

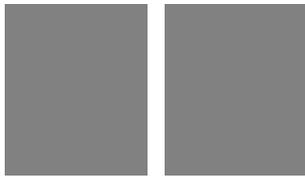
The Right to Anonymity (Complainants of Sexual Offences)

Preface

Considering the current legal framework for anonymity of complainants in sexual assault cases and a lacuna in the legislation which sees the shield lost in circumstances which Parliament may have overlooked.

Contributors

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A growing number of high profile sexual offence investigations in recent years has triggered debate about whether persons *accused* of sexual assault should be afforded anonymity. Some argue that this protection should apply, perhaps subject to judicial oversight, if not for the duration of proceedings, then at least up to the point of charge. The arguments for and against are compelling, and anonymity for defendants in such cases is likely to remain a contentious topic for some time.

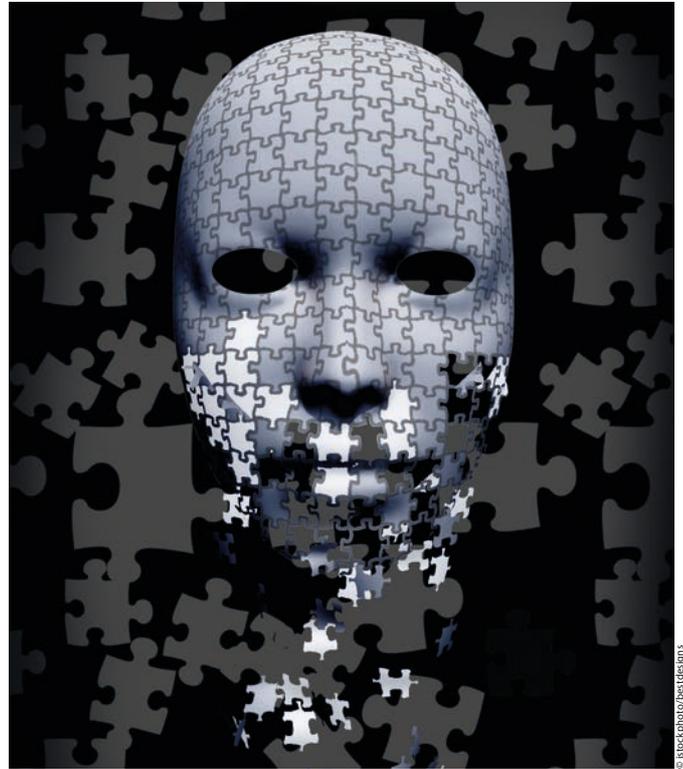
By contrast, complainants of sexual assault enjoy lifetime anonymity; with a prohibition on the media reporting any details which could lead to their identification. This right, which is enshrined in statute, is not absolute though and may be lost in certain scenarios (detailed below).

The Right to Anonymity (s.1, 1992 Act)

The right to anonymity is established by s.1 of the Sexual Offences (Amendment) Act 1992 which states that:

“Where an allegation has been made that an offence to which this Act applies has been committed against a person, no matter relating to that person shall during that persons’ lifetime be included in any publication if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed”.

The wording of the 1992 Act means that from the time someone is accused of a sexual assault, the said victim is prima facie entitled as a matter of law to lifetime protection of their identity as a complainant. Significantly, this remains the case even if the person in question has not made a formal complaint to the police or denies that the said offence took place (such as in instances of alleged family abuse). The public policy rationale for anonymity is that public identification of complainants is likely to deter others from coming forward to report such matters. The shield of anonymity seeks to guard both the privacy and dignity



of persons who have been the victim of what many would regard as a uniquely personal and traumatic form of offence.

Anonymity is a statutory consequence and freestanding legal right which automatically results from being identified as the complainant of a sexual assault and is not something which a Crown Court Judge independently has the power to make orders in relation to (or otherwise enforce).

Whilst a trial Judge can caution the media and others against reporting cases in a way that may breach anonymity, it is ultimately a matter for the media (and others) to police themselves to ensure they do not fall foul of the law. Self-regulation means that editors will often also have to make careful judgments as to which details can be reported to prevent possible “jigsaw identification” of a complainant.

The sanction for breaching anonymity is a £5,000 fine. Breaches are triable in the magistrate’s court. A decision and the power to take action lies with the Attorney-General (s.5(4) Sexual Offences (Amendment) Act 1992), and will necessarily follow the “breach” event.

Prosecutions for breaches would appear to be relatively rare.

The controversial case of footballer Ched Evans provides a recent example, which saw nine people fined by the courts after they admitted to naming the complainant on social media. It is perhaps noteworthy that all defendants appear to have claimed to be unaware that naming her amounted to a criminal offence.

The Exceptions (s.1(4), 1992 Act)

The anonymity rule is not absolute. Broadly speaking, there are three scenarios in which it ceases to apply. These may be summarised as follows:

First, a complainant may waive his or her entitlement to anonymity by giving written consent to being identified (provided they are 16 years old or older).

Secondly, the court may lift the restriction upon application by a defendant to persuade defence witnesses to come forward or where 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 (ss.3(1) & (2) Sexual Offences (Amendment) Act 1992).

Finally, the media is permitted to report a complainant's identity in the event of criminal proceedings **other than the actual trial or appeal in relation to the sexual offences.**

The last exception flows from s.1(4) and has been interpreted in particular to cover situations where a complainant is subsequently prosecuted for perjury or perverting the course of justice in respect of the original complaint.

Both authors were instructed defence counsel in the recent perjury trial of *R. v. Jemma Beale* which involved an interim application for leave to appeal by News Group Newspapers Limited (pursuant to section 159 of the Criminal Justice Act 1988). The appeal raised a discrete but important point regarding the construction and ambit of s.1(4) of the 1992 Act (*R. v. Jemma Beale* [2017] EWCA 1012 (Crim)).

The argument centred principally on whether Ms Beale was entitled to anonymity during the course of the proceedings; the central issue being whether the allegations of sexual assault were false. Ms Beale's defence was that they were all true.

In the lower court, the trial Judge concluded that Ms Beale continued to be entitled to anonymity unless and until it had been proved that the original allegations were false. The Judge acceded to submissions, (challenged by counsel instructed by the press) that Parliament could not have intended to remove the protection of lifetime anonymity until the falsity of any complaint had been proved to the criminal standard. However, the Judge also understood that he had no practical power to enforce this conclusion. If the press disagreed, action by way of relatively modest financial penalty could follow publication, which meant her identity would have already been revealed and the damage which was to be guarded against would have been done. The creative solution of the Judge to this serious problem was to make a Contempt of Court Act order prohibiting the identification of Jemma Beale, which would be reviewed (likely rescinded) in the event of conviction. This order and its purported justification was the subject of the appeal brought by the press. Inevitably the Court of Appeal also considered with care the meaning and implications of s.1(4) Sexual Offences (Amendment) Act 1992 because it was the trial Judge's conclusions about whether Ms Beale was in fact entitled to anonymity at the perjury trial which caused him to make the Contempt order.

The point of appeal focused on whether the court had been correct to make an order under s.(2) of the Contempt of Court Act on the basis that the publication of anything that

would lead to identification in this case would give rise to a substantial risk of prejudice to the administration of justice "in the effect it would have on future complainants". The Judge had accepted that proper reporting of the instant trial would not have caused any prejudice to those proceedings, and there were no other imminent proceedings which might have been impacted negatively by the reporting of Ms Beale's identity. Therefore a more general justification was invoked: that revealing Ms Beale's identity prior to conviction would potentially deter future complainants from reporting offences for fear that if truthful but disbelieved their anonymity might not be protected. The appellate justices found that the meaning of s.1(4) is clear on its face and that s.1(1) does not operate to limit reporting to protect a complainant's identity of any criminal proceedings **other than those in which a person is accused of the sexual offence in question** (or proceedings on appeal from such proceedings) and that proceedings in which a rape complainant is accused of perjury qualify as "other proceedings" for that purpose.

The Court of Appeal further noted as part of its judgment that there was a discussion to be had regarding the desirability or otherwise of permitting reports of proceedings in which those who have complained of rape are later prosecuted in respect of the alleged falsity of the said complaint. The presumption of innocence is arguably compromised by depriving such a person of their right to anonymity *before* any decision has been reached on the veracity of the allegation.

The Court of Appeal acknowledged that this was an important matter of public policy but that it remained a point for Parliament to grapple with, and not the courts.

The effect of the wording of s.1(4) would appear to mean that a complainant, later charged with assaulting her perpetrator, could be identified with full explanation in the assault proceedings (notwithstanding the fact that the rape may form the background or defence to the assault). It is unclear whether Parliament contemplated such a scenario at the time of drafting. Furthermore, is it really likely that the legislation was drafted with eyes open to the possibility that the radical and precious right to anonymity would be discarded prior to a complaint being proved to be false? Whilst open justice is rightly a cornerstone of our modern legal system, the now settled meaning of s.1(4) of the Sexual Offences (Amendment) Act can operate to deprive preemptorily a complainant, still presumed to have given a truthful account of sexual assault, of their lifetime right to anonymity.

Prosecutions for false reports of sexual assault remain relatively rare and fewer still proceed to trial. It is nevertheless incumbent on the legislators to consider the proper parameters of s.1 to ensure this important right is not removed without a proper process having been followed. ■

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