



Committee for Justice

# OFFICIAL REPORT (Hansard)

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

30 January 2020

# NORTHERN IRELAND ASSEMBLY

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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

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**Members present for all or part of the proceedings:**

Mr Paul Givan (Chairperson)  
Ms Linda Dillon (Deputy Chairperson)  
Mr Doug Beattie  
Mr Gordon Dunne  
Mr Paul Frew  
Mr Raymond McCartney  
Mr Patsy McGlone  
Miss Rachel Woods

## **Witnesses:**

**The Chairperson (Mr Givan):** You will find the next statutory rule to consider on pages 58 to 80 of your meeting pack. Again, it is subject to negative resolution. John, again, I invite you to give us a brief overview.

**Mr Larkin QC (Attorney General for Northern Ireland):** There is a work in progress over and above this. Assiduous readers of Sir John Gillen's report will know that he referred to this and expressed the view that I should issue guidance more widely in relation to section 5 so that people who make disclosures generally to social workers, medical personnel and other trusted professionals with whom there can be expected to be a reasonable relationship of confidence, do not then cause a problem for the disclosee in relation to section 5. We are the only jurisdiction in the UK that has the equivalent of section 5; it is a codification of the common-law offence of misprision of felony. Members who have a little leisure may want to read the debates in the House of Commons on that; there was a very useful contribution by Sir Robert Porter, as he later became, on that. The provision may have been slightly over-interpreted, and it can give rise to problems, but, properly analysed, it ought not to.

This statutory rule arose as part of a concrete problem that arose from the introduction of universal credit. As you know, there is the two-child cap. Many of us have problems with the two-child cap more generally, but within it there was an exception for conceptions that occurred as a result of rape. The concern was that the exception could not be accessed because, if there was a disclosure, there would then be an obligation on the person to whom it was disclosed to go to the police, and they would not want to do that. The guidance was designed to address that discrete issue. It offers an interpretation, firstly, of section 5 and a broader human rights context. If you, in order to access a benefit, indicate in

general terms that you have been the victim of sexual crime and conception has resulted, the person to whom you disclose that is, in real terms, at no risk whatever of proceedings under section 5.

**Mr Beattie:** Thank you, John. You have made the issue very clear. You are right: I find it slightly disturbing that this was brought up in the first place, that women actually have to disclose this information. I find the whole process slightly disturbing. I am fully supportive of the failure to disclose not being deemed as an article 5 offence. What is the follow-up to that? How do we still give support to the woman who does disclose to a qualifying officer? What happens next? How do we say, "Well, this woman still needs support", and there may still need to be an investigation because the person who did that to that woman could be predatory and could do the same to other women? How do we still give the support, and still conduct an investigation, but, at the same time, protect the woman so she is not subject to an article 5 offence? Does that make sense?

**Mr Larkin QC:** It does make sense. They are two separate things, and it shows that when you over-legislate, and, in my personal view, the universal credit legislation is an example of over-legislation, you often create problems. This is a problem that, on one view, did not need to exist. Therefore, if a woman has been the victim of sexual crime, and that has had the consequence of conception, then there are other care and justice routes open to her of course. This is not designed to address that; it is designed to address the fears of the relevant professional to whom the disclosure is made.

Generally, the issue of care for women who have been the victim of sexual crime is something that needs our continued attention. The way in which one hopes, first and foremost, to do that is by having an effective criminal justice system, effective offences in place and the effective policing of those offences so that people are deterred from committing them and that deterrence is followed through by effective police action when offences do take place. It needs an effective criminal justice system which pushes the offences through the system as effectively and fairly as possible.

Again, it was a huge advantage being present for the latter part of the DOJ presentation. As the Chair said, there is an issue with the time taken to process cases in this jurisdiction. We really cannot put a gloss on that. It really is as simple as that. When one hears about major incidents that take place in England and Wales, it seems to be an uncommonly short time before one is reading about the trial in the newspapers. That is not the position here. Typically, what happens here is one reads about the trial, and then, dimly in the back of one's memory, one recalls that the incident took place possibly two or three years ago. I mention that, because that is particularly an issue in relation to sexual offences.

**Mr Beattie:** If I can, I want to narrow this down a little bit, John, please, in my own mind. The victim goes and makes a declaration to a qualifying officer, she is going to be exempt from it being an article 5 offence, but what does the qualifying officer do? Is there still an onus on the qualifying officer to report it?

**Mr Larkin QC:** No, they do not. On the basis of this, they should have nothing to fear.

**Mr Beattie:** The point I am making is this: does it just stop there? We now have a vulnerable female, as she has been the victim of a sexual crime, and she has reported it to a qualifying officer. The qualifying officer has said, "OK". Everybody is protected, but what happens next? How do we make sure, as a duty of care to that young woman, that we can protect her in some way or even point her towards support and guidance? Do you see where I am coming from?

**Mr Larkin QC:** I do. Undoubtedly, it is an issue. Again, I remember, many years ago, in private practice, appearing for a defendant in a rape case. The case took a long time to come up, and it had various stops and starts with the jury. I remember speaking to a female police officer who was involved in the case, and I said, "If you do not mind me asking, if something like this happened to you, would you report it?". She thought for a minute and said, "No, I would not". That struck me, at the time and since, as both entirely understandable and entirely alarming that a police officer to whom such a thing might happen would choose to take that course. Of course, obviously, one does not know what one will do until a disastrous occurrence actually ensues. But, I suppose, the point is that nothing much is to be gained by shoving people into court or police stations. That must be their choice.

Different considerations arise — and it is something, certainly, which we will have in the more general guidance — for example, if there were a threat to minors, in which case, I am afraid, I would take the view that the personal feelings of the individual should rather yield to the more blindingly obvious public interest to ensure that children are protected. We will see that text in due course.

This is very narrow guidance. The issue that you raise needs a broader approach and, indeed, one that is certainly quite beyond the scope of this guidance.

**Mr Beattie:** I agree, John. I think that it absolutely does. I have real concern for untrained qualifying officers who may get some quite disturbing information passed to them and have nowhere to go with it. It can be as bad on them as on the victim who brings the issue to them in the first place. You are right: it seems very narrow.

**The Chairperson (Mr Givan):** As I understand it, a qualifying officer could be someone from Women's Aid.

**Mr Larkin QC:** Yes.

**The Chairperson (Mr Givan):** I think that Doug is asking about what support then comes in. This deals purely with the criminal justice end and not having to disclose.

**Mr Larkin QC:** It does.

**The Chairperson (Mr Givan):** What help is there for the victim to get that broader support? One of the organisations that has expertise in this, that people go to, is Women's Aid, so I am making an assumption — we should not make assumptions; we can follow this up — that some kind of support package would then be put in place, providing —.

**Mr Larkin QC:** Within that organisation. I think, if I may say so, Chair, that it would be a fairly safe assumption that Women's Aid would have a high degree of care for its workers, but, of course, that will not apply in other contexts necessarily.

**Mr Frew:** Again, for fear of showing my ignorance on this — which was also Raymond's fear — am I right in saying that this is a very narrow piece of legislation which protects workers who interface with members of the general public who may be rape victims? Does there have to be a criminal conviction of rape?

**Mr Larkin QC:** No, not at all. That is one of the points of this. If there has been a conviction, obviously, there would be no obligation to report the fact of conviction. This deals with those cases where, typically, one of the reasons why the elements of the offence will not be satisfied is because, as well as there being, as lawyers say, an "actus reus", a number of physical acts, there also needs to be a "mens rea", so there has to be a particular state of intention or recklessness on the part of the perpetrator. Of course, that is a whole area of information which typically will never be placed in front of one of the officers in this context.

**Mr Frew:** Does it affect social workers? Does it also protect them?

**Mr Larkin QC:** If they are one of those to whom disclosure is made in order to access the benefit, yes.

**Mr Frew:** Again, I am just throwing these questions out here because of my ignorance. Is there a fear or danger that a situation could arise, like the grooming gang in Bradford, and it not be detected, or that someone does not detect or report something due to this law?

**Mr Larkin QC:** No, for two reasons. One, as was mentioned with respect to domestic abuse and stalking, is that this does not bind: there is nothing to prevent a person reporting. Let us say, for example, that I, as someone who works in social security, receive disclosures. Then, I get another one that sounds very similar from someone who is utterly unconnected to the first claimant. Perhaps, the next week, I get another one. I am protected if I do not report it, but there is no reason why, as a citizen, I cannot report it.

**Mr Frew:** Right, OK.

**Mr Larkin QC:** Nothing can prevent me going to the police and saying, "Look, there seems to be something going on here".

**Miss Woods:** Thank you. Certainly, I understand where this guidance is coming from, and it is pretty horrific that we have to be here anyway. The fact that a rape clause is in social security legislation is pretty disgusting.

**Miss Woods:** I note your comments in your report about going more widely with this guidance, and what you said about circulating it to enable others who may have an interest in it or are affected by the work of the PPS to view it. Do you have any information, or how would you foresee this information getting out? Who is it going to? Is it going to be targeted, and when could it happen?

**Mr Larkin QC:** This is published on our website, so it is circulated most obviously in that way. I suppose the reference I was making to it more generally was producing guidance which will essentially surpass this, which will be aimed at responding to the invitation in Sir John Gillen's report, to ensure that people are not paralysed by fear. Because the big concern is —. Let us say that someone plucks up the courage, after several years, to come forward and thinks, "I am afraid. Will I put myself on the wrong side of section 5?" And that guidance will be designed to give reassurance about that. I would hope that that would have the widest possible circulation.

**Miss Woods:** Just to follow on from that, will the likes of those who are dealing with universal credit applications receive a copy of this or know about it?

**Mr Larkin QC:** No. The tricky thing is that the guidance is addressed to criminal justice organisations, so I cannot give guidance, for example, to the Social Security Agency. I can give guidance to the PPS and the PSNI, and therefore, I have to hope that, by publishing it on the website and by ensuring that the bodies that will make the relevant decisions are aware of it and, indeed, are obliged to have regard to its contents, the result is achieved.

**The Chairperson (Mr Givan):** OK members, if you are content, I will put the Question formally to the Committee.

I ask members to agree that the Committee for Justice considered SR2018/110 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 and, subject to the Examiner of Statutory Rules' report, has no objection to the rule.

*Question put and agreed to.*