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## STATUTORY INSTRUMENTS

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# 1999 No. 2789

## The Criminal Evidence (Northern Ireland) Order 1999

### PART IV

#### PROTECTION OF COMPLAINANTS IN PROCEEDINGS FOR SEXUAL OFFENCES

*[<sup>F1</sup>Serious sexual offences: exclusion of public from court*

**F1** Arts. 27A-27F and cross-headings inserted (28.9.2023) by Justice (Sexual Offences and Trafficking Victims) Act (Northern Ireland) 2022 (c. 19), ss. 19(2), 30(2); S.R. 2023/142, art. 3 (with arts. 4, 5)

#### **Exclusion of public from trial**

**27A.**—(1) Where a person is to be tried on indictment for a serious sexual offence, the court must give an exclusion direction before the beginning of the trial (but this is subject to paragraph (4)).

(2) An “exclusion direction” is a direction providing for the exclusion from the court, during the time the direction has effect, of all persons with the exception of—

- (a) members and officers of the court;
- (b) persons directly involved in the proceedings and, where the complainant is not such a person, the complainant;
- (c) any relative or friend of the complainant nominated by the complainant and specified in the direction;
- (d) any relative or friend of the accused nominated by the accused and specified in the direction;
- (e) bona fide representatives of news gathering or reporting organisations;
- (f) any other person specified in the direction as a person excepted from the exclusion.

(3) Paragraph (1) applies whether or not the trial relates to other offences as well as a serious sexual offence.

(4) Paragraph (1) does not apply if the time at which the exclusion direction would fall to be given (in the absence of this paragraph) is not within the lifetime of the complainant.

(5) Where an exclusion direction is given under this Article, the direction has effect from the beginning of the trial and continues to have effect until, in respect of each serious sexual offence to which the trial relates, the proceedings have been either—

- (a) determined (by acquittal, conviction or otherwise), or
- (b) abandoned,

in relation to the accused or (if there is more than one) in relation to each of the accused; but this is subject to paragraph (6).

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(6) The exclusion direction does not have effect during any time when a verdict is being delivered in the proceedings, and “verdict” here includes any finding which constitutes the determination of the proceedings in relation to an accused and an offence.

(7) In this Article and Articles 27B to 27D—

“complainant” means any person who is the complainant (within the meaning of Article 2(2)) in respect of a serious sexual offence to which the trial relates;

“effect”, in relation to a direction, means binding effect;

“persons directly involved in the proceedings” includes—

- (a) the accused;
- (b) legal representatives acting in the proceedings;
- (c) any witness while giving evidence in the proceedings;
- (d) any person acting in the capacity of an interpreter or other person appointed to assist a witness or an accused; and
- (e) members of the jury;

“serious sexual offence” means an offence against the law of Northern Ireland mentioned in section 2(3) of the Sexual Offences (Amendment) Act 1992.

#### **Nomination etc of persons to be excepted from exclusion**

**27B.**—(1) Only one person may be nominated by the complainant under Article 27A(2)(c), and only one person may be nominated by the accused under Article 27A(2)(d), but—

- (a) if more than one person is a complainant, a nomination may be made by each of the complainants, and
- (b) if more than one person is an accused in relation to the proceedings, a nomination may be made by each of the accused.

(2) Paragraph (1) has effect subject to Article 27C(1) (replacement nominated persons).

(3) The court may refuse to specify under Article 27A(2)(c) or (d) a person who has been nominated under that provision, but only where it appears to the court to be in the interests of justice to do so.

(4) Crown Court rules may make provision about nominations under Article 27A(2)(c) and (d), including provision—

- (a) for notice of intended nominations to be given to such persons as may be prescribed by the rules;
- (b) for a nomination to be withdrawn or substituted before a person is specified under Article 27A(2)(c) or (d).

(5) The court may specify a person under Article 27A(2)(f) only where it appears to the court to be in the interests of justice to do so.

(6) The court may exercise its power of refusal under paragraph (3), or specify a person under Article 27A(2)(f), either—

- (a) on an application made by a party to the proceedings or the complainant, or
- (b) of its own motion.

### Variation of exclusion directions given under Article 27A

**27C.**—(1) Where a person has been specified under Article 27A(2)(c) or (d) in an exclusion direction, the court may vary the exclusion direction by revoking the specification of that person, and if it does so—

- (a) the person who nominated that person may nominate under Article 27A(2)(c) or (d) (as the case may be) one other person instead,
- (b) Article 27B(3) applies accordingly, and
- (c) where the person nominated by virtue of this paragraph is specified under Article 27A(2)(c) or (d), this paragraph applies in relation to that person.

(2) The court may vary an exclusion direction given under Article 27A so as to—

- (a) specify under paragraph (2)(f) of that Article a person not already specified in the direction, or
- (b) revoke any specification of a person made under paragraph (2)(f) of that Article.

(3) The court may vary an exclusion direction under paragraph (1) or (2) only where it appears to the court to be in the interests of justice to do so, and may do so either—

- (a) on an application made by a party to the proceedings or the complainant, if there has been a material change of circumstances since the relevant time, or
- (b) of its own motion.

(4) In paragraph (3) “the relevant time” means—

- (a) the time when the exclusion direction was given, or
- (b) if a previous application was made for a variation under this Article, the time when the application (or last application) was made.

### Exclusion directions under Article 27A: general

**27D.**—(1) The court must state in open court its reasons for—

- (a) specifying a person under Article 27A(2)(f),
- (b) refusing under Article 27B(3) to specify a person,
- (c) refusing an application made under Article 27B(6),
- (d) varying an exclusion direction under Article 27C(1) or (2), or
- (e) refusing an application made under Article 27C(3).

(2) Where a statement is made by the court in proceedings from which persons are excluded by an exclusion direction, the fact that it is so made does not prevent the statement from being regarded as made “in open court”.

(3) Any proceedings from which persons are excluded by an exclusion direction shall nevertheless be taken to be held in public for the purposes of any privilege or exemption from liability available in respect of fair, accurate and contemporaneous reports of legal proceedings held in public.

(4) An exclusion direction has effect subject to—

- (a) Article 21 of the Criminal Justice (Children) (Northern Ireland) Order 1998 (court to be cleared while child is giving evidence in certain cases);
- (b) any power of the court to hear proceedings in private;
- (c) any power of the court to exclude a witness until that witness’s evidence is required;
- (d) any other power of the court to exclude a person from the court.

(5) Crown Court rules may make provision—

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- (a) for uncontested applications under Article 27B(6) or 27C(3) to be determined by the court without a hearing;
- (b) for preventing the renewal of an unsuccessful application under either of those provisions except where there has been a material change of circumstances;
- (c) for expert evidence to be given in connection with such an application;
- (d) for the manner in which confidential or sensitive information is to be treated in connection with such an application and in particular as to its being disclosed to, or withheld from, a party to the proceedings or the complainant.

### **Exclusion of public from appeal hearing**

**27E.**—(1) Paragraph (2) applies where a hearing is to be held by the Court of Appeal of any one or more of the following—

- (a) an application for leave to appeal against a conviction or sentence (or both) in respect of a serious sexual offence;
- (b) an appeal against a conviction or sentence (or both) in respect of a serious sexual offence;
- (c) an application for leave to refer a sentence in respect of a serious sexual offence to the Court of Appeal under section 36 of the Criminal Justice Act 1988 (reviews of sentencing);
- (d) a reference under that section of a sentence in respect of a serious sexual offence;
- (e) an application for leave to appeal under section 12 or 13A of the Criminal Appeal (Northern Ireland) Act 1980 (appeals against findings of not guilty on ground of insanity and unfitness to be tried) in respect of a serious sexual offence;
- (f) an appeal under either of those sections in respect of a serious sexual offence.

(2) The court must give an exclusion direction before the beginning of the hearing (but this is subject to paragraph (4)).

(3) Paragraph (2) applies whether or not the hearing relates to other offences as well as a serious sexual offence.

(4) Paragraph (2) does not apply if the time at which the exclusion direction would fall to be given (in the absence of this paragraph) is not within the lifetime of the complainant.

(5) Where an exclusion direction is given under this Article in relation to a hearing, the direction—

- (a) has effect from the beginning of the hearing, and
- (b) subject to paragraph (7), continues to have effect until, in respect of each relevant application or appeal to which the hearing relates, either—
  - (i) a decision has been made on the application or appeal, or
  - (ii) the application or appeal has been abandoned.

(6) In paragraph (5) a “relevant application or appeal” means any application, appeal or reference mentioned in paragraph (1).

(7) The exclusion direction does not have effect during any time when any of the following decisions is being pronounced by the court—

- (a) a decision to grant or refuse leave to appeal;
- (b) a decision on an appeal;
- (c) a decision to grant or refuse leave to make a reference under section 36 of the Criminal Justice Act 1988;
- (d) a decision on such a reference.

(8) In this Article—

“complainant” has the meaning given by Article 27A(7), reading the reference in Article 27A(7) to the trial as a reference to the hearing;

“effect” has the same meaning as in Article 27A (see Article 27A(7));

“exclusion direction” is to be read in accordance with Article 27F(1);

“sentence” has the same meaning as in Part 1 of the Criminal Appeal (Northern Ireland) Act 1980;

“serious sexual offence” has the same meaning as in Article 27A (see Article 27A(7)).

(9) A reference in this Article to a hearing is not to be taken to include any proceedings on an application for leave to appeal, or on an application for leave to refer a sentence, that are of a kind which (ignoring this Article) are not held in open court.

### **Exclusion from appeal hearings: further provision**

**27F.**—(1) Subject to paragraph (5), in Article 27E and this Article “exclusion direction” has the meaning given by Article 27A(2).

(2) The following provisions apply in relation to exclusion directions given under Article 27E as they apply in relation to exclusion directions given under Article 27A—

(a) Article 27B(1) to (3), (5) and (6);

(b) Article 27C; and

(c) Article 27D(1) to (4).

(3) As well as being subject as mentioned in Article 27D(4), an exclusion direction given under Article 27E has effect subject to section 24 of the Criminal Appeal (Northern Ireland) Act 1980 (right of accused to be present at hearing of appeal and limitations on that right).

(4) Rules made under section 55 of the Judicature (Northern Ireland) Act 1978 may make provision about any matter mentioned in paragraph (4) of Article 27B or paragraph (5) of Article 27D (reading the references in those paragraphs to Article 27A(2)(c) and (d), Article 27B(6) and Article 27C(3) as references to those provisions as applied by this Article).

(5) In their application by virtue of this Article, Article 27A(2) and the provisions mentioned in paragraph (2)(a) to (c) are to be read as if—

(a) in the definition of “the complainant” in Article 27A(7), the reference to the trial were a reference to the hearing, and

(b) in the definition of “persons directly involved in the proceedings” in Article 27A(7), subparagraph (e) were omitted.]

*[<sup>F1</sup>Sexual offences: restriction on certain evidence and questions]*

### **Restriction on evidence or questions about complainant's sexual history**

**28.**—(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—

(a) no evidence may be adduced, and

(b) no question may be asked in cross-examination,

by or on behalf of any accused at the trial about any sexual behaviour of the complainant.

(2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—

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- (a) that paragraph (3) or (5) applies, and
  - (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.
- (3) This paragraph applies if the evidence or question relates to a relevant issue in the case and either—
- (a) that issue is not an issue of consent; or
  - (b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or
  - (c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—
    - (i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or
    - (ii) to any other sexual behaviour of the complaint which (according to such evidence) took place at or about the same time as that event,
 that the similarity cannot reasonably be explained as a coincidence.
- (4) For the purposes of paragraph (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.
- (5) This paragraph applies if the evidence or question—
- (a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and
  - (b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.
- (6) For the purposes of paragraphs (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those paragraphs is capable of applying in relation to the evidence or question to the extent that it does not so relate).
- (7) Where this Article applies in relation to a trial by virtue of the fact that one or more of a number of persons charged in the proceedings is or are charged with a sexual offence—
- (a) it shall cease to apply in relation to the trial if the prosecutor decides not to proceed with the case against that person or those persons in respect of that charge; but
  - (b) it shall not cease to do so in the event of that person or those persons pleading guilty to, or being convicted of, that charge.
- (8) Nothing in this Article authorises any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from this Article.

## **Interpretation and application of Article 28**

**29.**—(1) In Article 28—

- (a) “relevant issue in the case” means any issue falling to be proved by the prosecution or defence in the trial of the accused;
- (b) “issue of consent” means any issue whether the complainant in fact consented to the conduct constituting the offence with which the accused is charged (and accordingly does not include any issue as to the belief of the accused that the complainant so consented);

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- (c) “sexual behaviour” means any sexual behaviour or other sexual experience, whether or not involving any accused or other person, but excluding (except in Article 28(3)(c)(i) and (5)(a)) anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused; and
- (d) subject to any order made under paragraph (2), “sexual offence” shall be construed in accordance with Article 3.

(2) The Secretary of State may by order make such provision as he considers appropriate for adding or removing, for the purposes of Article 28, any offence to or from the offences which are sexual offences for the purposes of this Order by virtue of Article 3.

- (3) Article 28 applies in relation to the following proceedings as it applies to a trial, namely—
  - (a) proceedings before a magistrates' court conducting a <sup>F2</sup>... preliminary inquiry into an offence,
  - (b) the hearing of an application under paragraph 4(1) of Schedule 1 to the Children's Evidence (Northern Ireland) Order 1995 (application to dismiss charge following notice of transfer of case to Crown Court),
  - (c) any hearing held, between conviction and sentencing, for the purpose of determining matters relevant to the court's decision as to how the accused is to be dealt with, and
  - (d) the hearing of an appeal,

and references (in Article 28 or this Article) to a person charged with an offence accordingly include a person convicted of an offence.

**F2** Words in art. 29(3)(a) repealed (17.10.2022) by Criminal Justice (Committal Reform) Act (Northern Ireland) 2022 (c. 4), s. 5(2), Sch. para. 15(b); S.R. 2022/221, art. 2(d)

### Procedure on applications under Article 28

**30.**—(1) An application for leave shall be heard in private and in the absence of the complainant. In this Article “leave” means leave under Article 28.

(2) Where such an application has been determined, the court must state in open court (but in the absence of the jury, if there is one)—

- (a) its reasons for giving or refusing leave, and
- (b) if it gives leave, the extent to which evidence may be adduced or questions asked in pursuance of the leave,

and, if it is a magistrates' court, must cause those matters to be entered in the Order Book.

- (3) Rules of court may make provision—
  - (a) requiring applications for leave to specify, in relation to each item of evidence or question to which they relate, particulars of the grounds on which it is asserted that leave should be given by virtue of paragraph (3) or (5) of Article 28;
  - (b) enabling the court to request a party to the proceedings to provide the court with information which it considers would assist it in determining an application for leave;
  - (c) for the manner in which confidential or sensitive information is to be treated in connection with such an application, and in particular as to its being disclosed to, or withheld from, parties to the proceedings.

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