details of an RRO by attending court or by contacting the Press Team who will provide the factual details of the order recorded on the Integrated Courts Operating System (ICOS).

Information relating to an RRO is always highlighted in red in correspondence issued by the NICTS Press Team to alert the NI Media that a live RRO is in place. Furthermore, NICTS Press team correspondence includes a notice to inform journalists that if they have any doubts as to the meaning or interpretation of such restrictions in application to a particular case it is vital that they seek their own legal advice before making any decision to publish.

Public Court lists online

Public Court Lists is a free service which allows any member of the public to view the court lists for civil and criminal business for any court venue for up to seven days ahead. Court lists are refreshed daily at 10:00pm.

5.2 Access to documents held on the court file

Following the ground-breaking decision of the Court of Appeal (E&W) in *R (Guardian News and Media Ltd) v. City of Westminster Magistrates Court* [2012] EWCA Civ 420 the default position now is that where documents have been placed before a judge and referred to in the course of proceedings the media is entitled to have access to those documents in accordance with the open justice principle. Where access to documents has been sought for a proper journalistic purpose, the case for allowing it will be particularly strong (paragraph [85]). This principle extends to any type of document on the court file and also extends to photographs, video footage, stills and sound recordings which have been shown or played in open court.

However, there may be countervailing reasons in an individual case which outweigh the merits of the application (paragraphs [85] & [86]). In deciding these questions the court has to carry out a proportionality exercise which is fact specific, where central considerations will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and conversely any risk of harm which access to the documents may cause to the legitimate interests of others.

5.3 Identification of those involved in court proceedings

In Re *Trinity Mirror*, the Court of Appeal in England & Wales[45] stated: "it is impossible to over-emphasise the importance to be attached to the ability of the media to be able to report criminal trials which represents the embodiment of the principle of open justice in a free country. An important aspect of the public interest in the administration of criminal justice is that the identity of those convicted and sentenced for criminal offences should not be concealed. From time to time occasions will arise where restrictions on this principle are considered appropriate but they depend on express legislation and, where the court is invested with a discretion to exercise such powers, on the absolute necessity for doing so in the individual case."

5.4 Unauthorised recording of court proceedings

Unauthorised tape recording of proceedings in court is a contempt of court under section 9 of the Contempt of Court Act 1981 and may be subject to forfeiture. However, courts may at their discretion permit journalists to record proceedings in court as an *aide memoire*.

It is an offence to take photographs or make sketches or attempt to do so in court, in respect of the judge, witness or party if in the court room, court building or court precincts. (Section 29 Criminal Justice Act (NI) 1945) The court can issue guidance on the extent of the precincts of the court buildings *e.g.* by way of a map. There appears to be no discretion given to courts to set this prohibition aside.

5.5 Live, text-based communications from court

A Practice Note on this topic issued by the Lord Chief Justice's Office in June 2016 is available to view on the Judiciary NI website at the link below:

Practice Note 1/2016 - Note taking and the use of live text - based forms of communication (including Twitter) from court for the purpose of fair and accurate reporting

5.6 Jury's deliberations

It is a contempt of court contrary to section 8 of the Contempt of Court Act 1981 to obtain, disclose or solicit any details of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings. The prohibition on disclosure binds both jurors themselves and the media in relation to the publication of any such disclosure.

[45] Sitting in this important case as a bench of five, which included the Presidents of the Queen's Bench and Family Divisions

5.7 Jigsaw identification

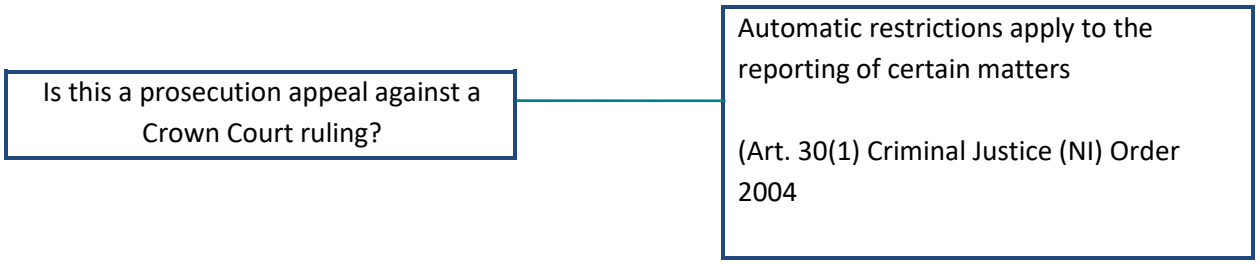
Jigsaw identification refers to the phenomenon whereby the identity of a person protected by a reporting restriction order may be inadvertently disclosed as a result of different media reports, none of which breaches the terms of any order or statutory provision, but which taken together enable the protected person to be identified. In most cases this is not an issue, but particular difficulties arise in relation to sex offences within the same family. For example, where one report refers to an unnamed defendant convicted of raping his daughter and another refers to the name of the defendant, the daughter will be identifiable to the public in breach of the automatic prohibition protecting victims of sexual offences.

In recognition of these potential difficulties the newspapers and broadcasters have aligned their respective codes so that the media adopts a common approach when reporting sexual offences. Typically the media will name the defendant but not name the victim (this would breach the statutory prohibition) or give any details of his or her relationship with the defendant. It is routine for in-house lawyers in the larger media organisations to check what information is already in the public domain before advising on whether a report of court proceedings is likely to breach any legal requirement, so even in non-sex cases in practice the media often ends up adopting a common approach.

Ready Reference Guides

Automatic Reporting Restrictions

Are these proceedings in the Youth Court?	Automatic ban on identifying a child under 18 in the proceedings and on publishing name, address, school and photo. (Art. 22(2) Criminal Justice (Children) (NI) Order 1998
Is this a prosecution for a sexual offence?	Automatic ban on identifying the complainant during his/her lifetime. (s.2 Sexual Offences (Amendment) Act 1992)
Are these committal proceedings in the Magistrates' Court?	Automatic restriction limits reporting to specified matters until the conclusion of the trial. (Art. 44(1) Magistrates' Courts (NI) Order 1981)
Is the hearing a dismissal application in the Crown Court?	If application unsuccessful automatic restriction limits reporting to specified matters in certain cases. (Various Acts – see 3.6 above)
Is the hearing a pre-trial hearing in the Crown Court?	Automatic ban on reporting the hearing until the conclusion of the trial (s.41 Criminal Procedure and Investigations Act 1996)
Is the hearing a preparatory hearing in a Crown Court involving serious fraud?	Automatic restriction limits reporting to specified matters until the conclusion of the trial (Art. 10 Criminal Justice (Serious Fraud) (NI) Order 1988)


Is this a prosecution appeal against a Crown Court ruling?
Automatic restrictions apply to the reporting of certain matters
(Art. 30(1) Criminal Justice (NI) Order 2004

Discretionary Reporting Restrictions

Under 18s

1. Is there a child under 18 concerned in the proceedings as a victim, witness or defendant?

↓

2. Is there a good reason for ordering that the child should not be identified?

↓

3. On the specific facts of this case, does the welfare of the child outweigh the strong public interest in open justice?

↓

4. Is the proposed restriction necessary and are the terms of the proposed order proportionate?

↓

The court may order the media under Art 22(1) Criminal Justice (Children) (NI) Order 1998 not to disclose the name, address, school or picture or any detail likely to lead to the child being identified as being concerned in the proceedings.

Adult witnesses

1. Is there an adult witness in the proceedings (other than the accused) whose evidence or co-operation with the preparation of the case is likely to be diminished by reason of fear or distress in connection with being identified?

↓

2. On the specific facts of this case, do the interests of justice favour making the order, or would such an order impose a substantial and unreasonable restriction on the reporting of the proceedings taking into account the open justice principle?

↓

3. Is the proposed restriction necessary and are the terms of the proposed order proportionate?

↓

The court may order the media under s.46 Youth Justice and Criminal Evidence Act 1999 not to publish any matter relating to the witness during his/her lifetime if it is likely to lead members of the public to identify him as being a witness in the proceedings.

Names and other matters withheld in court

1. Is there a power, under common law or statute, to withhold the material from the public in open court?

↓

2. On the facts of this case have the criteria for exercising that power been met?
   Are the common law conditions satisfied or the statutory terms met?

↓

3. Do the circumstances outweigh the strong public interest in open justice?

↓

4. Has the material been withheld from the public in open court or will it be?

↓

5. Is it necessary and proportionate to prohibit publication by the media?

↓

The court may order the media under s.11 Contempt of Court Act 1981 not to publish the name or matter that has been withheld.

Postponement of fair and accurate reports

1. Would a fair, accurate and contemporaneous report of the proceedings (or part thereof) published in good faith create a substantial risk of prejudice to the administration of justice in those or other proceedings?

↓

2. Is an order postponing the publication of such reports necessary and are its terms proportionate? Would such an order eliminate the risk of prejudice to the administration of justice? Could less restrictive measures achieve the objective?

↓

3. On the specific facts of this case, does the public interest in protecting the administration of justice outweigh the strong public interest in open justice?

↓

The court may order the media under s. 4(2) Contempt of Court Act 1981 to postpone publication of such reports until a specific event or for a specific period of time.

N.B.:ALL DISCRETIONARY REPORTING RESTRICTIONS

SHOULD BE PUT IN WRITING AND MADE AVAILABLE TO THE MEDIA.