Written Submission on the Children (Care and Justice) (Scotland) Bill

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1. This submission focuses exclusively on the new reporting restrictions proposed in sections 12 and 13 of the Children (Care and Justice) (Scotland) Bill. These provisions will establish a new statutory framework providing for the automatic anonymity of children who are accused of crime, victims of crime, or witnesses of crime, updating the existing reporting restrictions set out in section 47 of the Criminal Procedure (Scotland) Act 1995. While the Scottish Government's decision to recast Scots law's outdated reporting restrictions in criminal cases involving children is welcome, we believe there are at least six aspects of this element of the Bill which can and should be improved by Parliament.

Background: Campaign for Complainer Anonymity (CCA)

2. In September 2020, we co-founded the Campaign for Complainer Anonymity at Glasgow Caledonian University. Working with our LLB students, we have been researching legal approaches to reporting restrictions in over twenty different common law jurisdictions and how these have evolved in response to the social media age.[1] Our work on anonymity provisions has been expressed in a number of academic papers considering different legal and policy dimensions of reporting restrictions involving adults, children and young people, including how Scots law compares to England and Wales, international comparisons, and exploring public attitudes towards reporting restrictions.[2] In our submission to the Scottish

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[1] More information about the work of the Campaign for Complainer Anonymity can be accessed here: https://www.caledonianblogs.net/campaignforcomplaineranonymity/.

[2] A Tickell and S Stevenson-McCabe (2023) "Interpreting sexual offence verdicts: public attitudes to complainer anonymity and the "not proven" debate" *Edinburgh Law Review* 27(1) 95 – 104; A Tickell (2022) "How should complainer anonymity for sexual offences be introduced in Scotland? Learning the international lessons of #LetHerSpeak" *Edinburgh Law Review* 26(3) 355 – 389; A Tickell (2020) "Why don't sexual offence complainers

Government's *Improving victims' experiences of the justice system* consultation, we recommended that the legal rules governing child anonymity in criminal cases should be revisited.[3] We therefore welcome this opportunity to participate in the Committee's scrutiny of these important reform proposals.

3. Our research has highlighted the critical importance of anonymity laws having clear and workable thresholds establishing when reporting restrictions **begin**, when they **end** – and **who decides**. Our work has also underscored the importance of legislators adopting a realistic approach to how information may be published and shared using social media by accused people, complainers, witnesses of crime, media accounts, and members of the public. While reporting restrictions are often put in place by the law and courts to protect the **privacy and dignity** of their beneficiaries, the law must also recognise that some people who witness or experience crime will choose to share their experiences with the public – or a section of the public. It is critical, therefore, that legal frameworks are adopted which **respect and uphold the autonomy** of the intended beneficiaries of reporting restrictions, and do not penalise them either by unduly limiting, criminalising, or imposing high legal, economic or social costs on their ability to publicly communicate their experiences if they freely choose to do so.

4. As currently drafted, we do not believe sections 12 and 13 of this Bill strike the right balance between these interests.

Reporting restrictions in criminal cases involving children: the current law

5. In criminal cases, section 47 of the Criminal Procedure (Scotland) Act 1995 currently provides that "no newspaper report" or radio or television report "of any proceedings in a court shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of any person under the age of 18 years of age" who is either a child **accused** in a criminal case, or a child **witness** in a case involving an accused person who is under 18.[4] This includes photographs

have a right to anonymity in Scotland?" *Edinburgh Law Review* 24(3) 427 – 434. Open access versions of these papers are accessible at: https://researchonline.gcu.ac.uk/en/persons/andrew-tickell.

[3] A Tickell and S Stevenson-McCabe (2022) accessible here: https://consult.gov.scot/justice/victimsconsultation/consultation/view_respondent?uuId=529269698

[4] Criminal Procedure (Scotland) Act 1995, s 47(1).

of a relevant child "in a context relevant" to proceedings.[5] Where the accused person is 18 or over, section 47 gives judges in criminal cases **discretion** to restrict reporting of the identity of individual child witnesses – but there is no automatic right to anonymity.[6]

6. Section 47 also establishes circumstances in which reporting restrictions can be set aside. "If it is satisfied that it is in the public interest so to do," the court may direct that these reporting restrictions can be disapplied "at any stage of the proceedings."[7] As currently framed, the 1995 Act also empowers the Secretary of State to set aside any child reporting restrictions by order "after completion of the proceedings."[8]

7. The courts have held that section 47 extends only to "reports of any proceedings in a court." It therefore does not prohibit media identification of a child who has been arrested and charged with an offence. In the *Procurator Fiscal, Aberdeen v Aberdeen Journals Ltd*, for example, the *Press and Journal* newspaper was prosecuted for publishing a report identifying a 15-year old and confirming he had been arrested and charged with murder.[9] The Appeal Court held this news report did not breach the criminal reporting restrictions, notwithstanding the fact it wholly defeated the policy aims of section 47 that children accused and awaiting trial for crimes should not be identified. This produces a perverse situation in which it is lawful to identify a child who had been arrested and charged *before* their criminal trial, but not during the trial itself.

8. As the Scottish Government's *Policy Memorandum* identifies, the current law is problematic for several reasons. First, the language of section 47 is based on outdated assumptions about the publishing environment, failing to take into account the reality of modern communication beyond traditional broadcasters and print media. In the social media age – where everyone with an iPhone, information and thumbs is a publisher with potentially global reach – reporting restrictions

[5] Criminal Procedure (Scotland) Act 1995, s 47(2).
[6] Criminal Procedure (Scotland) Act 1995, s 47(3)(a).
[7] Criminal Procedure (Scotland) Act 1995, s 47(3)(b).
[8] Criminal Procedure (Scotland) Act 1995, s 47(3)(c).
[9] 2005 HCJAC 79.

should extend to any public communication, instead of being limited to particular mediums of communication.

9. Second, the 1995 Act currently adopts an inconsistent approach to the protection of the privacy and dignity of child witnesses and victims depending on the age of the alleged perpetrator. The idea that children who experience or witness crime at the hands of other children should benefit from automatic reporting restrictions – but that children victimised or witnessing crimes committed by adults should not – is an irrational distinction which fails to appreciate the paramount interest of children testifying in court.

10. Third, as currently framed, the reporting restrictions in the 1995 Act cannot be extended beyond the eighteenth birthday of a child accused, witness or complainer – even if the circumstances suggest an extension of reporting restrictions would be warranted or even necessary to support a child's welfare, ongoing development, rehabilitation or recovery after their involvement in the criminal justice process.

11. Fourth, the current restrictions fail to protect the identities of children from being disclosed in the media from the very beginning of their interactions with the criminal justice system, creating artificial opportunities for them to be lawfully identified in connection with criminal cases at early stage.

The Children (Care and Justice) Bill

12. The Scottish Government's proposals in section 12 and 13 of the Bill address a number of these important concerns about the current framework for child anonymity. However, we argue the Committee should consider six key areas where sections 12 and 13 could be improved. In some areas, we recommend provisions should be removed from the Bill. In others, we suggest additional provisions are needed. Our key recommendations are as follows:

    1. There should be **greater legal certainty** about when reporting restrictions **begin** to apply to child suspects, witnesses and suspected victims.
    2. The reporting restrictions in the Bill should be amended to recognise **the right of children and young people to waive their anonymity** without committing a criminal offence.

3. The Bill should be amended to allow courts to **extend reporting restrictions for child complainers and witnesses** – as well as children convicted of crime.
4. The **Scottish Government's** power to dispense with reporting restrictions should be **removed** from the Bill.
5. The **maximum penalty** for violating these reporting restrictions should be reviewed.
6. Reporting restrictions in cases involving children **should be updated in civil as well as criminal cases** to bring greater consistency to the law as a whole.

The balance of our submission expands on each of these recommendations in turn.

Recommendation 1: There should be greater legal certainty about when reporting restrictions begin to apply.

13. Our anonymity research highlights the importance of clear and legally foreseeable **triggers** for reporting restrictions coming into force. This is important not only from the perspective of children who may be subject to reporting – but also for the wider media, who need clear legal frameworks to work within alongside their broader professional regulations and ethical obligations. We think the **legal certainty** of the trigger for reporting restrictions coming into effect in section 106A of the Bill could be improved.

14. As currently framed, the reporting restrictions in section 106A of the Bill will trigger if a child is "**suspected**" to have committed, or having witnessed, or been a victim of crime. As introduced, the Bill does not specify whose "suspicion" causes these reporting restrictions to crystallise. Clearly a private individual suspecting a child has committed a crime could not credibly give rise to reporting restrictions on third parties unaware of their private suspicions. The Bill seems to presuppose that the suspicion giving rise to restrictions will arise in the context of official investigations by Police Scotland. Operationally, we are not clear whether Police Scotland would be prepared to disclose this kind of sensitive information about potential witnesses and victims to media agencies reporting a case.

15. Drawing on our wider anonymity research, different jurisdictions adopt different approaches to trigger events giving rise to reporting restrictions, including the first

disclosure of a potential offence to a police officer. This may be the kind of factual information – as opposed to the presence or absence of subjective "suspicion" – which could represent a more apt and objective starting point for reporting restrictions to apply, particularly from the perspective of media reporting of crime, which will often involve press interaction with the police to determine – amongst other things – whether a case is "active" for the purposes of the Contempt of Court Act 1981.

Recommendation 2: Reporting restrictions should be amended to recognise the right of children to waive their anonymity without committing a criminal offence.

16. Children's rights are properly concerned not only with the protection of the dignity and privacy of children and young people – but also a recognition of their **legitimate autonomy and rights to free expression**. On this basis, we believe the Bill should be amended to make clear that a child who makes a public disclosure of their involvement in a criminal case as a witness, victim or accused person does not commit a criminal offence under the proposed reporting restrictions.

17. In addition to protecting children from potentially adverse publicity and so safeguarding their ability to develop and mature in the wake of their participation in court cases, the UN Convention on the Rights of the Child also stresses that the "paramount interests" of children include assuring to a "child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."[10] In this context, this means recognising the autonomy of children and young people and establishing legal frameworks which give appropriate effect to that autonomy.

18. The Bill as introduced adopts a paternalistic approach to reporting restrictions which may be appropriate in many cases. Missing from these anonymity amendments is any recognition of the autonomy of children and young people

[10] UN Convention on the Rights of the Child (1989), Article 12(1).

subject to these restrictions, some of whom may wish to speak or otherwise communicate publicly about criminal cases they are or have been involved in.

19. If the Bill is enacted in its current form, a 16-year-old who shared a Facebook post with their circle of friends – or a TikTok video or YouTube clip more widely, discussing their experiences as a witness in a criminal case – would be committing a criminal offence unless they first sought permission of the court to set aside the reporting restrictions in their case. Complainer anonymity campaigns internationally have identified that requiring victims, witnesses – or here, potentially accused people – to return to court to receive judicial sanction to talk about their own experiences can impose additional costs on decisions to disclose, including economic, emotional and social costs, as well as making witnesses and victims responsible for identifying that a legal process is necessary to talk publicly about their own experiences, and potentially punishing them for failing to do so. We do not believe police or prosecutorial discretion can adequately address this fundamental rights issue.

20. The approach adopted in the Australian state of Victoria to children and young people waiving their anonymity could be helpful inspiration for amending the Bill. Under the Victorian framework, the crime of identifying a child concerned in a criminal case "does not apply to a victim of an alleged offence" who "publishes any matter that contains any particulars likely to identify that victim."[11] This means children can lawfully share information about their involvement in a criminal case without instructing solicitors to secure prior judicial authorisation to do so. Building a provision of this kind into the Bill would better recognise the realities of modern communication by young people, better uphold their autonomy, and eliminate the real risk of children being criminalised or otherwise burdened by reporting restrictions originally intended to uphold their dignity and privacy.

21. We also believe the law should recognise that third parties may innocently share these kinds of disclosures by children and young people in good faith on social media, and should be able to do so free from the risk of criminalisation. To extend the hypothetical example described above – imagine a relative or friend shared,

[11] Judicial Proceedings Reports Act 1958 s 4(1BA).

reposted, or retweeted a social media post by the 16-year-old describing their experience as a witness or complainer in court. Imagine they expressed supportive sentiments and said they were proud of them. Under the Bill as drafted, these secondary publishers would also be committing a criminal offence. We believe these issues should be regulated for on the face of the Bill, discriminating between secondary publishers sharing materials in good faith, and bad faith disclosures of children's identities.

Recommendation 3: The Bill should be amended to allow courts to extend reporting restrictions for child complainers and witnesses – as well as children convicted of crime.

22. The Bill should be amended to extend the rights of child witnesses and victims of crime to seek **extended reporting restrictions** in their particular circumstances. Section 47B of the Bill proposes a framework allowing the court to "extend periods of restriction on reporting of proceedings" from the basic starting point that reporting restrictions will fall where a convicted child, a complainer or witness turns 18. Under section 47B(3) as drafted, these reporting restrictions may be extended by the court for a convicted child, either on its own motion, on application by the prosecutor, or "a person accused of an alleged offence to which the proceedings relate."

23. As currently drafted, the reporting restrictions protecting the anonymity of child witnesses, complainers and children accused and convicted of crime will automatically fall either when they turn 18 or the criminal proceedings they are involved in are "disposed of" – whichever is later. In terms of **children convicted of crime**, the Bill introduces a new procedure in section 47B to allow the court to extend reporting restrictions, potentially for the child's whole lifetime. As currently drafted, no equivalent provision applies to reporting restrictions for **child victims and child witnesses of crime** who may lawfully be identified after they turn 18 or proceedings conclude. The Bill contains no legal mechanism for the anonymity of victims or witnesses of crime to be extended beyond the later of their 18th birthdays or the conclusion of proceedings.

24. There is a powerful argument for the section 47B power to be extended to witnesses and complainers granted anonymity under s.47(1A) of the Bill. While the Scottish Government intends to deal with sexual offences under a bespoke regime in the anticipated Criminal Justice Bill, it is easy to envisage circumstances in which the victims of non-sexual crimes during childhood – including crimes of violence, abuse and neglect – may be justifiably anxious to secure legal protection of their anonymity on a longer, or even lifelong, basis. As drafted, the provisions fail to recognise that some child witnesses and victims may have a pressing and justified interest in ensuring they are not identified in connection with a criminal case after they turn 18. Additional provisions should be introduced to the Bill, empowering the courts to extend reporting restrictions – where justified – to child witnesses and victims.

Recommendation 4: The Scottish Government's power to dispense with reporting restrictions should be removed from the Bill.

25. The Bill should be amended to remove the Scottish Government's power to **dispense with reporting restrictions** in cases involving children. The Bill envisages a continuing if residual legal role for the Scottish Government in deciding whether reporting restrictions continue to be justified in cases involving children. We believe the courts are the only appropriate forum for making decisions on whether reporting restrictions in cases involving children continue to apply or are set aside. Judicial decision-making on reporting restrictions – as envisaged by the Bill – will benefit from the reasoned submissions of interested parties, and new scope for the first-instance decision to be reviewed on appeal.

26. Scottish Government decisions, although subject to judicial review in the Court of Session, would have none of these advantages. While the Criminal Procedure (Scotland) Act 1995 currently gives the Secretary of State authority to dispense with reporting restrictions in respect of a child accused, complainer or witness qualifying for them,[12] the Scottish Government have not explained why they believe these powers should be retained by ministers. We have concluded they are not

[12] Criminal Procedure (Scotland) Act 1995, s 47(3)(c).

justified, and recommend the Scottish Ministers' power to dispense with reporting restrictions in cases involving children should simply be **removed from the Bill.**

27. This would leave a judicial framework of decision-making on whether and for how long reporting restrictions apply in cases involving children, with scope for an appeal. This approach would be more consistent with the broad trend of the European Convention on Human Rights jurisprudence, which has continued to reinforce the crucial distinction between the proper roles of the executive and the judiciary in determining fundamental rights questions in individual cases.

Recommendation 5: The maximum penalties for violations of reporting restrictions in cases involving children should be reviewed.

28. Fifth, we think the Committee should re-consider whether the **maximum penalty** envisaged for violating any of these reporting restrictions – a fine of just £2,500 – represents adequate deterrence or sanction for publishing information about a child witness, victim or accused, reflecting on the potential commercial and social media interest in identifying some children who are victims, accused of, or witness serious crime. Particularly in cases involving very serious offending, we know there can be considerable press and public interest in the identities of children accused of crime, and continuing pressure on reporting restrictions prohibiting their identification during and after trial.

29. The Scottish Government's *Policy Memorandum* does not discuss why they believe the maximum penalty for wilfully disclosing the identity of a child protected by reporting restrictions should be a fine on level 4 on the standard scale after summary prosecution – though this is currently the maximum penalty for breaching children's reporting restrictions in criminal cases,[13] civil cases,[14] fatal accident inquiries,[15] and children's hearings.[16]

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[13] Criminal Procedure (Scotland) Act 1995, s 47(5).
[14] Children and Young Persons (Scotland) Act 1937, s 46(2).
[15] Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016, s 22(6).
[16] Children's Hearings (Scotland) Act 2011, s 182(2).

30. We believe the Committee should explore why this extremely low level of financial penalty has been assessed as adequate for violations of the reporting restrictions set out in the Bill. Given the much broader range of potential publishers the revised reporting restrictions will apply to if this Bill is passed – including publishers operating outside frameworks of professional regulation like the Editors' Code or OFCOM regulations – circumstances can easily be envisaged in which a commercial publisher or a social media publisher with a financial interest in publishing explosive copy identifies a social and economic incentive to name or photograph a child whom the law does not currently permit to be identified, and nevertheless decides to disclose their identity.

31. In terms of potential sanctions – and the extent to which a publisher's decision-making on making an unlawful disclosure of a child's identity may be informed by the legal **consequences** of doing so – our impression is that a £2,500 fine represents an very low bar inhibiting publication. Running the risk of a £2,500 fine may not only *seem* like a price worth paying for the attention or social media traction which a formally unlawful disclosure of a child's identity could bring – but in cynical financial terms, it is easy to envisage that a scoop disclosure of this kind could be even more profitable, rendering any fine of this range "just the price of doing business."

Recommendation 6: Reporting restrictions should be updated in civil as well as criminal cases to bring greater consistency to the law as a whole.

32. Finally, we believe the Bill should be treated as an opportunity not only to modernise the laws regulating publicity of children's involvement in **criminal** cases, but to update the equally outdated provisions dealing with children as **witnesses in civil cases**.

33. Reporting restrictions in **civil cases** in Scotland are currently governed by section 46 of the Children and Young Persons (Scotland) Act 1937. This provides that in relation to any civil proceedings in any court, the court may direct that "no newspaper report" shall be published including a photograph of the child or identifying – either directly or by way of jigsaw identification – a person under 17

years of age who is “concerned in the proceedings.”[17] These are a discretionary rather than automatic reporting restrictions.

34. This framework has two key problems. The age threshold used in the 1937 Act does not align with the broader framework of reporting restrictions envisaged in the Bill and used in other justice contexts. In fatal accident inquiries, for example, sheriffs may order that “no person may publish any material by which” a child “may be identified in connection with the inquiry.” This modernised provision – unlike the 1937 Act – extends not only to newspapers, but to broadcasters and other publishers, including social media publishers and defines a child “someone who has not yet reached the age of 18 years.”[18] This Bill would should take the opportunity to update these civil court provisions – recognising that in some civil proceedings it may be appropriate for a witness under the age of 18 to be anonymised, and the need for modern reporting restrictions to apply not only to the traditional news press, but also to broadcasters, and online and social media publishers.

[17] Children and Young Persons (Scotland) Act 1937, s.46(1) accessible at: https://www.legislation.gov.uk/ukpga/Edw8and1Geo6/1/37/section/46.
[18] Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016, s.40.