

## **EXPLANATORY MEMORANDUM TO**

### **The Attorney General's Human Rights Guidance (The Application of Section 5 of the Criminal Law Act (Northern Ireland) 1967 to Victims of Serious Sexual Offences and those to whom they make Disclosures) Order (Northern Ireland) 2020**

#### **SR 2020 No. 113**

#### **1. Introduction**

- 1.1. This Explanatory Memorandum has been prepared by the the Attorney General for Northern Ireland to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.
- 1.2. The Statutory Rule is made under the powers conferred by section 8(3) of the Justice (Northern Ireland) Act 2004 and is subject to the negative resolution procedure.

#### **2. Purpose**

- 2.1. The Statutory Rule brings into operation human rights guidance relevant to the application of Section 5 of the Criminal Law Act (Northern Ireland) 1967 to victims of serious sexual offences and those to whom they make disclosures, in respect of the Public Prosecution Service for Northern Ireland and the Police Service of Northern Ireland. It also revokes previous guidance on the application of Section 5 of the Criminal Law Act (Northern Ireland) 1967 to rape victims and those to whom they make disclosures in connection with a claim for Social Security, Child Tax Credit or anonymous registration on the electoral roll.

#### **3. Background**

- 3.1. Section 8(1) of the Justice (Northern Ireland) Act 2004 obliges the Attorney General for Northern Ireland to issue guidance for criminal justice organisations on the exercise of their functions in a manner consistent with international human rights standards. This Statutory Rule brings into operation guidance for the Public Prosecution Service for Northern Ireland and the Police Service of Northern Ireland as required by section 8(3)(c) of the 2004 Act.

#### **4. Consultation**

- 4.1. The Attorney General has consulted with the Advocate General pursuant to section 8(5A) of the Justice (Northern Ireland) Act 2004.

#### **5. Equality Impact**

- 5.1. The Attorney General for Northern Ireland is not listed as a public authority for the purposes of section 75 of the Northern Ireland Act 1998.

#### **6. Regulatory Impact**

- 6.1. A Regulatory Impact Assessment is not required.

#### **7. Financial Implications**

- 7.1. Not applicable.

## **8. Section 24 of the Northern Ireland Act 1998**

8.1. It is the view of the Attorney General that this Statutory Rule is compliant with section 24 of the Northern Ireland Act 1998.

## **9. EU Implications**

9.1. Not applicable.

## **10. Parity or Replicatory Measure**

10.1. The Statutory Rule applies to Northern Ireland only. There is no corresponding Great Britain Statutory Instrument.

## **11. Additional Information**

11.1. The text of the guidance is attached to this Explanatory Memorandum at Annex A.

## ANNEX A

# **HUMAN RIGHTS GUIDANCE FOR THE PUBLIC PROSECUTION SERVICE AND THE POLICE SERVICE OF NORTHERN IRELAND** **THE APPLICATION OF SECTION 5 OF THE CRIMINAL LAW ACT (NORTHERN IRELAND) 1967 TO VICTIMS OF SERIOUS SEXUAL OFFENCES AND THOSE TO WHOM THEY MAKE DISCLOSURES**

## **INTRODUCTION**

1. This guidance is addressed to the Public Prosecution Service (PPS) of Northern Ireland and the Police Service of Northern Ireland (PSNI). It is intended to assist consideration of (1) investigations into or (2) prosecutions for, the offence of failing to report a serious sexual offence under section 5 of the Criminal Law Act (Northern Ireland) 1967<sup>1</sup>.
2. This guidance replaces human rights guidance previously made for the PPS by the Attorney General for Northern Ireland: Guidance No. 14, “The Application of Section 5 of the Criminal Law Act (Northern Ireland) 1967 to Rape Victims and Those to Whom They Make Disclosures in Connection With a Claim for Social Security, Child Tax Credit or Anonymous Registration on The Electoral Roll.” This new guidance is addressed to the PSNI and the PPS and extends beyond the specific statutory contexts addressed in the earlier guidance.

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<sup>1</sup> Section 5 of the 1967 Act applies to failing to report a ‘relevant offence’. It applies therefore to sexual offences which are ‘relevant offences’. By section 4 (1A) of the 1967 Act, this means (a) an offence for which the sentence is fixed by law and (b) an offence for which a person of 21 years or over (not previously convicted) may be sentenced to imprisonment for a term of five years (or might be so sentenced but for the restrictions imposed by Article 46(4) of the Magistrates’ Courts (Northern Ireland) Order 1981) but does not include an offence under Article 20 of the Sexual Offences (Northern Ireland) Order 2008.

3. It is important to note from the outset that in the vast majority of cases involving rape and other serious sexual offences, a failure to report what has happened to police will not amount to an offence. This is because a victim or someone in whom they have confided will be considered to have a reasonable excuse for not disclosing the information confided to the PSNI.

## **CONTEXT**

4. Victims of serious sexual offences may feel unable to tell the PSNI what has happened to them but may disclose what happened to a family member, friend, doctor, counsellor, teacher or social worker, for example. It might also be necessary for information about an offence to be disclosed for the purposes of social security<sup>2</sup> (in relation to the non-consensual conception of a child) or to have an entry in the electoral roll anonymised on safety grounds. Some of those who are told about the offence may be aware that it has not been reported to the police but may decide not to make contact with the police in the absence of the victim's consent.
5. If at a later stage, the PSNI become aware that a person has been raped or the victim of a sexual assault, a police officer may need to consider whether anyone has committed the offence of failing to report the offence. The PSNI may also ask a prosecutor for

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<sup>2</sup> Social security and tax credit legislation provides for an exception to the maximum number of children for whom support is provided where there is non-consensual conception of a child. Those who need to avail of the exception in respect of a child will provide information to an approved person. That professional will, if appropriate, confirm her understanding that the circumstances revealed to her are consistent with the application of the exception for non-consensual conception which allows financial support to be paid in respect of a child. The circumstances are that the child is likely to have been conceived as a result of sexual intercourse to which the mother did not freely agree or did not have the freedom and capacity to agree. See, for example, Universal Credit Regulations (Northern Ireland) 2016 and Child Tax Credit Regulations 2002.

prosecutorial advice<sup>3</sup> before deciding to commence or proceed with a criminal investigation. Prosecutors may also consider whether section 5 offences have occurred or should be prosecuted when working on the file passed to them in relation to the serious sexual offence itself.

## **STATUTORY FRAMEWORK**

6. Section 5 of the Criminal Law Act (Northern Ireland) 1967 reads in relevant part as follows:

“Penalties for concealing offences etc.

(1) Subject to the succeeding provisions of this section, where a person has committed a relevant offence, it shall be the duty of every other person, who knows or believes—

- i. that the offence or some other relevant offence has been committed; and
- ii. that he has information which is likely to secure, or to be of material assistance in securing, the apprehension, prosecution or conviction of any person for that offence;

to give that information, within a reasonable time, to a constable and if, without reasonable excuse, he fails to do so he shall be guilty of an offence...”

7. Both PSNI and PPS should be aware that liability under section 5 can only arise where another person has committed a relevant offence<sup>4</sup>. Before moving to consider the elements of the offence which relate to the belief and actions of the victim or her

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<sup>3</sup> For example, in relation to the quality and admissibility of evidence and whether, in the circumstances of the case under investigation, the public interest test for prosecution could ever be met see [3.4] of the Code for Prosecutors.

<sup>4</sup> See A-G’s Reference (no.3 of 1993) [1993] NI 50 at 54e: ‘liability in any person can only arise if an arrestable offence has actually been committed by someone else’ Note now ‘relevant’ offence.

confidant, investigators and prosecutors must be satisfied that admissible evidence is available which affords a reasonable prospect of proving beyond reasonable doubt that an offence of rape or other relevant offence has been committed.

8. The focus of this guidance is on the human rights standards applicable to:

1) the reasonable excuse element of the section 5 offence. If a reasonable excuse exists, no offence is committed;

and

2) the assessment of whether the public interest requires prosecution in the context of disclosures of serious sexual offences.

### **CONSIDERATION OF REASONABLE EXCUSE**

9. The issue of 'reasonable excuse' is key to PSNI investigative decision making and, for the PPS, one aspect of the evidential test for the section 5 offence. In considering whether there is sufficient evidence to afford a reasonable prospect of conviction, a prosecutor must assess whether there is admissible evidence upon which an impartial and properly directed jury could reasonably be expected to consider it beyond reasonable doubt that that the person with knowledge or belief that a serious sexual offence occurred failed without reasonable excuse to pass information to the police<sup>5</sup>.

10. It is extremely unlikely that a victim of a rape or other serious sexual offence who fails to report it to the PSNI has committed an offence under section 5 of the Criminal Law Act (Northern Ireland) 1967 as there is almost certainly a reasonable excuse,

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<sup>5</sup> Prosecutions are initiated or continued by the PPS only where it is satisfied that The Test for Prosecution is met. This is a two-stage test:

1. The Evidential Test – the evidence which can be adduced in court sufficient to provide a reasonable prospect of conviction.
2. The Public Interest Test – prosecution is required in the public interest.

arising from an inevitably traumatising experience, for not approaching the police. Similarly, a supportive family member or close friend who does not wish to approach the police without the victim's agreement is very likely to have a reasonable excuse for not doing so.

11. Where a doctor, nurse, counsellor, other healthcare professional receives information regarding a sexual offence there will almost invariably be a reasonable excuse for not reporting the matter to the PSNI, given the professional duty of confidentiality owed to patients or clients.
12. Where another person (for example, a teacher or youth worker) in whom a victim of sexual crime might reasonably be expected to entrust a disclosure of that sexual offence receives such a disclosure there will, by reason of that trust, be a reasonable excuse for not relaying that disclosure without the consent of the victim. Compliance with procedures for vulnerable adult or child safeguarding may be relevant.
13. Where a professional or employee involved in the operation of social security and tax credit or electoral legislation receives a disclosure, again, there will almost invariably be a reasonable excuse for not reporting the matter to the PSNI, when the disclosure is made only for the purpose of obtaining a benefit or anonymous registration and the person making the disclosure has not herself reported the matter. There is no specific obligation on 'approved persons' or 'qualifying persons' arising from their discrete functions to report criminal offences to the police. In the absence of such specific obligations, the need to secure the operational efficiency of the respective statutory scheme is capable of constituting a reasonable excuse for non-disclosure.

14. In considering the reasonableness of the excuse, a police officer or a prosecutor should strive to strike a balance between the general interest of society (including the interest in protecting persons against future serious harm) in information about the serious sexual offence being disclosed to the police and the interests and rights of the person who failed to disclose the information, as well as those of the victim. In doing so, the police officer or prosecutor should:

As regards a victim

- a) take into account the devastating effects of rape and other serious sexual offences and the length of the recovery process as regards the reason for the victim not reporting the crime;
- b) where relevant, be conscious of the dynamics of control and manipulation in abusive relationships;
- c) where relevant, take into account the extent to which a victim of a serious sexual offence who has been trafficked was compelled to withhold information;
- d) take account of the effect of the relationship between the victim, the perpetrator and any children;
- e) where relevant, afford particular weight to the fact that the person who failed to disclose is (or was at a relevant time) a child;
- f) consider whether the reporting of the serious sexual offence at an earlier stage would have involved such a risk to the victim or a third party's safety as to breach the rights protected under Article 2 or 3 ECHR;



As regards a family member or friend

- g) take into account the devastating effects of rape and other serious sexual offences and the length of the recovery process as regards the reason for the family member or friend not reporting the crime without the victim's agreement<sup>6</sup>;
- h) take account of the effect of the relationship between the friend or family member, the victim, the perpetrator and any children;
- i) where relevant, afford particular weight to the fact that the person who failed to disclose is (or was at a relevant time) a child;
- j) consider whether the reporting of the serious sexual offence at an earlier stage would have involved such a risk to the victim or a third party's safety as to breach the rights protected under Article 2 or 3 ECHR;

As regards another person to whom a disclosure is made by a victim

- k) take into account the devastating effects of rape and other serious sexual offences and the length of the recovery process as regards the reason why a professional working with (or an employee aware of) the victim might not contact the police without her agreement<sup>7</sup>;

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<sup>6</sup> Plainly, where a victim of rape makes a disclosure and wishes another person to contact the police on her behalf, a refusal to pass information to the police in such circumstances may not be regarded as reasonable.

<sup>7</sup> Plainly, where a victim of rape makes a disclosure and wishes another person to contact the police on her behalf, a refusal to pass information to the police in such circumstances may not be regarded as reasonable.

- l) take into account that the belief<sup>8</sup> that rape occurred arose as a result of information given in order to obtain, for example:
  - (a) financial support for a child or
  - (b) the protection of an anonymous entry in the electoral roll or
  - (c) counselling or medical services;
- m) consider whether the reporting of the rape or other serious sexual offence at an earlier stage would have involved such a risk to the victim or a third party's safety as to breach the rights protected under Article 2 or 3 ECHR;
- n) where relevant, take into account whether any professional procedures for the protection of children and vulnerable adults were complied with on receipt of the information.

## **THE PUBLIC INTEREST TEST**

15. Prosecutors are required to consider in every case what the public interest requires. A particularly sensitive and thoroughly-considered approach is required in relation to assessing whether the public interest requires prosecution of a victim of a serious sexual offence for not reporting the crime perpetrated against them.

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<sup>8</sup> It is very unlikely that a belief, for the purposes of the section 5 offence, will have been formed in the circumstances described in this paragraph. It will not normally be necessary for family, friends or professionals other than police or prosecutors to form a view about the state of mind of any perpetrator (essential to the crime of rape) in order to discharge his or her functions. A person who forms no view about what the alleged perpetrator believed in relation to consent cannot be said to have formed a belief that the offence of rape had been committed (even where he or she believes that the woman did not consent).

16. It is so highly unlikely as to be unimaginable that the public interest will ever require that a victim of a rape or other serious sexual offence be prosecuted for the section 5 offence. Each case will be a matter for the prosecutor's discretion but it is likely to be in only the most wholly exceptional of cases that the public interest would require that the victim (or the victim's friends or family members) be prosecuted for withholding information about the offence.
17. It is also highly unlikely that it will be in the public interest to prosecute a person for failure to report information received about a rape to the PSNI where that disclosure of rape is made in the context of the operation of social security and tax credit or electoral legislation.
18. The situation may be different where the victim is a child or vulnerable adult and the professional who received the disclosure is under a free-standing professional duty (arising from his or her own specific professional or employment obligations) to disclose the offence to the PSNI. The situation may also be different where a failure to report the offence has the clear (and foreseeable) effect of putting other persons at serious risk of harm.
19. The primary public interest to be considered by a prosecutor is the interest in bringing perpetrators of serious sexual offences to justice and protecting the public. The European Convention on Human Rights requires that the State have in place a system for the effective investigation and prosecution of these offences. Penalisation of victims and those to whom they make disclosures for failing to come forward with information is likely to create a barrier to victim support and to undermine their willingness to cooperate as witnesses.

20. Prosecution for an offence contrary to section 5 in these circumstances should therefore only be undertaken where there is obvious culpability on the part of an individual who fails to provide information to the PSNI. Such culpability is likely to arise, for example, in the case of a person who obtains relevant information from a perpetrator.
21. In exercising discretion as to whether the public interest requires prosecution, the prosecutor should consider whether the following factors against prosecution apply in the individual case under consideration:
- a) the protection of the victim's physical and psychological integrity, particularly when he or she could be required to provide testimony at a future trial;
  - b) the potential impact on the willingness of the victim and those to whom disclosures are made to give evidence at a future trial;
  - c) the potential creation of an environment unfavourable to victims coming forward to make a complaint a period of time after the offence;
  - d) the potential creation of an environment unfavourable to witnesses coming forward to provide information about disclosures made to them by victims.

This guidance on the public interest test is in addition to that provided in the Code for Prosecutors.

#### **CONSIDERATION OF AN EARLY DECISION NOT TO PROSECUTE**

22. Prosecutions only proceed where a prosecutor is satisfied that the 'test for prosecution' is met. This is a two-stage test: 1) the evidential test – that the evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction and

2) the public interest test – that prosecution is required in the public interest. There cannot be a prosecution unless both stages of the test are met. Normally, the prosecutor must consider and be satisfied on the evidential test before moving to consider the public interest test.

23. However in accordance with [4.6] of the Code for Prosecutors, a prosecutor, with the approval of the relevant Assistant Director, may be satisfied that the broad extent of the criminality has been determined and that a fully-informed assessment of the public interest allows a decision not to prosecute to be made. It is likely that this exceptional process will apply to all cases of withholding information about a rape or other serious sexual offence.

24. Therefore, prior to the completion of an investigation (before an interview under caution is carried out, for example), prosecutors should consider the potential for an early application of the public interest test. They should be particularly alert to the advantage of avoiding the potential distress caused by an interview under caution.

## **INTERNATIONAL STANDARDS**

25. This guidance is based on international human rights standards, in particular the:

- European Convention for the Protection of Human Rights and Fundamental Freedoms;
- Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence;
- Council of Europe Convention on Action Against Trafficking in Human Beings;

- United Nations Convention on the Rights of the Child;
- United Nations Convention on the Rights of Persons with Disabilities
- Council of Europe Recommendation (2000) 19 on the role of public prosecution in the criminal justice system;
- Council of Europe Recommendation (2006) 8 on assistance to crime victims;
- Council of Europe Recommendation (2002) 5 on the protection of women against violence;
- Council of Europe Recommendation (97) 13 concerning intimidation of witnesses and the rights of the defence;
- Guidelines for the Role of Prosecutors – Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Havana between 27th August and 7th September 1990;
- Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (1999) – International Association of Prosecutors;
- European Guidelines on Ethics and Conduct for Public Prosecutors “The Budapest Guidelines” (2005);
- Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations (30 March 2011);
- Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims;

- Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.
26. The PPS and the PSNI should ensure that the above guidance is circulated to all prosecutors and police officers to ensure awareness of, and adherence to, the above standards.
27. It is similarly important that the general public and other criminal justice organisations are aware of the standards to which the PSNI and the PPS are held. This guidance should be made available to enable others who may have an interest in, or who may be affected by, the work of the PPS and the PSNI to view the guidance.

#### **REVIEW AND MONITORING**

28. Difficulties encountered in the application of this guidance by the PSNI or the PPS should be notified to the Attorney General as soon as possible.
29. The Attorney General will formally seek the views of the PSNI and the PPS on any revision or amendment of this guidance. It is open to the PSNI and the PPS to suggest revision or amendment of this guidance at any time.

John F Larkin QC  
Attorney General for Northern Ireland