LIBERTY

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Liberty response to the Home Affairs Committee consultation on anonymity for those accused of sexual crimes

February 2003

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Background

1. 1 Complainants in rape cases have been given anonymity since 1976 when S.4 of the Sexual Offences (Amendment) Act of that year introduced prohibitions against publication of any matter which could lead to their public identification. Subsequent amendments to the Act have extended this protection to both female and male complainants in the wider classification of 'rape offences', the protection beginning from the moment the allegation is made and extending indefinitely. .

1.2 'Anonymity' is a misnomer in that the name and details of the complainant are known to the defendant and the court, and the prohibition is against press publication of information which could identify the complainant to the public at large. The anonymity is not absolute, in that under S.4 (3) of the 1976 Act the trial judge may remove the restriction if he considers it is in the public interest to do so. S.3 of the Sexual Offences (Amendment) Act 1992 provides that anonymity can be displaced when publicity will induce witnesses to come forward, and the defendant's defence would be substantially prejudiced without this. Such directions are rarely made, but preserve the principle of open justice where it is necessary to over ride the public interest in victims being anonymous.

1.3 The principle of anonymity was introduced as a result of the Heilbron Report (Report of the Advisory Group on the Law of Rape: Cmnd 6352, December 1975) The precedent for anonymity came from blackmail cases, where orders prohibiting the publication of the complainant's name and details were traditionally made under the Court's discretionary power at common law – the purpose of anonymity was to encourage women to

come forward and report rape, without the additional distress of private details being generally publicized. The report said,

> ‘ we are fully satisfied that if some procedure for keeping the name of the complainant out of the newspapers could be devised, we could rely on more rape cases being reported to the police, as women would be less unwilling to come forward if they knew there was hardly any risk that the judge would allow their name to be disclosed’. (para 154)

1.4 The Heilbron committee considered whether the defendant should also be anonymous and concluded, forcefully, that he should not be. At para 177,

> ‘ the reason why we are recommending anonymity for the complainant is not only to protect victims from hurtful publicity for their sake alone, but in order to encourage them to report crimes of rape so as to ensure that rapists should not escape prosecution. Such reasoning cannot apply to the accused. The only reason for giving him anonymity is the argument that he should be treated on an equal basis. We think it erroneous to suppose that the equality should be with her – it should be with other accused persons and an acquittal will give him public vindication.’

1.5 Despite the recommendations of the Heilbron Report, the 1976 Act did include anonymity for the defendant in cases of rape, introduced by concessionary amendment during the debate stage. This was removed by S.158 of the Criminal Justice Act 1988 following a recommendation by the Criminal Law Revision Committee (Fifteenth Report, Sexual Offences, Cmnd 9213, April 1984) The CLRC, which approved of the Heilbron proposals, recommended that defendants’ anonymity be removed. They found there was no reason in principle why rape should be distinguished from other offences, concluding at para 2.92,

'the 'tit for tat argument' – that the man should be granted anonymity because the woman has it – is not in our opinion valid despite its superficial attractiveness'

Submissions

2.1 Liberty accepts the principle of anonymity for complainants in rape or other serious sexual offences[1] is justifiable. The disparity between the numbers of rapes that apparently occur each year and the very low number of convictions by the courts demonstrates that the criminal justice system is failing the victims of rape. In order to ensure that those who are raped feel able to report this to the police victims should retain their right to anonymity. Liberty agrees that the protection from publicity encourages victims to report the crime.

2.2 Liberty does not support the extension of this principle to defendants. The parties in a rape offence are not 'equal' in the sense that they both require the protection of anonymity: the public interest in encouraging complainants to give evidence permits a departure from the general rule that court proceedings are truly public hearings. There is no equivalent public interest in permitting others to remain anonymous. Liberty considers that the original arguments as outlined above continue to be valid, and that the public interest in open justice over rides the 'tit for tat' argument. Trials should take place in public, and the press should be able to report them in full. The rights of the public to scrutinize the criminal justice system, even where the parties themselves may not welcome it, is a fundamental protection which should not be eroded.

2.3 The importance of this cannot be over stated and is a fundamental provision of Article 6 of the Convention on Human Rights: the right to a fair and public hearing open to the scrutiny of the press ought not to be

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[1] In the Sex Offences Bill the offence of 'Assault by penetration' (Clause 3) for example is of comparable seriousness.

limited unless there is an overwhelming public interest in so doing. The exceptions to the public nature of a trial contained within Article 6(1),

> 'the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of parties so require or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

should not be extended to include anonymity of a defendant who is, in principle, in no different position from any other innocent citizen facing a serious charge.

2.4 Liberty does not consider that the principle of equality of arms contained within Article 6 is violated by any perceived 'unfairness' caused by the disparity in anonymity in such cases. The defendant is not put at a disadvantage *in the conduct of his trial* by the press being unable to report identifying details of the complainant. The identity of the complainant is known to him and to the court, and he is not prevented from any legitimate conduct of his defence by the anonymity of the accuser. As far as the jury is concerned, the complainant and defendant are in the same position within the court.

2.5 Liberty understands that there may be a public perception of apparent 'unfairness' where a defendant has been acquitted of the charge, the publicity attending the trial has been extensive and detailed, and the complainant continues to be protected by anonymity. However, where the acquittal can properly be seen, in the words of the Heilbron report, as a 'vindication' of the defendant's innocence, perceptions of unfairness are misconceived. Where the public perception is or might be that 'there is no smoke without fire', the defendant in a rape offence is in no different

position from any other defendant who has faced trial where there has been extensive publicity of the facts.

2.6 Liberty considers that arguments based on 'no smoke without fire' are not strong enough to justify further limitations on the right of the press to report trials – the answer to such argument is of course that the presumption of innocence under Article 6(1) provides defendants with the protection from innuendo that is required, and that a respect for the integrity of the jury system and its decisions should be positively encouraged.

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