

EXPLANATORY MEMORANDUM TO

The Attorney General's Human Rights Guidance (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) Order (Northern Ireland) 2018

SR 2018 No. 110

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)(c) 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 in respect of 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, for the Public Prosecution Service for Northern Ireland, by the Attorney General for Northern Ireland on the exercise of functions in a manner consistent with international human rights standards.

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 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. Not applicable.

ANNEX A

HUMAN RIGHTS GUIDANCE FOR THE

PUBLIC PROSECUTION SERVICE

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

INTRODUCTION

1. This guidance is addressed to the Public Prosecution Service (PPS) of Northern Ireland.
2. It is intended to assist in PPS consideration of potential prosecution under section 5 of the Criminal Law Act (Northern Ireland) 1967 where information about conception by rape has been disclosed as a result of a claim for social security or child tax credit or where information about a person's rape is revealed in an application by that person for anonymous registration on the electoral roll. The guidance should also assist in analogous circumstances in which a disclosure is made in the context of a statutory purpose unconnected with criminal investigation.
3. This guidance applies the human rights standards relevant to decision-making in relation to prosecution of (a) rape victims (b) family members to whom rape victims make disclosures, and (c) professionals or employees to whom disclosures are made (whether or not those disclosures were sought) in the course of a social security application in respect of a child or an application for anonymous registration on the electoral roll.
4. This guidance emphasises that, in the vast majority of cases in which disclosures are not drawn to the attention of police, no offence will have been committed. Even when the section 5 offence can be said to have been committed, the primary public interest in bringing perpetrators of rape to justice and protecting the public means that any penalisation of victims (and those to whom they make disclosures) for failing to come forward with

information is likely to create future barriers to victim support, to undermine confidence in the criminal justice system and to damage the willingness of victims and witnesses to cooperate with the criminal justice system.

5. In summary, even where information about rape is not passed on to the police by a victim or a person to whom she makes disclosure, the existence of a reasonable excuse will mean that the section 5 offence has not been committed. Even where no reasonable excuse exists, the public interest points away from prosecuting the victims of rape or those to whom victims make disclosures of rape.

CONTEXT

6. Consideration of whether the withholding of information about a rape amounts to an offence may arise when a prosecutor is preparing a rape prosecution (and even then such consideration will be rare). The prosecutor will be aware of when the victim and others provided, or failed to provide, information to the police.
7. Such consideration may also occur – although it is highly unlikely that it will – where a prosecutor receives a file in the absence of an ongoing rape investigation because police have become aware that information about a rape has been withheld from them by a victim or a professional working with her. The PSNI may also ask a prosecutor for prosecutorial advice¹ before deciding to commence or proceed with a criminal investigation.
8. This guidance has been produced principally because the approach of prosecutors to section 5 of the 1967 Act has been raised in the context of the operation of social security and tax credit legislation which provides for an exception to the maximum number of children for whom support is provided where there is non-consensual conception of a child.

¹ 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.

9. Those who need to avail of the exception in respect of a child will provide information to an approved person². 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.
10. There has also been a focus on how prosecutors approach the context where a woman provides information about a rape (which has not been reported to the police) to a ‘qualifying officer’ as part of an application to have an entry in the electoral roll anonymised on safety grounds³.

STATUTORY FRAMEWORK

11. 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;

² Universal Credit Regulations (Northern Ireland) 2016, Schedule 12, paragraph 5 and Child Tax Credit Regulations 2002, regulation 13. An ‘approved person’ means a person of a description specified on a list approved by the Department or HMRC, as relevant, and acting in their capacity as such.

³ Representation of the People (Northern Ireland) Regulations 2008, as amended, regulation 38D.

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...”

12. Liability under section 5 can only arise where another person has committed a relevant offence⁴. Before moving to consider the elements of the offence which relate to the belief and actions of the victim or her confidant, the prosecutor must be satisfied that there is evidence available that affords a reasonable prospect of proving beyond reasonable doubt that an offence of rape has been committed.
13. 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 the rape disclosures.

CONSIDERATION OF REASONABLE EXCUSE

14. The issue of ‘reasonable excuse’ is 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 credible evidence upon which an impartial jury could reasonably be expected to consider it beyond reasonable doubt that that the person with knowledge or belief that rape occurred failed to pass information to the police without reasonable excuse.
15. It is, firstly, extremely unlikely that a woman who fails to report her own rape to the police has committed an offence under section 5 of the Criminal Law Act (Northern Ireland) 1967 as there is almost certainly a reasonable excuse, arising from an inevitably traumatising experience, for not approaching the

⁴ See section 4(1A) of the Act. For present purposes, in practice this refers to rape.

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.

16. Where a professional or employee involved in the operation of social security and tax credit or electoral legislation receives a disclosure there will almost invariably be a reasonable excuse for not reporting the matter to the police, 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 to the police. 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.
17. In considering the reasonableness of the excuse, 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 crime of rape 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 prosecutor should:

As regards a victim

- a) take into account the devastating effects of rape 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 rape victim who has been trafficked was compelled to withhold information;
- d) take account of the effect of the relationship between the rape 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 rape 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 the length of the recovery process as regards the reason for the family member or friend not reporting the crime without the victim's agreement⁵;
- h) take account of the effect of the relationship between the friend or family member, the rape 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 rape 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 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 agreement⁶;

⁵ 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.

⁶ 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 belief⁷ that rape occurred arose as a result of information given in order to obtain financial support for a child or the protection of an anonymous entry in the electoral roll;
- m) consider whether the reporting of the rape 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

- 18. A particularly sensitive and thoroughly-considered approach is required in relation to assessing whether the public interest requires prosecution of a victim of rape for not reporting the crime perpetrated against her.
- 19. It is so highly unlikely as to be unimaginable that the public interest will ever require that a victim of rape 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 rape victim (or her friends or family members) be prosecuted for withholding information about the offence against her.
- 20. 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 police where that disclosure of rape is made in the context of the operation of social security and tax credit or electoral legislation.

⁷ 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 never be necessary for either an approved person or a qualifying person 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).

21. The situation may be different where the victim of the rape 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 police. The situation may also be different where a failure to disclose the offence to police has the clear (and foreseeable) effect of putting other persons at serious risk of harm.
22. The primary public interest to be considered by a prosecutor is the interest in bringing perpetrators of rape 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 rape. In the particular circumstances of the crime of rape, 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.
23. 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 police. Such culpability is likely to arise, for example, in the case of a person who obtains relevant information from a perpetrator, not those who are themselves victims of the rape or those to whom she makes disclosures.
24. 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 rape victim's physical and psychological integrity, particularly when she could be required to provide testimony at a future rape trial;
 - b) the potential impact on the willingness of the rape victim and those to whom disclosures are made to give evidence at a future rape trial;
 - c) the potential creation of an environment unfavourable to victims coming forward to make a complaint of rape 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 rape 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

- 25. 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.
- 26. 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.
- 27. 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

- 28. 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;
- 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.

GENERAL

29. The PPS should ensure that the above guidance is circulated to all prosecutors to ensure awareness of, and adherence to, the above standards.
30. It is similarly important that the general public and other criminal justice organisations are aware of the standards to which the PPS is 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 to view the guidance.

REVIEW AND MONITORING

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

John F Larkin QC

Attorney General for Northern Ireland