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Reporting Restrictions in the Criminal Courts

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Foreword
By The Rt Hon The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales

Open justice is a hallmark of the rule of law. It is an essential requisite of the criminal justice system that it should be administered in public and subject to public scrutiny. The media play a vital role in representing the public and reflecting the public interest. However, as is well known, there are some exceptions to these principles. Difficulties and uncertainty can sometimes arise in ensuring they are correctly applied and observed.

This guide, now in its third edition, is a practical guide for judges and the media on the statutory and common law principles which should be applied. I warmly thank Guy Vassall-Adams of Matrix Chambers for his work in revising this guidance to ensure its legal accuracy and practical effectiveness.

The guide, Reporting Restrictions in the Criminal Courts, has been adopted by the Judicial College, the Media Lawyers' Association, the Society of Editors and the News Media Association. It is available to the judiciary, the media and the public via the judiciary's website (**www.judiciary.gov.uk**) as well as on the websites of the Society of Editors (**www.societyofeditors.co.uk**) and the News Media Association (**www.newsmediauk.org**).

I am grateful for the efforts of the industry and the Judicial College for the production of this impressive and useful guide.

The Rt Hon The Lord Thomas of Cwmgiedd
Lord Chief Justice of England and Wales

Media and Public Access to Proceedings in the Magistrates' Court and Crown Court Advice and Guidance for Magistrates and Judges

Introduction

In recognition of the open justice principle, the general rule is that justice should be administered in public. To this end:

- Proceedings must be held in public.
- Evidence must be communicated publicly.
- Fair, accurate and contemporaneous media reporting of proceedings should not be prevented by any action of the court unless strictly necessary.

Therefore, unless there are exceptional circumstances laid down by statute law and/or common law the court must not:

- Order or allow the exclusion of the press or public from court for any part of the proceedings.
- Permit the withholding of information from the open court proceedings.
- Impose permanent or temporary bans on reporting of the proceedings or any part of them including anything that prevents the proper identification, by name and address, of those appearing or mentioned in the course of proceedings.

Important statutory exceptions to the open justice principle are the exclusion of the public from proceedings in the Youth Courts and the prohibition on identifying under 18s concerned in proceedings in the Youth Courts (see sections 2.2 and 3.9 below). In addition, particular considerations apply to reporting restrictions in relation to under 18s appearing in the adult criminal courts (see section 4.2 below).

The courts and Parliament have given particular rights to the press to give effect to the open justice principle, so that they can report court proceedings to the wider public, even if the public is excluded.

Guidance follows on the recommended approach to take when making decisions to exclude the media or prevent it from reporting proceedings in the courts. The guidance takes the form of an easy reference checklist for use in court.

Throughout this document reference is made to "the media". This includes the press, radio, television, press agencies and online media. In general terms, the automatic and discretionary reporting restrictions described in this guidance apply both to traditional media such as newspapers and broadcasters and to online media and individual users of social media websites such as Twitter and Facebook.[1]

A structured approach for magistrates and judges

If the court is asked to exclude the media or prevent it from reporting anything, however informally, do not agree to do so without first checking whether the law permits the court to do so. Then consider whether the court ought to do so. Invite submissions from the media or its legal representatives. The prime concern is the interests of justice.

1. Magistrates should seek legal advice.

Magistrates should seek the advice of the Clerk/Legal Adviser on the circumstances in which the law allows the court to exclude the media, withhold information, postpone or ban reporting before considering whether it would be a proper and appropriate use of that power in the case before the court.

2. Check the legal basis for the proposed restriction.

Is there any statutory power which allows departure from the open justice principle? What is the precise wording of the statute? Is it relevant to the particular case?

Or is the applicant suggesting that the power for the requested departure from the open justice principle is derived from common law and the court's inherent jurisdiction to regulate its own proceedings? If so, does the case law actually support that contention?

3. Is action necessary in the interests of justice?

Is action necessary in the interests of justice? Automatic restrictions upon reporting might already apply, or there may be restrictions on reporting imposed by the media's codes, or as a result of an agreed approach.

The burden lies on the party seeking a derogation from open justice to persuade the court that it is necessary on the basis of clear and cogent evidence. Has the applicant produced clear and cogent evidence in support of the application?

Is any derogation from the open justice principle really necessary? Always consider whether there are any less restrictive alternatives available.

4. If restrictions are necessary how far should they go?

Where the court is satisfied that a reporting restriction pursues a legitimate aim and is truly necessary, it must consider carefully the terms of any order. The principle of proportionality requires that any order must be narrowly tailored to the specific objective the court has in mind and must go no further than is necessary to achieve that objective. Over-broad orders are liable to be set aside.

5. Invite media representations.

Invite oral or written representations by the media or their representatives, as well as legal submissions on the applicable law from the prosecution, in addition to any legal submissions and any evidence which the law might require in support of an application for reporting restrictions from a party.

Before imposing any reporting restriction or restriction on public access to proceedings the court is required to ensure that each party and any other person directly affected (such as the media) is present or has had an opportunity to attend or to make representations.[2]

Where, exceptionally, the court makes an order where advance notice has not been given, the court should invite the media to make representations as soon as possible.

In the Instructions to Prosecution Advocates the Director of Public Prosecutions (DPP) has highlighted the role of the Prosecution in respect of safeguarding open justice, including opposition to reporting restrictions, where appropriate.

6. As soon as possible after oral announcement of the order in court, the order should be committed to writing.

If an order is made, the court must make it clear in court that a formal order has been made and its precise terms. Magistrates should seek the advice of the Clerk/Legal Adviser on the drafting of the order and the reasons for making it. It may be helpful to suggest at the same time that the court would be prepared to discuss any problems arising from the order with the media in open court, if they are raised.

The reporting restrictions order should be in precise terms, giving its legal basis, its precise scope, its duration and when it will cease to have effect, if appropriate. The reasons for making the order should always be recorded in the court record.

7. Notifying the media.

The court should have appropriate procedures for notifying the media that an order has been made. Copies of the written notice must be provided to the media and members of staff should be available and briefed to deal with media inquiries, inside and outside court hours.

8. Review.

The court should exercise its discretion to hear media representations against the imposition of any order under consideration or as to the lifting or variation of any reporting restriction as soon as possible.

1. The open justice principle

The general rule is that the administration of justice must be done in public, the public and the media have a right to attend all court hearings and the media is able to report those proceedings fully and contemporaneously. The public has the right to know what takes place in the criminal courts and the media in court acts as the eyes and ears of the public, enabling it to follow court proceedings and to be better informed about criminal justice issues.

The open justice principle is reflected in rule 6.2 of the Criminal Procedure Rules 2015, which requires the court, when exercising its powers in relation to reporting and access restrictions, and when furthering the overriding objective, to have regard to the importance of dealing with criminal cases in public and allowing a public hearing to be reported to the public.

The open justice principle is central to the rule of law. Open justice helps to ensure that trials are properly conducted. It puts pressure on witnesses to tell the truth. It can result in new witnesses coming forward. It provides public scrutiny of the trial process, maintains the public's confidence in the administration of justice and makes inaccurate and uninformed comment about proceedings less likely. Open court proceedings and the publicity given to criminal trials are vital to the deterrent purpose behind criminal justice. Any departure from the open justice principle must be necessary in order to be justified.

Parliament has recognised the importance of contemporaneous media reports of legal proceedings by giving protection from liability for contempt of court and defamation to fair, accurate and contemporaneous reports of court proceedings.[3] The important role of the media as a public watchdog is also recognised under the right to freedom of expression guaranteed by Article 10 of the European Convention of Human Rights.[4]

As public authorities under the Human Rights Act, courts must act compatibly with Convention rights, including the right to freedom of expression under Article 10 ECHR and the right to a public hearing under Article 6 ECHR. While Article 10 and Article 6 are both qualified rights and permit of exceptions. In some cases, the right to privacy under Article 8 may be engaged and need to be weighed in the balance. However, any restriction on the public's right to attend court proceedings and the media's ability to report them must fulfil a legitimate aim under these provisions and be necessary, proportionate and convincingly established.[5] It is for the party seeking to derogate from the principle of open justice to produce clear and cogent evidence in support of the derogation.[6]

The open justice principle

- The general rule is that the administration of justice must be done in public The public and the media have the right to attend all court hearings and the media is able to report those proceedings fully and contemporaneously
- Any restriction on these usual rules will be exceptional. It must be based on necessity
- The burden is on the party seeking the restriction to establish it is necessary on the basis of clear and cogent evidence
- The terms of any order must be proportionate – going no further than is necessary to meet the relevant objective

Courts are required to hear the media's representations in relation to a proposed reporting restriction or restriction on public access to proceedings before making any order.[7] Exceptionally this may not be possible where an unexpected issue arises; in such circumstances the media should be invited to make representations at the first available opportunity.

The courts and DPP have highlighted the role of the prosecution in safeguarding open justice in the Instructions to Prosecution Advocates. The Instructions state that prosecutors should not apply for reporting restrictions themselves unless they feel that they are essential. Where the defence applies for reporting restrictions, the Instructions state that prosecutors should oppose reporting restrictions they do not consider necessary for a fair trial.[8] In addition to the Instructions to Prosecution Advocates the CPS has published general guidance for prosecutors on contempt of court and reporting restrictions[9] and specific guidance relating to reporting restrictions concerning children and young persons.[10]

The open justice principle is subject to common law exceptions and to statutory exceptions, including those relating to Youth Court proceedings, which are addressed in the following sections.

2. Hearings from which the public may be excluded

2.1 Trials in private: all criminal courts

In accordance with the open justice principle, the general rule is that all court proceedings must be held in open court to which the public and the media have access. The common law attaches a very high degree of importance to the hearing of cases in open court and under Article 6 ECHR the right to a public hearing and to public pronouncement of judgment are protected as part of a defendant's right to a fair trial.

The court has an inherent power to regulate its own proceedings, however, and may hear a trial or part of a trial in private in exceptional circumstances. The only exception to the open justice principle at common law justifying hearings in private is where the hearing of the case in public would frustrate or render impractical the administration of justice.[11] The test is one of necessity. The fact, for example, that hearing evidence in open court will cause embarrassment to witnesses does not meet the test for necessity.[12] Neither is it a sufficient basis for a hearing in private that allegations will be aired which will be damaging to the reputation of individuals.[13] The interests of justice could never justify excluding the media and public if the consequence would be that a trial was unfair.[14]

Rules 6.6 to 6.8 of the Criminal Procedure Rules 2015 govern procedure "where a court can order a trial in private".[15] A party who wants the court to hear a trial in private must apply by notice in writing not less than 5 business days before the start of the trial.[16] The application must be displayed within the vicinity of the courtroom and give notice to reporters.[17] The media should be given an opportunity to make representations in opposition to the application.[18] If the order is made, the court must not commence the trial in private until the following business day or until any appeal against the order has been disposed of (if later).[19]

Hearing a case in private has a severe impact upon the general public's right to know about court

proceedings, permanently depriving it of the information heard in private. It follows that if the court can prevent the anticipated prejudice to the trial process by adopting a lesser measure e.g. a discretionary reporting restriction such as a postponement order under s.4(2) Contempt of Court Act, it should adopt that course. In making an application for a case to be heard in secret, a party must explain why no measures other than trial in private will suffice.[20]

Often the adoption of practical measures such as allowing a witness to give evidence from behind a screen or ordering that a witness shall be identified by a pseudonym (such as by a letter of the alphabet) and prohibiting publication of the witness's true name by an anonymity order under s.11 CCA (see below), will remove the need to exclude the public. Another possibility, where only a small part of the witness's evidence is sensitive, is to allow that part to be written down and not shown to the public or media in court. However, measures such as these are also exceptional and stringent tests must be satisfied before they are adopted.

The necessity test requires that even where a court concludes that part of a trial should be heard in private, it must give careful consideration as to whether other parts of the same case can be heard in public and must adjourn into open court as soon as exclusion of the public ceases to be necessary.

Circumstances which may justify hearing a case in private include situations where the nature of the evidence, if made public, would cause harm to national security e.g. by disclosing sensitive operational techniques or identifying a person whose identity for strong public interest reasons should be protected e.g. an undercover police officer. The application to proceed in private should be supported by relevant evidence and the test to be applied in all cases is whether proceeding in private is necessary to avoid the administration of justice from being frustrated or rendered impractical. Disorder in court may also justify an order that the public gallery be cleared. Again the exceptional measure should be no greater than necessary. Representatives of the media (who are unlikely to have participated in the disorder) should normally be allowed to remain.

The Court has a discretion under s.37 Children and Young Persons Act 1933 to exclude the public but not bona fide representatives of the media during the testimony of witnesses aged under 18 in any proceedings relating to an offence against, or conduct contrary to decency and morality. At common law, the court can exclude the public but allow media representatives to remain when considering exhibits in obscenity trials.

Section 25 of the Youth Justice and Criminal Evidence Act 1999 permits the court to exclude persons of any description from the court during the evidence of a child or vulnerable adult witness in cases relating to a sexual offence or where there are grounds for believing that a witness has been, or may be, intimidated. However, it was not envisaged that the media should routinely be excluded alongside the rest of the public, even in such exceptional cases. Even where the media generally are to be excluded, one nominated representative of the media must be permitted to remain.[21]

Under the Serious Organised Crime and Police Act 2005 a court may review the sentence of a defendant who has assisted the police, or previously obtained a reduced sentence having agreed to assist the police but reneged on the agreement. Pursuant to s.75 of the Act the court may exclude the public and media from such proceedings, where satisfied that this is necessary to protect any person and is in the interests of justice.[22]

The Administration of Justice Act 1960 s.12 defines a number of specific situations where publication of information about proceedings in private of itself constitutes a contempt of court e.g. in matters relating to national security. In all other cases, to publish what has occurred in private is not a breach of confidence or a contempt of court unless it causes a substantial risk of serious prejudice to the administration of justice.[23]

The Criminal Justice and Courts Act 2015 creates an exception to the open justice principle by allowing a single magistrate to sit anywhere out of court and decide and sentence certain cases on the papers in the event of a guilty plea or a failure to respond to the statutory notification.[24] In addition, the Deregulation Act 2015 removes the presumption that written witness statements should be read aloud in open court unless the court directs otherwise.

Decisions by magistrates to hear trials in private may be challenged through judicial review proceedings.

2.2 Youth Courts

Section 47 of the Children and Young Persons Act 1933 is a statutory exception to the open justice principle which generally bars the public from attending Youth Court proceedings.

This prohibition does not extend to court members and officers, the parties, their legal representatives and witnesses, or to representatives of the media or to such other persons as the court may specially authorise to be present.

Hearings from which the public may be excluded

- The general rule is that all court proceedings must be held in open court to which the public and the media have access
- The court may hear trials in private in exceptional circumstances where doing so is necessary to prevent the administration of justice from being frustrated or rendered impractical
- Where lesser measures such as discretionary reporting restrictions would prevent prejudice to the administration of justice, those measures should be adopted
- Where is it necessary to hear parts of a case in private the court should adjourn to open court as soon as it is no longer necessary for the public to be excluded
- The embarrassment caused to witnesses from giving evidence in open court does not meet the necessity test
- There is statutory exception to the open justice principle for proceedings in in the Youth Courts, which members of the public are prohibited from attending

3. Automatic reporting restrictions

There are a number of automatic reporting restrictions which are statutory exceptions to the open justice principle. The existence of an automatic restriction may make any further discretionary restrictions unnecessary e.g. there is no need to make a discretionary order in respect of a child victim of a sexual offence because the automatic restrictions as to the identity of any victim of a sexual offence apply. It may be of assistance in some cases for the judge to remind the media of any automatic restriction and to consider whether any guidance will assist the media to keep within such automatic restrictions. Such guidance from the judge is not binding.[25] The statutory provisions give the courts the power to lift or vary the automatic restrictions in specified circumstances if asked to do so by a party or the media or on the court's own initiative.

3.1 The strict liability rule

The Contempt of Court Act 1981 provides the framework for all reporting of criminal proceedings in England and Wales. Sections 1 and 2 of create the strict liability rule, which makes it a contempt of court to publish anything to the public which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced, even if there is no intent to cause such prejudice. In practice this means that ignorance of the law or of the existence of a reporting restriction or its terms is no defence if contempt is committed.

The strict liability rule applies to all publications, which is defined very widely as including "any speech, writing, programme included in a programme service or other communication in whatever form, which is addressed to the public at large". Accordingly the strict liability rule is not only of relevance to newspapers and broadcasters but also applies to online media and individual users of social media websites. The strict liability rule only applies once proceedings are "active", which means that the relevant initial step must have been taken, such as placing a suspect under arrest.

There are three specific defences under the Act. The most important in practice is the defence provided by s.4 for "a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith". Section 5 of the Act creates a defence which protects publications relating to discussions in good faith of public affairs or matters of general public interest, providing that the risk of prejudice to particular legal proceedings is merely incidental to the discussion. In addition, there is a defence under s. 3 for publishers and distributors who can show that they took reasonable care and did not know or have reason to suspect that proceedings were active (publishers) or that a publication contained matter in breach of the strict liability rule (distributors).

The existence of the strict liability rule is in itself a significant safeguard as it places the media in jeopardy of being in contempt of court when reporting criminal proceedings unless that reporting is fair and accurate and published in good faith. It is important for courts to bear this in mind, particularly when a party seeking discretionary reporting restrictions seeks to argue that absent such additional restrictions media reporting is likely to be inaccurate, biased or otherwise prejudicial. The correct approach is for the court to proceed on the basis that such reporting is not likely and to trust the media to fulfil their responsibilities to report proceedings accurately and make sensible judgments about publications which may cause prejudice.[26]

3.2 Victims of sexual offences

Victims of a wide range of sexual offences are given lifetime anonymity under the Sexual Offences (Amendment) Act 1992.

The 1992 Act imposes a lifetime ban on reporting any matter likely to identify the victim of a sexual offence, from the time that such an allegation has been made and continuing after a person has been charged with the offence and after conclusion of the trial. The prohibition imposed by s.1 applies to "any publication" and therefore includes traditional media as well as online media and individual users of social media websites, who have been prosecuted and convicted under this provision.[27]

The offences to which the prohibition applies are set out in s.2 of the 1992 Act and include rape, indecent assault, indecency towards children and the vast majority of other sexual offences.

There is no power under the 1992 Act to restrict the naming of a defendant in a sex case. Complainants enjoy the protection provided by s.1 of the 1992 Act and it is for the media to form its own judgment as to whether the naming of a defendant in a sex case would of itself be likely to identify the victim of the offence.[28] The same must be true for witnesses other than victims in sex cases.

A defendant in a sex case may apply for the restriction to be lifted if that is required to induce potential witnesses to come forward and the conduct of the defence is likely to be substantially prejudiced if no such direction is given.

There are three main exceptions to the anonymity rule. First, a complainant may waive the entitlement to anonymity by giving written consent to being identified (if they are 16 or older).[29]

Secondly, the media is free to report the victim's identity in the event of criminal proceedings other than the actual trial or appeal in relation to the sexual offence. This exception caters for the situation where a complainant in a sexual offences case is subsequently prosecuted for perjury or wasting police time in separate proceedings.[30] It appears to have been the intention of Parliament, however, that a complainant would retain anonymity if, during the course of proceedings, sexual offences charges are dropped and other non-sexual offence charges continue to be prosecuted.[31]

Thirdly, the court may lift the restriction to persuade defence witnesses to come forward, or where the court is 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.[32] This last condition cannot be satisfied simply because the defendant has been acquitted or other outcome of the trial.[33]

3.3. Victims of female genital mutilation

Section 71 of the Serious Crime Act 2015, which came into force on 3 May 2015, introduced a new automatic reporting restriction for the victims of female genital mutilation (FGM).

The reporting restriction applies from the moment that an allegation has been made that a FGM offence has been committed against a person and imposes a lifetime ban on identifying that person as being an alleged victim of FGM.

The court has the power to relax or remove the restriction if satisfied that the restriction would cause substantial prejudice to the conduct of a person's defence at a trial of a FGM offence, or if the restriction imposes a substantial and unreasonable restriction on the reporting of the proceedings and it is in the public interest to do so.

3.4 Rulings at pre-trial hearings

Crown Court judges may make pre-trial rulings on the admissibility of evidence or on points of law relevant to a forthcoming trial under the Criminal Procedure and Investigations Act 1996, ss.39 and 40 and magistrates have similar powers at pre-trial hearings under s.8A of the Magistrates' Court Act 1980.

Automatic reporting restrictions under section 41 of the 1996 Act and section 8C of the 1980 Act prevent reporting of these rulings and the proceedings on applications relating to such rulings. These restrictions continue until the trial has been concluded when they automatically cease to apply.

The trial judge or magistrate may lift the restrictions on the application of any person before the conclusion of the trial if satisfied, after hearing any representations from the accused, that it is in the interests of justice to do so. The restrictions will continue to apply, however, to any representations that were made by the accused in relation to the lifting of the restrictions.

3.5 Preparatory hearings

Crown Court judges undertake preparatory hearings in terrorism-related cases and may also order preparatory hearings in other cases such as long, complex or serious cases and serious fraud cases.[34] Automatic reporting restrictions prevent the reporting of these preparatory hearings with the exception of certain specified facts about the proceedings such as the names of the accused and the offences with which they have been charged.[35] These restrictions continue until the conclusion of the trial when they automatically cease to apply.

The trial judge may lift the restrictions on the application of any person before the conclusion of the trial if satisfied, after hearing any representations from the accused, that it is in the interests of justice to do so. The restrictions will continue to apply, however, to any representations that were made by the accused in relation to the lifting of the restrictions.

3.6 Dismissal proceedings

In Crown Court proceedings automatic reporting restrictions prevent the publication of any report of an unsuccessful dismissal application made by an accused person except for certain specified facts such as the name of the accused and the offence.

A dismissal application may be made in respect of any charge brought against a person who has been sent for trial under section 51 or 51A of the Crime and Disorder Act 1998.[36]

The trial judge may lift the restrictions on the application of any person after hearing representations from the accused.

Successful dismissal applications may be fully reported and the restrictions automatically lapse at the conclusion of the trial. Before the trial concludes the trial judge has a discretion to lift the restrictions if, after hearing representations from the accused where any of them object, he is satisfied that it is in the interests of justice to do so.

3.7 Allocation and sending proceedings in Magistrates' Courts

The procedure by which cases are sent from the Magistrates' Court to the Crown Court has changed, with allocation and sending proceedings having replaced committal proceedings. Allocation and sending proceedings initially replaced committal proceedings in specific local justice areas but were later extended to the rest of England and Wales.[37]

There are automatic reporting restrictions that apply to the reporting of allocation and sending proceedings in the Magistrates' Courts (Crime and Disorder Act 1998, s.52A). These prevent the media from reporting anything except certain specified facts about the case such as the name of the court, names of the accused and the charges they face. The restrictions may be lifted on application by any person but where any of the accused objects to their removal, the court may only do so if satisfied that it is in the interests of justice.

These restrictions cease to apply if the court decides the case is suitable for summary trial and the accused pleads guilty, or after the conclusion of a summary trial.

3.8 Prosecution appeals against rulings

In Crown Court, Court of Appeal and Supreme Court proceedings, automatic reporting restrictions apply when the prosecution informs the court of its intention to appeal against the court's rulings and to the court's subsequent decision as to whether to expedite the prosecution appeal, or adjourn, or discharge the jury. The restrictions prevent the publication of anything other than certain specified factual information (identification of court, judge, defendant, witnesses, lawyers, offence, bail, legal aid, place and date of adjourned proceedings etc). Subject to consideration of the (unreportable) objections of defendant(s), the courts may order that the restrictions do not apply to any extent, if it is in the interests of justice to do so, otherwise the restrictions automatically lapse at the conclusion of the trial(s) (Criminal Justice Act 2003, s. 71).

3.9 Youth Court proceedings

Youth Court proceedings are a statutory exception to the open justice principle as the media, although permitted to attend, are prohibited from publishing the name, address or school or any other matter that is likely to identify a person under 18 as being "concerned in the proceedings" before the

Youth Courts (Children and Young Persons Act 1933, s.49). A child or young person is "concerned in the proceedings" if they are a victim, witness or defendant.

The prohibition on publication also extends to proceedings on appeal from a youth court (including by way of case stated); proceedings in a magistrates' court for breach, revocation or amendment of a youth rehabilitation order; and on appeal from such proceedings in a magistrates' court (including by way of case stated).[38]

There are three exceptional situations in which these automatic reporting restrictions may be lifted. First, the court may lift the restriction if satisfied that it is appropriate to do so for avoiding injustice to the child. Secondly, the court may lift the restriction to assist in the search for a missing, convicted or alleged young offender who has been charged with, or convicted of, a violent or sexual offence (or one punishable with a prison sentence of 14 years or more in the case of a 21-year-old offender). Thirdly, the restriction may be lifted in relation to a child or young person who has been convicted, if the court is satisfied that it is in the public interest to do so.

When deciding whether to lift the automatic reporting restriction following conviction, particular considerations relevant to offenders under 18 must be balanced against the open justice principle. The particular considerations relevant to offenders under 18 include the:

- Duty to have regard to the principle aim of the youth justice system to prevent offending by children and young persons as required by s.37 Crime and Disorder Act 1998;
- Obligation to have regard to the welfare of the child or young person as required by s.44 Children and Young Persons Act 1933;
- Right to privacy under Article 8 ECHR (as interpreted through international instruments such as the UN Convention on the Rights of the Child[39] and the Beijing Rules[40])[41] ; and
- Jurisprudence requiring the 'best interests of the child' to be 'a primary consideration' (though not necessarily one that prevails over all other considerations) in accordance with Article 3 of the UN Convention on the Rights of the Child[42].

It is wrong for the court to dispense with a juvenile's prima facie right to anonymity as an additional punishment, or by way of 'naming and shaming'.[43] The welfare of the child must be given very great weight and it will rarely be the case that it is in the public interest to dispense with the reporting restrictions.[44] Where it decides to lift the reporting restrictions, the court must clearly identify the specific public interest which justifies that course.[45]

The Court must offer the parties an opportunity to make representations and take these into account before lifting the restrictions.[46]

The Youth Justice and Criminal Evidence Act 1999, s.44 creates a new automatic reporting restriction

that prohibits the publication of any matter likely to identify a child or young person who is the subject of a criminal investigation and which lasts until the commencement of proceedings. The 1999 Act also makes a number of amendments to s.49 of the 1933 Act. However, s.44 has not been brought into force and it appears that there are no current plans for doing so.

3.10 Special measures and other directions

Section 47 of the Youth Justice and Criminal Evidence Act 1999 prohibits the reporting of special measures directions, directions relating to the use of Live Link for an accused and directions prohibiting an accused from cross-examining a witness in person.

These automatic restrictions may be lifted by the Court and lapse automatically when proceedings against the accused are determined or abandoned.

3.11 Alleged offences by teachers against pupils

Section 141F of the Education Act 2002 as amended introduces an automatic reporting restriction which prevents the identification of any teacher who is alleged by a pupil at the same school (or by someone on the pupil's behalf) to have committed a criminal offence against the pupil. This reporting restriction may be varied or lifted on the application of any person and automatically ends if proceedings against the teacher are instituted. Provision is made for an appeal against such restrictions.

3.12 Indecent material calculated to injure public morals

Section 1 of the Judicial Proceedings (Regulation of Reports) Act 1926 prohibits the publication in relation to any judicial proceedings of any indecent medical, surgical or physiological details which would be calculated to injure public morals.

Automatic reporting restrictions

- There are several automatic reporting restrictions which are statutory exceptions to the open justice principle
- Victims of sexual offences are given lifetime anonymity which does not apply if they consent in writing to their identity being published. Their anonymity can also be lifted by the court in other limited circumstances
- Reports of pre-trial hearings in the Crown Court cannot generally be published until after the trial is over.
- Reports of preparatory hearings in the Crown Court in long, complex or serious cases, complex fraud cases and unsuccessful dismissal applications are also prohibited (apart from a limited range of factual matters) until the trial is over.
- Similar restrictions apply in respect of sending and allocation proceedings in the Magistrates' Courts
- These restrictions on pre-trial proceedings lapse at the conclusion of the trial and may be lifted earlier where the court is satisfied that it is in the interests of justice to do so
- Reports of special measures directions and directions prohibiting the accused from conducting cross –examination cannot be published until the trial(s) of all accused are over, unless the court orders otherwise
- Reports of the prosecution's notices of appeal against rulings and the courts' decisions on whether to expedite the appeal, or, if not, to adjourn the proceedings or discharge the jury, cannot be published (apart from a limited range of factual matters) until the trial of (all) the accused are over, unless the court orders otherwise.
- The media is prohibited from publishing the name, address or school or any matter likely to identify a child or young person involved in Youth Court proceedings whether as a victim, witness or defendant
- The Youth Court may lift the restriction in specified circumstances including where the child or young person is convicted of an offence and the court considers that it is in the interests of justice to do so
- The court must give great weight to the welfare of the child and it is wrong to dispense with the automatic anonymity for a juvenile as an additional punishment, or by way of "naming and shaming".

4. Discretionary reporting restrictions

4.1 Procedural safeguards common to all discretionary reporting restrictions

Before imposing a discretionary reporting restriction, courts should check that no automatic reporting restriction already applies which would make a discretionary restriction unnecessary.

Where a discretionary restriction is potentially available, courts must ensure that they apply the restriction with care, checking that the relevant statutory conditions have been met. Where the statutory conditions are met, the court must make a judgment, balancing the need for the proposed restriction against the public interest in open justice and freedom of expression. In all cases, courts must be satisfied that the need for the proposed restriction has been convincingly established by clear and cogent evidence and that the terms of the proposed order go no further than is necessary to meet the statutory objective.

The imposition of a reporting restriction directly engages the media's interests, affecting its ability to report on matters of public interest. For this reason the court should not impose any reporting restrictions without first giving the media an opportunity to attend or to make representations[47], or, if the Court is persuaded that there is an urgent need for at least a temporary restraint, as soon as practicable after they have been made.[48] The media bring a different perspective to that of the parties to the proceedings. They have a particular expertise in reporting restrictions and are well placed to represent the wider public interest in open justice on behalf of the general public.[49] Because of the importance attached to contemporaneous court reporting and the perishable nature of news, courts should act swiftly to give the media the opportunity to make representations.

Any reporting restriction imposes potential criminal liability on media organisations, journalists or editors who breach it. If a breach occurs, media organisations and their employees may face unlimited fines.[50] For these reasons, it is essential that any reporting restriction should be reduced to writing as soon as possible, clear and precise in its terms and drawn up as a court order as soon as practicable. Once orders have been made, they should be drawn to the attention of the media by being shown on the court list and on the door of the court and wherever possible sent to relevant local and/or national media organisations. Court staff should respond positively to media organisations' requests for assistance in relation to the existence or terms of reporting restriction orders.

Procedural safeguards

- Where automatic reporting restrictions already provide protection it is generally not necessary to impose additional discretionary restrictions
- Care must be taken to ensure that the statutory conditions for imposing a discretionary reporting restriction are met
- Where the statutory conditions are met, the court must make a judgment balancing the need for the reporting restriction against the public interest in open justice and freedom of expression
- The need for any order must be justified by clear and cogent evidence and the terms of any order must be proportionate, going no further than is necessary to meet the statutory objective
- The media must be given an opportunity to make representations about discretionary reporting restrictions
- Orders should be put in writing as soon as possible
- The media should be put on notice as to the existence and terms of the order.

4.2 Protection of under-18s

Summary of new provisions

From 13 April 2015 there are now two main powers to make discretionary reporting restrictions for under-18s. Under s.45 of the Youth Justice and Criminal Evidence Act 1999 ("YJCEA") a criminal court can grant anonymity to a juvenile defendant, victim or witness in adult criminal proceedings. Such anonymity will last until that person reaches the age of 18. This power is not available to Youth Courts, as s.49 CPYA provides automatic anonymity in those proceedings (see 3.7 above).

In addition, under s.45A of the YJCEA, criminal courts including Youth Courts are given a new power to grant life-long anonymity to juvenile victims and witnesses, bringing the law for under-18s into line with the law for adult victims and witnesses (see 4.3 below).[51] Consistently with the law in relation to adult defendants, there is no power under s.45A to grant life-long anonymity to juvenile defendants.

Section 45 YJCEA replaces s.39 of the Children and Young Person's Act 1933 ("CYPA") in relation to all criminal proceedings. However, section 39 continues to apply to civil and family proceedings and to Injunctions and Criminal behaviour Orders (see 4.8 below). Section 39 has been amended so that reporting restrictions made under s.39 now apply to online publications, as well as the print and broadcast media.[52]

The intention of Parliament in enacting these provisions was to widen the scope of protection applying specifically to under-18s. Although the new powers are of broader application than s.39 CYPA 1933, they give rise to similar issues and it has been held that the s.39 case law provides appropriate guidance to the principles and practice to be followed concerning applications under s.45.[53]

The CPS has produced its own guidance on "Reporting Restrictions – Children and Young People as Victims, Witnesses and Defendants.[54] Owing to the continuing relevance of s.39, further guidance is provided in Appendix 1.

Reporting restrictions under s.45 of the YJCEA 1999

The general power to impose a discretionary reporting restriction in relation to a person under aged 18 is now contained in s.45 of the YJCEA. This discretionary power applies to under-18 victims, witnesses and defendants.

Section 45 of YJCEA permits a criminal court to prevent any information being included in a publication which is likely to lead members of the public to identify the under-18 victim, witness or defendant as a person concerned in the proceedings. When deciding whether to make an order under s.45 the court must have regard to the welfare of that person.

As with any departure from open justice there must be a good reason for imposing an order under s.45. The court must be satisfied that, on the facts of the case before it, the welfare of the child outweighs the strong public interest in open justice.[55]

The reason for the "good reason" requirement is explained in the case law under s.39. The courts have emphasised that Parliament intended to preserve the distinction between juveniles in Youth Courts, who are automatically entitled to anonymity, and juveniles in the adult criminal courts, who are not so entitled and must apply for a discretionary reporting restriction.[56] The rule under s.49 is the reverse of the rule under s.33 CYPA and s.45 YJCEA. Under s.49 CYPA 1933 there must be a good reason for lifting the order; under s.45 YJCEA there must be a good reason for imposing it.

In deciding whether to impose an order under s.45, the court must balance the open justice principle against particular considerations relevant to those under 18. The particular considerations include the:

- Duty to have regard to the principle aim of the youth justice system to prevent offending by children and young persons as required by s.37 Crime and Disorder Act 1998;
- Obligation to have regard to the welfare of the child or young person as required by s.44 CYPA;
- Right to privacy under Article 8 ECHR (as interpreted through international instruments such as the UN Convention on the Rights of the Child[57] and the Beijing Rules[58])[59]; and
- Jurisprudence requiring the 'best interests of the child' to be 'a primary consideration' (though not necessarily one that prevails over all other considerations) in accordance with Article 3 of the UN Convention on the Rights of the Child[60].

Neither the principle of open justice nor the best interests of the child necessarily dictate the conclusion in a particular case.[61] The court must weigh the competing public interest factors on the particular facts before it. The case law governing this balancing exercise under s.39 CYPA remains relevant under s.45.[62]

In summary, the court must balance the interests of the public in the full reporting of criminal proceedings against the desirability of not causing harm to a child concerned in the proceedings.[63] Among the possible public interests is the public interest in knowing the outcome of court proceedings and the valuable deterrent effect that the identification of those guilty of at least serious crimes may have on others.[64]

In relation to harm, publication can have a significant effect on the prospects and opportunities of young defendants and, therefore, on the likelihood of effective integration into society.[65] That the defendant's identity is already known to some people in the community is not necessarily a good reason for allowing much wider publication.[66] Prior to and during the trial, the welfare of the defendant is likely to take precedence over the public interest in publication, whereas after conviction, the age of the offender and the seriousness of the crime will be particularly relevant.[67] The court should give considerable weight to the age of the offender and to the potential damage of public identification as a criminal before having the burden or benefit of adulthood.[68]

The definition of publication in s.63 of YJCEA is wide and covers the print media, broadcast media and online publications such as Twitter and Facebook.

Section 45(8) of YJCEA identifies particular examples of information that a s.45 reporting restriction may contain, including the child or young person's name, home address, school, place of work or still or moving image. However, this list is not intended to be exhaustive.

Section 45 orders should be carefully framed, to prevent them from having an overbroad effect. The purpose of a s.45 order is not to prevent the publication of the name, address or other details of the child or young person per se; what a s.45 order seeks to do is to prevent their identification as a victim, witness or defendant in criminal proceedings. For this reason, when making an order under s.45, courts should track the language of s.45(3) YJCEA and make sure to include the qualifying words in italics "if it is likely to lead members of the public to identify him as *a person concerned in the proceedings*". Adopting this language prevents media reports of unrelated matters e.g. the same child winning a prize at school, being caught by the restriction.

The s.45 reporting restriction ceases to apply when the young person reaches the age of 18. In these circumstances, the court now has the power to impose life-long anonymity under s.45A YJCEA if the relevant conditions are met.

The court, or an appellate court, may dispense with a s.45 reporting restriction if satisfied that doing so is in the interests of justice or that the restrictions impose a substantial and unreasonable restriction on the reporting of the proceedings and it is in the public interest to remove or relax the restriction. When considering the "public interest" the court should have regard, in particular, to the matters identified in s.52 YJCEA: the open reporting of crime, the open reporting of matters relating to health and safety, the prevention and exposure of miscarriages of justice, the welfare of the child or young person and the views of the child or young person.

The fact that proceedings have been determined in any way or abandoned is not in itself a sufficient reason for dispensing with the reporting restrictions, although it may be a relevant consideration.[69] When deciding whether to relax or remove a restriction, the court must have regard to the welfare of the child or young person concerned.

Breach of a s.45 order is a criminal offence, subject to certain specific defences. Further information is contained MOJ Circular No. 2015/02 "Reporting Restrictions applying to Under-18s: Youth Justice and Criminal Evidence Act 1999 and Criminal Justice and Courts Act 2015", 23 March 2015.

Life-long anonymity under s.45A of the YJCEA 1999

Section 45A YJCEA contains a new power for the criminal courts to impose a life-long reporting restriction in the case of an under-18 victim or witness. This provision brings the law for juvenile victims and witnesses into line with that of their adult counterparts in criminal proceedings.

Section 45A permits a criminal court to prevent any information being included in a publication during the lifetime of a victim or witness which is likely to lead members of the public to identify that under-18 victim or witness as being concerned in the proceedings. The same wide definition of publication in s.63 of YJCEA applies as in s.45 orders and covers the print media, broadcast media and online publications such as Twitter and Facebook.

As with s.45 orders, s.45A identifies particular matters that may be included in a s.45A reporting restriction e.g. the name, address, school etc of an under-18, but the reporting restriction power is not limited to those specific matters. For the same reasons that apply in the case of s.45 orders, care should be taken to ensure that s.45A orders track the statutory language so as to prevent them from having an overbroad effect (see above).

The test for making a s.45A order is that the court must be satisfied that fear or distress on the part of the victim or witness in connection with being identified as a person concerned in the proceedings is likely to diminish the quality of that person's evidence or the level of cooperation they give to any party to the proceedings in connection with that party's presentation of its case. Witnesses who could benefit from a s.45A order could therefore be witnesses for the prosecution or the defence.

The applicant for an order under s.45A must explain how their circumstances meet the statutory

criteria and why a reporting restriction would be likely to improve that person's evidence, or their level of cooperation.[70]

When applying the test in s.45A the court is required to take into account certain particular matters: the nature and alleged circumstances of the offence to which the proceedings relate; the age of the victim or witness; their social and cultural background and ethnic origins (if relevant); their domestic, educational and employment circumstances (if relevant); any religious and political beliefs (if relevant); any behaviour towards the victim or witness on behalf of an accused or others and the views expressed by the victim or witness.

In deciding whether to make a reporting restriction, the court must also have regard to the welfare of the child or young person, whether it would be in the interests of justice to make the direction and the public interest in avoiding the imposition of a substantial and unreasonable restriction on the reporting of the proceedings. Section s.45A therefore gives statutory effect to the requirement for the court to take into account the impact on the media's ability to report the proceedings when considering whether to make an order (and not just when it is being asked to remove or relax a reporting restriction).

The court, or an appellate court, has identical powers to dispense with a s.45A order as apply in the case of s.45 orders (see above) and must take into account the same public interest considerations. As with s.45 orders, the fact that the proceedings have been determined or abandoned is a relevant, but not decisive consideration, and the court, when deciding whether to remove or relax a restriction, must have regard to the welfare of the child or young person concerned.

Breach of a s.45A order is a criminal offence, subject to certain specific defences. Further information is contained MOJ Circular No. 2015/02 "Reporting Restrictions applying to Under-18s:Youth Justice and Criminal Evidence Act 1999 and Criminal Justice and Courts Act 2015", 23 March 2015.

Protection of under-18s

- Under s.45 of YJCEA a criminal court may make an order preventing the publication of information that identifies a child or young person as being a victim, witness or defendant in the proceedings
- This restriction applies to traditional print and broadcast media as well as online publications
- The court must have regard to the welfare of the child or young person
- A s.45 order ceases to have effect when the child or young person turns 18
- The court may remove or relax the s.45 reporting restriction if satisfied that it imposes a substantial and unreasonable restriction on reporting and that it is in the public interest
- Under s.45A of YJCEA a criminal court may make an order preventing the publication of information that identifies a child or young person as being a victim or witness in the proceedings during the course of their lifetime

- The court must be satisfied that the fear or distress on the part of the victim or witness arising from such identification would be likely to diminish the quality of their evidence or their cooperation with any party to the proceedings
- The court must also take into account the impact on the media's ability to report the proceedings before making a s.45A order
- The court may remove or relax the s.45A reporting restriction if satisfied that it imposes a substantial and unreasonable restriction on reporting and that it is in the public interest

4.3 Protection of adult victims and witnesses

Section 46 of the Youth Justice and Criminal Evidence Act 1999 gives the court power to restrict reporting about certain adult witnesses (other than the accused) in criminal proceedings on the application of any party to those proceedings.

The Court may make a reporting direction that no matter relating to the witness shall during his life-time be included in a publication if it is likely to lead members of the public to identify him as being a witness in the proceedings. Again, publication of the name, address, educational establishment, workplace or a still or moving picture of the witness is not of itself an offence, unless its inclusion is likely to lead to his identification as a witness by the public in the criminal proceedings. A s.46 order may also restrict the identification of children where it would lead to the identification of the adult in question.[71]

An adult witness is eligible for protection if the quality of his evidence or his co-operation with the preparation of the case is likely to be diminished by reason of fear or distress in connection with identification by the public as a witness. The applicant for an order under s.46 must explain why a reporting direction would improve the quality of the witness' evidence or level of cooperation.[72] Quality of evidence relates to its quality in terms of completeness, coherence and accuracy. Factors which the court must take into consideration include the nature and circumstances of the offence, the age of the witness, any behaviour towards the witness by the defendant or his family or associates and the views of the witness.[73]

The court must also consider whether the making of a reporting direction would be in the interests of justice and consider the public interest in avoiding the imposition of a substantial and unreasonable restriction on the reporting of proceedings.[74]

The court may give a direction at any time dispensing with the restrictions if satisfied either that

it is in the interests of justice or that the restrictions impose a substantial and unreasonable restriction on the reporting of the proceedings and that it is in the public interest. Such directions are referred to as "excepting directions". The fact that the proceedings have been determined in a particular way or abandoned is not a sufficient reason in and of itself to dispense with the restrictions, but will often be a relevant consideration.

Section 52 of the YJCEA 1999 sets out some of the matters to which the court should have regard in determining the public interest, including the interest in open reporting of crime, human health and safety, exposure of miscarriages of justice, as well as the welfare and views of the 'protected person', or an 'appropriate person' with parental responsibility (as defined).

The subject of a s.46 anonymity direction can also waive his/her anonymity, or in the case of an under-16 year old, their parent or guardian (including a local authority) may waive the young person's anonymity, by giving written consent to the inclusion of any identifying material otherwise prohibited (subject to safeguards that it was not obtained by interference with the peace and comfort of that person).

The media has a right of appeal against s.46 orders under s.159 of the Criminal Justice Act 1998 even where the restriction on reporting is confined to photographs or film.[75]

A court which reviews the sentence of a defendant who has assisted the police, or failed to assist the police after having agreed to do so (under the Serious Organised Crime and Police Act 2005, s.74) may impose a reporting restriction prohibiting the publication of any matter relating to the proceedings including the fact that the reference has been made.[76] The court may make such an order only to the extent that such an order is necessary to protect any person and is in the interests of justice.[77]

Protection of adult witnesses

- Under s.46 of the Youth Justice and Criminal Evidence Act a court may prohibit the publication of matters likely to identify an adult witness in criminal proceedings (other than the accused) during his lifetime
- The court must be satisfied that the quality of his evidence or his co-operation with the preparation of the case is likely to be diminished by reason of fear or distress in connection with identification by the public as a witness
- In exercising its discretion, the court must balance the interests of justice against the public interest in not imposing a substantial and unreasonable restriction on reporting of the proceedings
- Excepting directions may be given, or the order revoked or varied at any stage of the proceedings, or written consent to identification may be given by the subject or, if under 16, by their parent or guardian.

4.4 Names and other matters withheld in court

Where a court exercises its powers to allow a name or any other matter to be withheld from the public in criminal proceedings, the court may make such directions as are necessary under s.11 of the Contempt of Court Act 1981 prohibiting the publication of that name or matter in connection with the proceedings.

Section 11 can only be invoked where the court allows a name or matter to be withheld from being mentioned in open court. It follows that there is no power to prohibit publication of any name or other matter which has been given in open court in the proceedings.[78] For this reason, applications for an order under s.11 may be heard in private provided there is good reason for doing so.[79]

Section 11 does not itself give the court power to withhold a name or other matter from the public. The power to do this must exist either at common law or from some other statutory provision.

Consistent with the requirement to protect the open justice principle and freedom of expression, courts should only make an order under s.11 where the nature or circumstances of the proceedings are such that hearing all evidence in open court would frustrate or render impractical the administration of justice.[80] It follows that a defendant in a criminal trial must be named save in rare circumstances.[81] It is not appropriate therefore to invoke the s.11 power to withhold matters for the benefit of a defendant's feelings or comfort[82] or to prevent financial damage or damage to reputation resulting from proceedings concerning a person's business.[83] Nor can the power be invoked to prevent identification and embarrassment of the defendant's children, because of the defendant's public profile.[84]

Where the ground for seeking a s.11 order is that the identification of a witness or a defendant will expose that person to a real and immediate risk to his life engaging the state's duty to protect life under Article 2 ECHR,[85] the court will consider whether the fear is objectively well-founded.[86] In practical terms, the applicant will have provide clear and cogent evidence to show that publication of his name will create or materially increase a risk of death or serious injury.[87]

In rare circumstances, the right to private and family life under Article 8 ECHR may mean that normal media reporting has to be curtailed, but injunctions to cover these cases are dealt with by the High Court rather than the criminal courts.[88]

The court is required to hear representations from the media about making orders under s.11. In cases of urgency, a temporary order should be made and the media should be invited to attend on the next convenient date. The media have a right of appeal against s.11 orders made in the Crown Court under s.159 CJA and may challenge orders made in the Magistrates' Courts in judicial review proceedings. A defendant does not have a right of appeal under s.159 against an order refusing to restrict reporting of his identity, but such an order may be challenged by way of judicial review.[89]

Names and other matters withheld in court

- Where a court exercises a common law or statutory power to withhold a name or other matter from being given in evidence in open court, it may prohibit publication of that name or matter under s.11 Contempt of Court Act 1981
- The court may only exercise its power to prohibit publication under s.11 where it has deliberately withheld that information from being given in open court
- In order to have a common law power to withhold material from the public in court, it must be satisfied that, if the name or matter was to be heard in open court, it would frustrate or render impractical the administration of justice and that the order is necessary taking into account the public interest in open justice
- Alternatively, there must be some other power to withhold the name or other material from the public in court. Section 11 does not give that power.

4.5 Postponement of fair and accurate reports

Under s.4(2) of the Contempt of Court Act 1981 the court may order the postponement of publication of a fair, accurate and contemporaneous report of its proceedings where that is necessary to avoid a substantial risk of prejudice to the administration of justice in those or other proceedings.

It is now clear that the court has no inherent or common law power to postpone the publication of a report of proceedings conducted in open court.[90] It follows that unless there is a postponement power which may properly be exercised under s.4(2), there is no power to order the postponement of reporting.

It is normally contempt of court under the 'strict liability rule' to publish anything which creates a substantial risk of serious prejudice to the administration of justice – see s.2 of the 1981 Act. However, ordinarily fair, accurate and contemporaneous reports of legal proceedings held in public which are published in good faith will not breach the strict liability rule – see s.4(1) of the Act.

The power to make postponement orders recognises that there may need to be exceptions to the general defence under s.4(1). Matters may be discussed in open court, but in the absence of the jury which, if published before the end of the case, could prejudice the proceedings. There can also be circumstances where two or more trials are due to take place which are closely connected and where publication of reports of trial 1 could cause a substantial risk of prejudice to trial 2.

The subject matter of a postponement order under s.4(2) is fair, accurate, good faith and contemporaneous reports of the proceedings. Trial judges have no power under s.4(2) to postpone publication of any other reports e.g. in relation to matters not admitted into evidence or prejudicial comment in relation to the proceedings.[91] Likewise, courts have no power under s.4(2) to prevent

publication of material that is already in the public domain. Such publications may incur liability for contempt of court under the strict liability rule and the media bears the responsibility for exercising its judgment in such cases.[92]

Where a court is exercising its discretion as to whether to make a s.4(2) postponement order the test to be applied has three stages:[93]

The first question is whether reporting of the proceedings would give rise to a substantial risk of prejudice to the administration of justice. If not, that is the end of the matter.

If there is a substantial risk of such prejudice, the court must ask whether a s.4(2) order would eliminate that risk. If not, there could be no necessity to impose a ban. Even if a judge is satisfied that the order would achieve the objective, he should still ask whether the risk can be overcome by less restrictive means. If so, a s.4(2) order could not be said to be necessary.

If the judge is satisfied that the order is necessary, he has a discretion and must balance the competing public interests between protecting the administration of justice and ensuring open justice and the fullest possible reporting of criminal trials. An order under s.4(2) should be regarded as a last resort.[94]

As orders must be proportionate in order to comply with Article 10 ECHR, the court must limit the order to those specific matters that create a substantial risk of prejudice to the administration of justice if published contemporaneously. As s.4(2) is a postponement power, the order should normally identify the specific event or time when the order will come to an end.

The reference in s.4(2) to avoiding a substantial risk of prejudice to the administration of justice referred to the protection of the public interest in the administration of justice rather than the private welfare of those caught up in that administration. Where a defendant argued that the scandalous nature of the allegations would result in members of the public attacking him, he was not entitled to a s.4(2) order as attacks upon the accused by ill-intentioned persons were not to be regarded as a natural consequence of the publication of the proceedings and such dangers should not cause the court to depart from well-established principles.[95] Besides, s.4(2) only allows a court to *postpone* reporting, not to ban it indefinitely.[96] It is rarely appropriate to use s.4(2) to alleviate the difficulties of witnesses giving evidence, when there are other statutory measures designed for that purpose.[97]

Section 4(2) is regularly invoked in cases involving sequential trials. The aim in those cases is to postpone the reporting of specific parts of the evidence in the first trial to prevent prejudice to the defendants in the second trial. It is generally not appropriate to invoke this power in relation to matters that form part of the evidence in both trials because in those cases prejudice is unlikely to arise. Section 4(2) is also regularly invoked when a retrial is ordered by the Court of Appeal.

Before imposing an order in the context of sequential trials, the judge must be satisfied that there is a substantial risk of prejudice arising from contemporaneous reports of the first trial sufficient to outweigh

the strong public interest in the full and contemporaneous reporting of criminal proceedings. The judge must also bear in mind that the staying power of news reports is very limited. In addition, it has often been said that normally juries can be trusted to follow conscientiously the directions of trial judges to decide cases on the evidence which they have heard in court and to ignore anything they may have read or viewed in the media.[98]

The appellate courts have also emphasised that newspapers and broadcasters should be trusted to fulfil their responsibilities accurately to inform the public of court proceedings and to exercise sensible judgment about the publication of comment which may interfere with the administration of justice. The media has access to the best legal advice and has its own judgments to make. The risk of being in contempt of court for damaging the interests of justice is not one any responsible editor would wish to take. In itself this is an important safeguard and it should not be overlooked because there are occasions in which there is ill-judged publicity in the media.[99]

Postponement of fair and accurate reports

- Under s.4(2) of the Contempt of Court Act 1981 the court may postpone publication of a fair, accurate and contemporaneous report of its proceedings where that is necessary to avoid a substantial risk of prejudice to the administration of justice in those or other proceedings
- The power is strictly limited to fair, accurate reports and contemporaneous reports of the proceedings
- The court must be satisfied that a substantial risk of prejudice would arise from such reports
- If the concern is potential prejudice to a future trial, in making that judgment, the court will bear in mind the tendency for news reports to fade from public consciousness and the conscientiousness with which it can normally be expected that the jury in the subsequent case will follow the trial judge's directions to reach their decision exclusively on the basis of evidence given in that case
- Before making a s.4(2) order, the court must be satisfied that the order would eliminate the risk of prejudice and that there is no less restrictive measure that could be employed
- If satisfied of these matters, the court must exercise its discretion balancing the risk of prejudice to the administration of justice against the strong public interest in the full reporting of criminal trials

4.6 Quashing of acquittal and retrial: restriction on publication in the interests of justice

Under s.82 of the Criminal Justice Act 2003, if necessary in the interests of justice, the Court of Appeal can make orders to prevent the inclusion of any matter in a publication which appears to it would give rise to a substantial risk of prejudice to the administration of justice in a retrial.[100] Before

the prosecution has given notice of its application for an acquittal to be quashed and a retrial, such an order can only be made on the application of the DPP and where an investigation has commenced. After such notice has been given, the order may be made on either on the application of the DPP, or on the Court of Appeal's own motion. The order may apply to a matter which has been included in a publication published before the order takes effect, but such an order applies only to the later inclusion of the matter in a publication (whether directly or by inclusion of the earlier publication), and does not otherwise affect the earlier publication.

Unless an earlier time is specified, by s.82(8) and (9) CJA 2003 the order will automatically lapse when there is no longer any step that could be taken which would lead to the acquitted person being tried pursuant to an order made on the application, or if he is so tried, at the conclusion of the trial.

4.7 Postponement of derogatory remarks made in mitigation

Section 58 of the Criminal Procedure and Investigations Act 1996 gives courts the power to postpone reports of derogatory assertions about named or identified persons that have been made in mitigation. The court must have substantial grounds for believing that the assertion is derogatory and false or that the facts asserted are irrelevant to the sentence.

This power may be exercised when a court is determining sentence following conviction, when a Magistrates' Court is determining whether an accused should be committed to a Crown Court for sentence and when a court is considering whether to give permission to appeal against a sentence or hearing an appeal against, or reviewing, a sentence. An interim order can be made as soon as the assertion has been made if there is a real possibility that a final order will be made. A final order (maximum duration 12 months) must be made as soon as reasonably practicable after the sentence is passed.

An order must not be made in relation to an assertion if it appears to the court that the assertion was previously made at the trial at which the person was convicted of the offence or during any other proceedings relating to the offence.[101]

Such orders may be revoked at any time and orders made after the handing down of a sentence automatically cease to have effect after 12 months.

Home Office Circular 24/3/1997 suggests that the media or other third parties can make applications, perhaps by written submission, for orders to be revoked.[102]

Postponement of derogatory remarks in mitigation

- Section 58 of the Criminal Procedure and Investigations Act 1996 gives courts the power to postpone reports of certain assertions about named or identified persons that have been made in mitigation
- The court must have substantial grounds for believing that the assertion is derogatory and false or that the facts asserted are irrelevant to the sentence
- Orders must not be made in relation to assertions that were made during the trial or any other proceedings relating to the offence

4.8 Injunctions and Criminal Behaviour Orders

What were formerly known as Anti-Social Behaviour Orders (ASBOs) have been replaced by a new regime in the Anti-Social Behaviour, Crime and Policing Act 2014. In summary, ASBOs in civil proceedings have been replaced by Injunctions, breach of which is not a criminal offence, but which is a contempt of court where committed by a person aged over 18 and which, in respect of under-18s, could result in the court imposing a supervision order or a detention order. ASBOs in criminal proceedings have been replaced by Criminal Behaviour Orders, which may only be made following conviction for a criminal offence. Breach of a Criminal Behaviour Order is a criminal offence.

In terms of reporting, civil proceedings for an Injunction against an adult are the same as ordinary civil proceedings to which no automatic reporting restrictions apply.[103] If the person against whom the Injunction is sought is under 18, the automatic reporting restriction imposed by s.49 CYPA 1933 does not apply, so the media is able to identify the child or young person concerned however s.39 CYPA 1933 does apply and enables the court to impose a discretionary reporting restriction where the relevant conditions are met. The same is true in terms of reporting proceedings for breach of an Injunction by a person under 18. Further guidance regarding the imposition of orders under s.39 CYPA 1933 is provided in Appendix 1.

Likewise, there is no automatic reporting restriction for under-18s against whom proceedings are brought for a Criminal Behaviour Order (s.49 CYPA 1933 does not apply), however the court could impose a reporting restriction under s.39 CYPA. There are also no automatic reporting restrictions for CBO breach proceedings, however s.45 of the Youth Justice and Criminal Evidence Act 1999 applies in relation to CBO breach proceedings against someone aged under 18, so the court has the power to impose discretionary reporting restrictions. Care will be required when reporting breach proceedings for a CBO not inadvertently to report any previous convictions in the Youth Court to which s.49 CPYA 1933 continues to apply.

Injunctions and Criminal Behaviour Orders

- There are no automatic reporting restructions which apply to proceedings for an Injunction, proceedings for breach of an Injunction, or proceedings for a Criminal Behaviour Order, even if those proceedings relate to a child or young person
- The Court reatins the power to impose a discretionary reporting rstriction to prevent the identification of a child or young person under s.39 CYPA 1933
- In criminal proceedings for breach of a Criminal Behaviour Order, there are also no automatic reporting restrictions that apply to a child or young person, but the Court has the power to impose a discretionary reporting restriction under s.45 YJCEA 1999.

5. Additional matters relating to court reporting

5.1 The availability of court lists, court registers and reporting restrictions

Crown Court lists may be accessed over the internet from CourtServe.[104] Magistrates' Courts lists are available from the court offices of the court concerned and are the subject of a 1989 Home Office circular that encourages justices' clerks to meet reasonable requests by the media for copies of court lists and the register of decisions in Magistrates' Courts.[105] The Home Secretary considered that court lists should be made available in court on the day of the hearings and, where provisional lists are prepared in advance, copies should be available on request. At a minimum the lists should contain each defendant's name, age, address and, where known, his profession and the alleged offence. Courts will not breach the Data Protection Act 1998 by providing journalists with such information.

On 15 July 2008, the Secretary of State for Justice announced in Parliament that the media could immediately access court registers containing the outcome of criminal cases and details of upcoming court cases free of charge. 'The Protocol for sharing court registers and court lists with local newspapers' (April 2014) is agreed between HMCTS, the News Media Association and the Society of Editors. It recognises that 'although there is no direct equivalent of the magistrates court register in the Crown Court, similar principles are to apply insofar as they can'. During the passage of the Criminal Justice and Courts Bill in 2014 and the introduction of trial by a single justice on the papers, ministers confirmed in both Houses that the Protocol would continue to apply and that further open justice and transparency measures, including Rules changes, would also be considered for such cases. The Criminal Procedure Rules 2015 now make provision for publication of court listings for all courts, including online publication.[106]

It is now standard practice that any reporting restriction is shown on the Crown Court list under the name of the relevant case – allowing a ready means of checking whether there are such restrictions in place. Court of Appeal Criminal Division daily cause lists are available on **www.justice.gov.uk** and similarly indicate where reporting restrictions are or may be engaged.

In March 2014 the Law Commission recommended that there should be a single publicly accessible website enabling the media and members of the public to find out if an order had been made under s.4(2) of the Contempt of Court Act 1981.[107] This website would include a restricted area where, for a charge, certain users could find out the details of the reporting restriction and could sign up for automated alerts of new orders. At the time of writing, this website had not been established.

5.2 Access to documents held on the court file

Following the decision of the Court of Appeal in *R(Guardian News and Media Ltd) v City of Westminster Magistrates Court* [2012] 3 WLR 1343, [2012] EWCA Civ 420, the default position now is that where documents have been placed before a judge and referred to in the course of proceedings the media is entitled to have access to those documents in accordance with the open justice principle.

Where access to documents has been sought for a proper journalistic purpose, the case for allowing it will be particularly strong. This principle extends to any type of document on the court file and also extends to photographs, video footage, stills and sound recordings which have been shown or played in open court.[108]

However, there may be countervailing reasons in an individual case which outweigh the merits of the application. In deciding these questions the court has to carry out a proportionality exercise which is fact specific, where central considerations will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and conversely any risk of harm which access to the documents may cause to the legitimate interests of others.

Rule 5.8 of the Criminal Procedure Rules sets out the procedure for such applications and provides guidance as to the kinds of considerations which the court may take into account when carrying out the balancing exercise.

5.3 Media access to prosecution materials

Media access to materials relied upon by the prosecution in criminal proceedings is governed by a Protocol between ACPO, the CPS and the Media entitled "Publicity and the Criminal Justice System" and published in October 2005 (the "Protocol").[109]

The stated purpose of the Protocol is "to ensure greater openness in the reporting of criminal proceedings" and to "provide an open and accountable prosecution process, by ensuring the media have access to all relevant material wherever possible, and at the earliest appropriate opportunity."

The Protocol sets out the categories of material relied upon by the Prosecution in court which should normally be released to the media. This includes maps and photographs (including custody photos of defendants), diagrams and other documents produced in court; videos showing scenes of crimes as recorded by police after the event; videos of property seized; sections of transcripts of interviews or statements as read out in court and videos or photographs showing reconstructions of the crime and CCTV footage of the defendant.

The Protocol also sets out further categories of Prosecution material which may be released after consideration by the CPS in consultation with the police and relevant victims, witnesses and family members. These categories are CCTV footage or photographs showing the defendant and victim, or the victim alone, that has been viewed by the public and jury in open court; video and audio tapes of police interviews with defendants, victims or witnesses and victim and witness statements.

The Protocol applies even if the accused pleads guilty and the case does not proceed to trial, providing the material released to the media reflects the prosecution case and has been read out, or shown in open court, or placed before the sentencing judge. The Protocol also provides for a review mechanism enabling the media to make further representations to the CPS if an initial request for media access is refused.

5.4 Identification of those involved in court proceedings

At common law, it would be considered inimical to the administration of justice to protect the identity of magistrates presiding over proceedings. Their identity should be made known to press and public.[110]

The media is particularly concerned about accurate identification of those involved in court proceedings. Announcement in open court of names and addresses enables the precise identification vital to distinguish a defendant from someone in the locality who bears the same name and avoids inadvertent defamation. The Home Secretary issued Circular No 78/1967 in response to press concern. In addition to recommending that courts supply the press with advance copies of court lists, the circular encouraged courts to ensure the announcement in open court of both the names and the addresses of defendants. The circular acknowledges that a person's address is as much a part of his description as his name. It states that there is therefore a strong public interest in facilitating press reports that correctly describe persons involved. Statutory reporting restrictions, even when automatic, provide for the lawful publication of magistrates' identities and names and addresses of defendants and others appearing before the courts. Common law also restricts the circumstances in which names and addresses can be withheld from the public or reporting restrictions imposed to prevent or postpone their publication (see above).

In *Re Trinity Mirror* [2008] QB 770, [2008] EWCA Crim 50, the Court of Appeal stated: "it is impossible to over-emphasise the importance to be attached to the ability of the media to be able to report criminal trials which represents the embodiment of the principle of open justice in a free country. An important aspect of the public interest in the administration of criminal justice is that the identity of those convicted and sentenced for criminal offences should not be concealed. From time to time occasions will arise where restrictions on this principle are considered appropriate but they depend on express legislation and, where the court is invested with a discretion to exercise such powers, on the absolute necessity for doing so in the individual case."[111]

5.5 Committal for Contempt of Court

The Lord Chief Justice has issued a Practice Direction setting out the requirements for open justice in relation to committals for contempt of court.[112] The Practice Direction applies to all proceedings for committal for contempt of court and to all courts in England and Wales.

The fundamental requirement is that all committal hearings, whether on application or otherwise and whether for contempt in the face of the court or for any other form of contempt, shall be listed and heard in public. If a court is exceptionally considering derogating from the general rule and holding a committal hearing in private, or imposing any other restriction on open justice, it must give advance notice to the national print and broadcast media and hear submissions at the outset of the hearing from the parties and the media. Where the court decides to hold a committal hearing in private, it must first sit in public and give a reasoned judgment setting out the basis for its decision.

The Practice Direction provides that in all cases where a court finds that a person has committed a contempt of court, whether or not the court conducted the hearing in public or in private, the court must at the conclusion of the hearing sit in public and provide information about the case including the name of the person, the nature of the contempt of court in relation to which the committal order is being made and the punishment being imposed. This information must also be provided to the national media and the Judicial Office, for publication on the website of the Judiciary of England and Wales. For the avoidance of any doubt, the Practice Direction states in terms that "There are no exceptions to these requirements".

In relation to all committal decisions, the court must also produce a written judgment setting out its reasons, or ensure than any oral judgment is transcribed on an expedited basis.

5.6 Unauthorised recording of court proceedings

Unauthorised tape recording of proceedings in court is a contempt of court under s.9 of the Contempt of Court Act 1981 and may be subject to forfeiture.[113] However, courts may at their discretion permit journalists to record proceedings in court as an aide memoire.[114] The recording must not be broadcast or used to brief witnesses: see Criminal Practice Direction 2015 Amendment No 3 [2015] EWCA Crim 430 at Part 16A.2

It is an offence to take photographs or make sketches (with a view to publication) or attempt do so in court, in respect of a judge, a juror, witness or party if in the court room, court building or court precincts including the cell area.[115] The court can issue guidance on the extent of the precincts of the court buildings e.g. by way of a map. The prohibition on the taking of photographs includes taking pictures on a mobile phone, video recordings, photographs on conventional cameras or by any other means.

The Crime and Courts Act 2013 s.32 empowers the Lord Chancellor to make regulations disapplying the prohibitions in section 41 of the Criminal Justice Act 1925 and section 9 of the Contempt of Court Act 1981, thereby permitting the filming and broadcasting of court proceedings. In July 2013 the first regulations came into effect; they permit the recording and broadcasting, subject to detailed safeguards, of certain proceedings in the Court of Appeal.[116] In addition, any criminal appeals which reach the Supreme Court are filmed and broadcast live on the Supreme Court Live service which applies to all Supreme Court hearings.[117]

5.7 Live, text-based communications from court

In December 2011 the Lord Chief Justice issued guidance on using laptops and hand-held devices to communicate directly from courts in England and Wales e.g. by sending emails or by tweeting. This guidance has now been subsumed in to the Criminal Practice Direction 2015 Amendment No 3 [2015] EWCA Crim 430 at Part 16C. The Practice Direction provides that a representative of the media or a legal commentator who wishes to use live, text-based communications may do so without making an application to the court, as it is presumed that they will be doing so for the purpose of preparing fair and accurate reports of the proceedings and that this does not pose a danger of

interference with the proper administration of justice. A member of the public who wishes to make live, text-based communications from court is required to make an application for permission, which may be done informally by communicating a request to the judge through court staff.

The Practice Direction makes it clear that a judge always retains full discretion to prohibit live, text-based communications from court, the touchstone being whether such communications may interfere with the administration of justice. It states that all electronic devices must be used in silent mode and that the court may limit the use of such devices, e.g. to members of the media only, where there is the potential for interference with the court's own sound recording equipment. For the avoidance of doubt, the Practice Direction underlines that use of mobile devices for these purposes remains subject to the statutory bans on taking photographs in court and on making sound recordings. Users of electronic devices to make live, text-based communications must also comply with the strict provisions of sections 1, 2 and 4 of the Contempt of Court Act 1981 in relation to the reporting of court proceedings.

5.8 Jury's deliberations

It is a criminal offence under s20D Juries Act 1974 to obtain, disclose or solicit any details of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings. The prohibition on disclosure binds both jurors themselves and the media in relation to the publication of any such disclosure.[118]

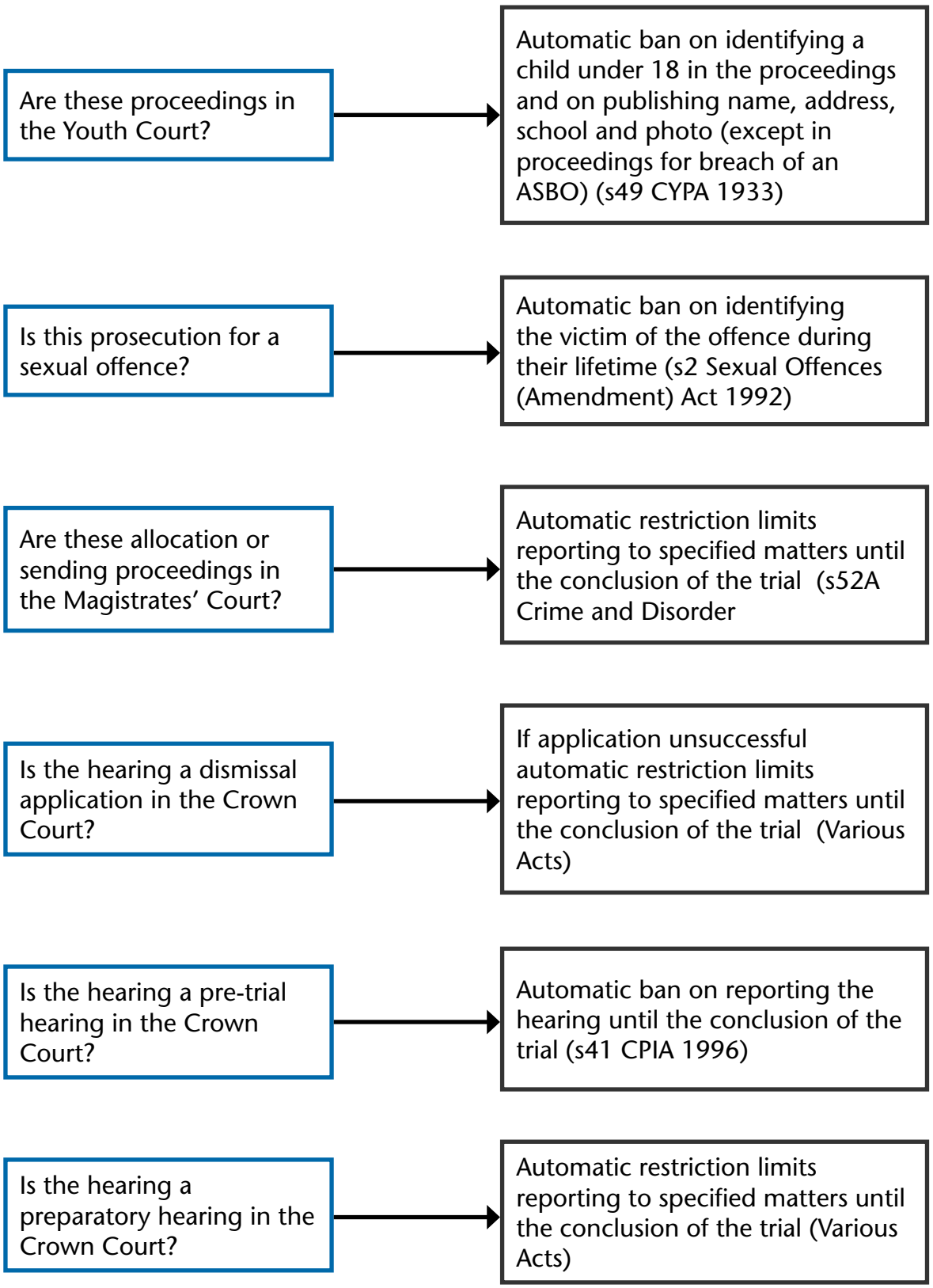
5.9 Jigsaw identification

Jigsaw identification refers to the phenomenon whereby the identity of a person protected by a reporting restriction order may be inadvertently disclosed as a result of different media reports, none of which breach the terms of any order or statutory provision, but which taken together enable the protected person to be identified. In most cases this is not an issue, but particular difficulties arise in relation to sex offences within the same family. For example, where one report refers to an unnamed defendant convicted of raping his daughter and another refers to the name of the defendant, the daughter will be identifiable to the public in breach of the automatic prohibition protecting victims of sexual offences.

In recognition of these potential difficulties the newspapers and broadcasters have aligned their respective codes so that the media adopts a common approach when reporting sexual offences.[119] Typically the media will name the defendant but not name the victim (this would breach the statutory prohibition) or give any details of his or her relationship with the defendant. It is routine for in-house lawyers to check what information is already in the public domain before advising on whether a report of court proceedings is likely to breach any legal requirement, so even in non-sex cases in practice the media often ends up adopting a common approach.

Ready Reference Guides

Ready reference guide to automatic reporting restrictions



Discretionary Reporting Procedures

Protecting the welfare of Under-18 Witnesses, Victims & Defendants

1. Is there a child or young person under 18 concerned in the proceedings as a victim, witness or defendant?

2. Is there a good reason for ordering that the child should not be identified having regard to the welfare, privacy and best interests of the child?

3. On the specific facts of this case, do these factors outweigh the strong public interest in open justice?

4. Is the proposed restriction necessary and are the terms of the proposed order proportionate?

The court may order the media and online publishers under s.45 YJCEA 1999 not to publish specific information that is likely to lead members of the public to identify him as being concerned in the proceedings. An order made under s.45 will last until the person reaches the age of 18 and then ceases to have effect.

Lifetime Anonymity for Witnesses and Victims (Under-18 and Adult)

1. Is there a victim or witness in the proceedings (other than the accused) whose evidence or co-operation with the case is likely to be diminished by reason of fear or distress in connection with being identified?

2. On the specific facts of this case, do the interests of justice and the welfare of the child in the case of a person aged under-18 favour making the order, or would such an order impose a substantial and unreasonable restriction on the reporting of the proceedings taking into account the open justice principle?

3. Is the proposed restriction necessary and are the terms of the proposed order proportionate?

The court may order the media and online publishers under s.45A JYCEA 1999 (under-18s) and s.46 JYCEA 1999 (adults) not to publish specific information relating to the victim or witness during his lifetime that is likely to lead members of the public to identify him as being concerned in the proceedings. This reporting restriction is not available for defendants.

Names and other matters withheld in court

1. Is there a power, common law or statutory, to withhold the material from the public in open court?

2. On the facts of this case have the criteria for exercising that power been fulfilled? Are the common law conditions satisfied or the statutory terms met?

3. Do the circumstances outweigh the strong public interest in open justice?

4. Has the material been withheld from the public in open court or will it be?

5. Is it necessary and proportionate to prohibit publication by the media?

The court may order the media under s.11 CCA 1981 not to publish the name or matter that has been withheld.

Postponement of fair and accurate reports

1. Would a fair, accurate and contemporaneous report of the proceedings (or part thereof) published in good faith create a substantial risk of prejudice to the administration of justice in those or other proceedings?

2. Is an order postponing the publication of such reports necessary and are its terms proportionate? Would such an order eliminate the risk of prejudice to the administration of justice? Could less restrictive measures achieve the objective?

3. On the specific facts of this case, does the public interest in protecting the administration of justice outweigh the strong public interest in open justice?

The court may order the media under s.4(2) CCA 1981 to postpone publication of such reports until a specific event or for a specific period of time.

All discretionary reporting restrictions should be put in writing and made available to the media.

Appendix 1

Section 39 of the CYPA 1933

Although s.39 of the Children and Young Person's Act 1933 ("CYPA 1933") no longer applies to criminal proceedings, this power to impose a discretionary reporting restriction in relation to a young person aged under 18 continues to be available in family and civil proceedings and in relation to Injunctions and Criminal Behaviour Orders (see section 4.8 above). For this reason, the following guidance from the previous edition of this Guide is included for ease of reference.

Section 39 of CYPA permits a court to prohibit publication by the media of the name, address, school or any information calculated to lead to the identification of any child or young person concerned in criminal proceedings. The power to prohibit publication also extends to pictures of the child or young person. The new definition of "publication" introduced in 2015 in s.39(3) is now wide enough to cover publications by the print media, broadcast media and online publications.[120]

The child or young person will be concerned in criminal proceedings if he is a victim, defendant or witness in the case, but not merely because he is 'concerned' in the sense of being 'affected'.[121] He must still be alive.[122] The publication of the name, address and other details relating to the child is not in itself prohibited – what a s.39 order seeks to do is to prevent the identification of a child as a witness, victim or defendant in the criminal proceedings. Media reports on unrelated matters e.g. the same child winning a prize at school would not be affected by an order in s.39 terms.

Criminal proceedings commence when a defendant is charged – there is therefore no power to impose a s.39 order to protect the identity of a person who has been arrested but has not yet been charged.

The order should spell out what is prohibited. A s.39 order should track the language of the legislation.[123] It could be less extensive, but it cannot be wider. Thus there is no power to prohibit the publication of the names of adults involved in the proceedings or other children or young persons not involved in the proceedings as witnesses, defendants or victims.[124] The court may, however, give guidance to the media if it considers that the naming of an adult defendant would be likely to identify a child. Such guidance is not binding.[125] The media may, for instance, be able to name a defendant without infringing the order, if the relationship of the victim to the defendant is omitted or the nature of the offence is blurred (e.g. 'a sexual offence' rather than incest). See 5.7 below on jigsaw identification.

There must be a good reason, apart from age alone, for imposing a s.39 CYPA order. There is a clear distinction between the automatic ban on identification of children in Youth Court proceedings and the discretion to impose an order under s.39 of the 1933 Act. Whereas under s.49 CYPA (see 3.8 above) there must be a good reason for lifting the order, under s.39 the onus lies on the party contending for the order to satisfy the court that there is a good reason to impose it. The appellate courts have emphasised that Parliament intended to preserve the distinction between juveniles in Youth Court proceedings and in the adult courts.[126]

In deciding whether to impose an order under s.39, the judge must balance the interests of the public in the full reporting of criminal proceedings against the desirability of not causing harm to a child concerned in the proceedings.[127] The court is required to have regard to the welfare of the child. Where the child is an accused person the court should give considerable weight to the age of the offender and to the potential damage to any young person of public identification as a criminal before having the burden or benefit of adulthood.[128] That the child's identity is already known to people in the community is not necessarily a good reason for allowing publication of that identity.[129]

Any order made must comply with Article 10 ECHR – it must be necessary, proportionate and there must be a pressing social need for it.[130] Age alone is not sufficient to justify imposing an order as very young children cannot be harmed by publicity of which they will be unaware and s.39 orders are therefore unnecessary.[131]

Courts may review an order at any time and frequently are invited to do so where a defendant named in an order has been convicted at trial. The courts have recognised that in considering whether to lift an order the welfare of the child must be taken into account, but the weight to be given to that interest changes where there has been a conviction, particularly in a serious case; there is a legitimate public interest in knowing the outcome of proceedings in court and the potential deterrent effect in respect of the conduct of others in the disgrace accompanying the identification of those guilty of serious crimes.[132]

A s.39 order automatically lapses when the person reaches the age of 18 and cannot extend to reports of the proceedings after that point.[133]

If a reporting restriction is imposed, the judge must make it clear in court that a formal order has been made. The order should use the words of s.39 and identify the child or children involved with clarity. A written copy should be drawn up as soon as possible after the order has been made orally. Copies must be available for inspection and communicated to those not present when the order was made (e.g. by inclusion in the daily list). Court staff should assist media inquiries in relation to the order.

(Endnotes)

1 The Contempt of Court Act 1981 applies to all publications and nearly all of the automatic and discretionary reporting restrictions referred to in this guidance would apply in practice to online publishers and individual users of social media websites.
2 Criminal Procedure Rules 2015, rule 6.2(3), Criminal Practice Direction (October 2015), para 6B.4(e).
3 See s.4(1) Contempt of Court Act 1981; s.14 Defamation Act 1996.
4 *Observer and Guardian v UK* (1992) 14 EHRR 153, para. 59.
5 *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593; *Re Trinity Mirror* [2008] 2 Cr.App.R. 1, CA. See also footnote 13 below.
6 *R v Central Criminal Court ex parte W, B and C* [2001] 1 Cr App R 2.
7 Criminal Procedure Rules 2015, rule 6.2(3), Criminal Practice Direction (October 2015), para 6B.4(e).
8 https://www.cps.gov.uk/legal/p_to_r/prosecuting_advocates_instructions
9 CPS Legal Guidance: Contempt of Court and Reporting Restrictions. Available at www.cps.gov.uk/legal/a_to_c/contempt_of_court
10 CPS Legal Guidance: Reporting Restrictions – Children and Young People as Victims, Witnesses and Defendants. Available at: http://www.cps.gov.uk/legal/p_to_r/reporting_restrictions/
11 *AG v Leveller Magazine* [1979] AC 440, per Lord Diplock p.450; *R v Times Newspapers* [2007] 1 WLR 1015.
12 *Scott v Scott* [1913] AC 417.
13 *Global Torch v Apex Global Management Ltd* [2013] 1 WLR 2993 (CA). The court held that hearings in public were integral to open justice and that open justice, Article 10 and Article 6 ECHR would generally trump the Article 8 rights to reputation of parties and witnesses in a civil case. The same considerations in favour of open justice would carry even greater weight in a criminal case.
14 *R v Wang Yam* [2008] EWCA Crim 269.
15 Criminal Procedure Rules 2015, rule 6.6(1).
16 Ibid, r.6.6(2).
17 Ibid, r.6.6(5).
18 Ibid, r.6.7.
19 Criminal Procedure Rules 2015, r.6.6(8).
20 Criminal Procedure Rules 2015, r.6.6(3)(c).
21 Youth Justice and Criminal Evidence Act 1999, s.25(3).
22 Ibid, s.75(3).
23 *Hodgson v Imperial Tobacco* [1998] 1 WLR 1056, per Lord Woolf at p.1072C.
24 The Government has said that the HMCTS Protocol on supply of court registers to the local press and the Criminal Procedure Rules relating to access to court documents will continue to apply to such cases, although
25 *R(Press Association) v Cambridge Crown Court* [2012] EWCA Crim 2434, para 20.
26 *R v B* [2007] EMLR 5.
27 For example individuals who posted on social network websites revealing the identity of a victim of rape by the former footballer Ched Evans were convicted of offences under this provision. See e.g. www.theguardian.com/uk/2012/nov/05/ched-evans-rape-naming-woman
28 *R(Press Association) v Cambridge Crown Court* [2012] EWCA Crim 2434, paras 15-17 .
29 It is a defence to an offence of publishing identifying matter under s.5 of the Sexual Offences (Amendment) Act 1992 to show that the complainant gave written consent to the publication: see s.5(2).
30 Ibid, s.1(4).
31 "Report of the Advisory Group on the Law of Rape" (The Heilbron Committee), Cmnd. 6352, paragraphs 168-172. As the purpose of the anonymity provision is to encourage complainants in sexual offences cases to come forward, it would be inconsistent with the statutory purpose if dropping a sexual offence charge during the course of proceedings had the effect of removing anonymity. In addition, any interpretation that anonymity automatically falls away in such circumstances creates problematic conflicts e.g. it could lead to sexual offences charges being maintained in order to ensure continued anonymity, in circumstances where dropping the charge (e.g. in a negotiated plea) was in the interests of justice.
32 Ibid, s.3.
33 Ibid, s3(3).
34 Criminal Procedure Rules, rule 15.1.

35 Criminal Procedure and Investigations Act 1996, s.37; Criminal Justice Act 1987, s.11.
36 Crime and Disorder Act 1998, Schedule 3.
37 The new regime began in specific local justice areas on 18 June 2012 and was extended to the whole country on 28 May 2013 by the Criminal Justice Act 2003 (Commencement No 31 and Saving Provisions) Order 2013/1103.
38 Children and Young Persons Act 1933, s.49(2)
39 The UN Convention on the Rights of the Child 1989 has been ratified by the United Kingdom and applies to all children under the age of 18. Article 40(2)(b)(vii) entitles every child 'accused of having infringed the penal law… [t]o have his or her privacy fully protected at all stages of the proceedings.'
40 The UN Standard Minimum Rules for the Administration of Justice 1985 (the Beijing Rules) are not binding. Rule 8 invites States to protect the privacy of defendants and offenders under 18. In particular, rule 8.1 indicates the 'juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling' and rule 8.2 indicates 'no information that may lead to the identification of a juvenile shall be published'.
41 *McKerry v Teesdale and Wear Valley Justices* [2001] EMLR 5, per Lord Bingham CJ at [12] to [16].
42 *McKerry v Teesdale and Wear Valley Justices* [2001] EMLR 5, per Lord Bingham CJ at [13] and *ZH (Tanzania) v Secretary of State for the Home Department* 2011 UKSC 4; [2011] 2 AC 166; [2011] 2 WLR 148, per Lord Kerr at [46].
43 *McKerry v Teesdale and Wear Valley Justices* [2001] EMLR 5, per Lord Bingham CJ at [17].
44 *McKerry v Teesdale and Wear Valley Justices* [2001] EMLR 5, per Lord Bingham CJ at [17].
45 *McKerry v Teesdale and Wear Valley Justices [2001]* EMLR 5, per Lord Bingham CJ at [17].
46 Children and Young Person's Act 1933, s.49(4B).
47 Criminal Procedure Rules 2015, r.6.2(3).
48 Criminal Procedure Rules 2015, r.6.2(3).
49 In *R v Clerkenwell Metropolitan Stipendiary Magistrate, ex parte The Telegraph Plc* [1993] QB 462, May LJ held at p.462 that a court contemplating making a s.4(2) order should receive assistance from those who would, absent the order, have a right to report the proceedings and that the media is "the best qualified to represent that public interest in publicity which the court has to take into account in performing any balancing exercise which has to be undertaken."
50 Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which came into force on 12 March 2015, provides that following commencement of that provision fines which would, on summary conviction, have been punishable by a maximum fine at Level Five on the Standard Scale (£5,000) shall in future be punishable by a fine of any amount. As pointed out in MOJ Circular No 2015/02 at para 32, courts will continue to set fines according to the seriousness of the offence and the means of the offender.
51 This change in the law follows the criticisms made by Sir Brian Leveson in *JC and RT v Central Criminal Court* [2014] EWHC 2041, where he called for urgent reform to address the anomaly that a child or young person who was the subject of a s.39 CYPA order lost anonymity when they reached the age of 18, while adults who obtained orders under s.46 of the Youth Justice and Criminal Evidence Act 1999 could be granted life-long anonymity
52 This change follows the judgment of Mr Justice Tugendhat in *MXB v East Sussex Hospitals Trust* [2012] EWHC 3279 (QB), where he held that s.39 CYPA only applied to reports of court proceedings in newspapers and broadcast services and did not cover online publications. The same finding was made by Sir Brian Leveson in *JC & RT v Central Criminal Court* [2014] EWHC (1041). This deficiency was remedied by an amendment to s.39 CYPA in s.79(7) of the Criminal Justice and Courts Act 2015, widening the definition of publication in s.39.
53 *R v H* [2015] EWCA Crim 1579, per Treacy LJ at [8].
54 http://www.cps.gov.uk/legal/p_to_r/reporting_restrictions/
55 *R v H* [2015] EWCA Crim 1579, per Treacy LJ at [7].
56 *R v Central Criminal Court ex parte W* [2001] 1 Cr.App.R. 2 (and the cases cited therein).
57 The UN Convention on the Rights of the Child 1989 has been ratified by the United Kingdom and applies to all children under the age of 18. Article 40(2)(b)(vii) entitles every child 'accused of having infringed the penal law…[t]o have his or her privacy fully protected at all stages of the proceedings.'

58 The UN Standard Minimum Rules for the Administration of Justice 1985 (the Beijing Rules) are not binding. Rule 8 invites States to protect the privacy of defendants and offenders under 18. In particular, rule 8.1 indicates the 'juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling' and rule 8.2 indicates 'no information that may lead to the identification of a juvenile shall be published'.
59 *R (Y) v Aylesbury Crown Court* [2012] EWHC 1140 (Admin), per Hooper LJ at [35] to [36].
60 *R (Y) v Aylesbury Crown Court [2012]* EWHC 1140 (Admin), per Hooper LJ at [35] and ZH (Tanzania) v Secretary of State for the Home Department 2011 UKSC 4; [2011] 2 AC 166; [2011] 2 WLR 148, per Lord Kerr at [46].
61 *R(A) v Lowestoft Magistrates' Court* [2014] 1 WLR 1489, per Kenneth Parker J at [10].
62 *R v H [2015]* EWCA Crim 1579, per Treacy LJ at [8].
63 *Ex parte Crook* [1995] 1 WLR 139.
64 *R(Y) v Aylesbury Crown Court* [2012] EWHC 1140 (Admin), per Hooper LJ at [44].
65 *R(Y) v Aylesbury Crown Court* [2012] EWHC 1140 (Admin), per Hooper LJ at [42].
66 *R(Y) v Aylesbury Crown Court* [2012] EWHC 1140 (Admin), per Hooper LJ at [19].
67 *R(Y) v Aylesbury Crown Court* [2012] EWHC 1140 (Admin), per Hooper LJ at [46].
68 *R v Inner London Crown Court ex parte Barnes* [1995] Times, 7 August.
69 *R(Y) v Aylesbury Crown Court* [2012] EWHC 1140 (Admin), per Hooper LJ at [46].
70 Criminal Procedure Rules 2015, r.6.4(3)(e).
71 *ITN News v R* [2013] 2 Cr.App.R. 22, para 29.
72 Criminal Procedure Rules 2015, r.6.4(3)(f).
73 See Youth Justice and Criminal Evidence Act 1999, s.46(4).
74 See Youth Justice and Criminal Evidence Act 1999, s.46(8).
75 *ITN News v R* [2013] 2 Cr.App.R. 22, para 26.
76 Serious Organised Crime and Police Act 2005, s.75(2)(b).
77 Ibid, s.75(3).
78 *Re Trinity Mirror* [2008] 2 Cr.App.R. 1, CA.
79 *Re Carlin's Application for Judicial Review* [2013] NICA 40, para 4.
80 *AG v Leveller Magazine* [1979] AC 440.
81 *R v Marines A, B, C, D & E* [2013] EWCA Crim 2367, para 84.
82 *Evesham Justices ex parte McDonagh* [1988] QB 553.
83 *R v Dover JJ ex parte Dover District Council* 156 JP 433, DC.
84 *Crawford v DPP, The Times*, 20 February 2008, *R v Marines A, B, C, D & E* [2013] EWCA 2637.
85 *Osman v United Kingdom* [1998] 29 EHRR 245, para. 116.
86 *In re Officer L* [2007] 1 WLR 2135.
87 *R(M) v The Parole Board* [2013] EWHC 141 (Admin).
88 *Re Trinity Mirror* [2008] 2 Cr.App.R. 1, CA (and any such injunction ought not restrain the publication of the defendant's name or nature of his/her conviction, on the basis that his/her children would thereby be harmed).
89 *R v L* [2002] EWCA Crim 641; R v Marines A, B, C, D & E [2013] EWCA 2637.
90 *Independent Publishing Co Ltd v AG of Trinidad and Tobago* [2005] 1 AC 190.
91 *Galbraith v Her Majesty's Advocate,* High Court of Justiciary, 7.9.2000, adopted by the Court of Appeal in R v B [2007] EMLR 5.
92 *R v B* [2007] EMLR 5. (A case where the DPP supported the media's appeal against reporting restrictions imposed in a terrorism case.)
93 *Ex parte the Telegraph Group plc* [2001] 1 WLR 1983.
94 *Application for leave to appeal by MGN Limited* [2011] EWCA Crim 100, para 15.
95 *Re Belfast Telegraph Newspapers Ltd's Application* [1997] NILR 309..
96 *Re Times Newspapers Ltd* [2008] 1 WLR 234.
97 *Application for leave to appeal by MGN Limited* [2011] EWCA Crim 100, para 23.
98 *R v Horsham Justices, ex parte Farquharson* [1982] 1 QB 762, R v B [2007] EMLR 5.
99 *R v B* [2007] EMLR 5, para. 25.
100 *R Dunlop* [2006] EWCA Crim 828.
101 See s.58(5) Criminal Procedure and Investigations Act 1996
102 The Home Office Circular also provides guidance to court staff on: the prompt notification of the media when an order has been made; the display and content of notices on court premises and the availability of more detailed information; the entry into the court register of the dates on which the order commences and ceases to have effect; its statutory basis; whether interim or final; names of the defendant and the third party protected; and the derogatory assertions.

103 See Anti-social Behaviour, Crime and Policing Act 2014, s.17.
104 https://www.courtserve.net/
105 Home Office Circular 80/1989.
106 Criminal Procedure Rules 2015, r.5.8(9)-(11).
107 See http://www.lawcom.gov.uk/project/contempt-of-court-court-reporting/. While the recommendation of a reporting restriction website is very welcome there seems to be no good reason in principle why such a website should be restricted to s.4(2) orders, as the same difficulties regarding accessibility and notification apply to all discretionary reporting restrictions.
108 *R v Marines A, B, C, D & E* [2013] EWCA Crim 2367.
109 https://www.cps.gov.uk/publications/agencies/mediaprotocol.html
110 *R v Felixstowe Justice ex p Leigh* (1987) QB 582; R v Evesham Justices ex p McDonagh (1988) 2 WLR 227.
111 *Re Trinity Mirror* [2008] 2 Crim.App.R. 1.
112 Practice Direction: Committal for Contempt of Court – Open Court, 26 March 2015.
113 Criminal Procedure Rules 2015, r.6.10.
114 See ibid, r.6.9.
115 See Criminal Justice Act 1925, s.41.
116 Court of Appeal (Recording and Broadcasting) Order 2013, SI 2013/2786.
117 See Supreme Court Practice Direction 8, paragraph 8.17.1.
118 *Att.Gen. v Associated Newspapers* [1994] 2 AC 238.
119 Press Complaints Commission Code of Practice; OFCOM Code; BBC Editorial Guidelines.
120 Section 39(3) was introduced by s.79(7) of the Criminal Justice and Courts Act 2015.
121 *R v Jolleys; Ex parte Press Association* [2013] EWCA Crim 1135, paras 12-13; cf a case brought "in respect of" a child, which may be sufficient for s.39: *R(A) v Lowestoft Magistrates' Court* [2013] EWHC 659 (Admin), paras
122 *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593.
123 *R v Jolleys; Ex parte Press Association* [2013] EWCA Crim 1135, para 19.
124 *Ex p. Godwin* [1992] QB 190, 94 Cr.App.R. 34 (CA).
125 Ibid.
126 *R v Central Criminal Court ex parte W, B and C* [2001] 1 Cr.App.R 7.
127 *Ex parte Crook* [1995] 1 WLR 139.
128 *R v Inner London Crown Court ex.p.B* [1996] COD 17, DC.
129 *R(Y) v Aylesbury Crown Court* [2012] EWHC 1140 (Admin).
130 *Briffett v CPS* [2002] EMLR 12.
131 See e.g. *R(A) v Lowestoft Magistrates' Court* [2014] 1 WLR 1489 at [24]-[26].
132 *R v Central Criminal Court ex parte S* [1999] 1 FLR 480, DC.
133 *JC & RT v Central Criminal Court* [2014] EWHC (1041) (Divisional Court).