Criminal Justice Committee
Victims, Witnesses and Justice Reform (Scotland) Bill

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Introduction

1. This submission focuses exclusively on the proposals in **Part 6 of the Bill** to introduce automatic **anonymity for complainers in sexual and other qualifying offences**.

2. It is often assumed that victims of sexual crime *already* have an automatic right to lifelong anonymity in Scotland and that reporting restrictions backed up by criminal sanctions are already available to courts, police and prosecutors here.[1] This is currently the legal position in the rest of the UK for most sexual crime – and has been the case since 1976.[2]

3. However, **there is currently no corresponding legal right to anonymity for complainers in Scotland**.[3] While the 1992 Act does apply in Scotland – its effect is only to prohibit Scottish publishers from disclosing information likely to identify a complainant in a sexual prosecution *in England and Wales*. Scottish prosecutions are not covered, meaning that it is lawful for publishers to identify complainers in these cases – with or without their consent – unless the courts make special orders restricting publicity under the Contempt of Court Act.[4]

4. Considering the substantial and increasing volume of sexual offences (a) being reported to Police Scotland and (b) prosecuted at both Sheriff and High Court level – official data shows these

[1] There are different ways of describing the people who will benefit from reporting restrictions under the Bill. The Bill is framed in terms of "victims" – though its provisions will apply to cases where there is no prosecution, or indeed where the accused is acquitted of committing an offence against them. Scots lawyers generally describe people who testify about their experiences of crime as "complainers." Sexual violence advocacy and support services often use the language of "survivors" to describe their service users. For the avoidance of doubt, these terms will be used interchangeably in this submission to refer to anyone who says they have been the victim of a sexual or other qualifying crime. In a similar way, references to "sexual crime" in this submission should be taken to include other qualifying offences included in the Bill.
[2] Originally set out in the Sexual Offences (Amendment) Act 1976 – now the Sexual Offences (Amendment) Act 1992.
[3] In terms of the mainstream media, protecting the identities of victims of sexual offending is written into the OFCOM code and the Editors' Code. However, the evidence suggests that this ethical principle is not always upheld. The Independent Press Standards Organisation found that articles published by the *Greenock Telegraph* (2023) and *Daily Record* (2015) identified sexual offence complainers.
[4] 1981 Act, section 11.

contempt powers are seldom used, leaving the overwhelming majority of Scottish complainers unprotected.

5. Our experience suggests this legal background is not widely understood. The Scottish media routinely refers to victims of sexual offences "waiving their right to anonymity" – contributing to the impression that adequate legal regulation is already in place. The starker reality is that victims of sexual crime currently have no legal "right to anonymity" to waive under Scots Law, and must rely on press ethics, decency or restraint on social media – and seldom-made contempt orders – to prevent their identities spilling into the public domain. Section 63 of this Bill finally addresses this gap in the law.

About us

6. We launched the Campaign for Complainer Anonymity at Glasgow Caledonian University in September 2020. Working with our law students, the project aims to research **international best practice** on reporting restrictions for complainers in sexual cases, **public attitudes** to complainer anonymity in Scotland, and **raise awareness** of the need for reform.

7. Our research examines how Scots law compares with **twenty other common law jurisdictions** – including the rest of the United Kingdom,[5] Ireland, India, Singapore, Hong Kong, Canada, America, New Zealand, and Australia.[6] Our studies show that in failing to provide clear legal rules restricting publicity in these cases, Scotland is out of step not only with the rest of the UK – but also with the overwhelming majority of comparator common law jurisdictions. This supports the case for reform.

8. Our comparisons with Australia have generated particularly important insights, as a number of Australian states – including Tasmania, Victoria and Northern Territory – have recently updated their anonymity laws in the wake of the international #MeToo campaign and the domestic #LetHerSpeak movement[7] – confronting the challenges of regulating publishing in the social media

[5] A Tickell (2020) "Why don't sexual offence complainers have a right to anonymity in Scotland?" *Edinburgh Law Review* 24(3) 427 – 434. An open access versions of this paper is available here: https://researchonline.gcu.ac.uk/en/publications/why-dont-sexual-offence-complainers-have-a-right-to-anonymity-in-.

[6] 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, accessible here: https://researchonline.gcu.ac.uk/en/publications/how-should-complainer-anonymity-for-sexual-offences-be-introduced.

[7] For the background to this, see generally: https://www.letusspeak.com.au/.

age while facilitating the autonomy of victims of sexual crimes to share their stories if they choose to do so.

9. In addition to highlighting creative ways to reform Scots law in this area, the experience in these jurisdictions highlights the potential problems caused by well-intentioned reforms which have not been adequately stress-tested against reality – including extending anonymity beyond a complainer's natural life, legislating in a way which pretends social media does not exist, and introducing provisions allowing complainers to "tailor" consent to be identified by particular publishers – but not others.

10. We were able to share these findings with the Scottish Government at an early stage in the policy development of this aspect of the Bill. In our judgement, the Bill's provisions on complainer anonymity reflect the best lessons learned from this international practice – upholding the autonomy and privacy of complainers while ensuring that the updated legal framework will not result in the imposition of unnecessary legal, social and economic costs on them to secure or waive their anonymity, or create unreasonable legal expectations of social media users sharing associated media in a legitimate way. In this submission, we aim to give the Committee a practical overview of the advantages of different elements of the Bill which may not be obvious from reading its legislative language abstractly.

11. The second main empirical strand of our work explores **public attitudes** towards complainer anonymity.[8] Working with the Diffley Partnership, we commissioned a nationwide opinion poll in September 2021 on different aspects of complainer anonymity. Our results are based on a survey of 2,115 respondents from across Scotland, weighted to the population by age and gender. Our survey identified a high level of support for the principle of complainer anonymity and a degree of confusion about whether complainers already have a right to anonymity in Scots law.

12. 42% of our respondents believed that "the media can never identify people who say they have been the victim of a sexual offence." 18% "didn't know" what reporting restrictions current applied. 73% tended to agree (26%) or strongly agreed (47%) with the proposition that "people who say they have been the victim of a sexual offence should have the right to anonymity for the rest of their lives, preventing them from being identified in the media or on social media."

[8] 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, accessible here: https://researchonline.gcu.ac.uk/en/publications/interpreting-sexual-offence-verdicts-public-attitudes-to-complain.

Why complainer anonymity matters

13. Complainer anonymity can be understood as a means of protecting the **privacy** of people who disclose their experiences of sexual victimisation – but also their **autonomy** to decide whether, when and if they wish to disclose their experiences.

14. As Clare McGlynn has argued, reporting restrictions in sexual cases have traditionally been understood as serving "a dual purpose: privacy and the administration of justice."[9] Temkin argues other factors should also be taken into account in justifying automatic restrictions, including "the unaccountable stigma which attaches to sexual assault victims and does not apply to other victims of crime" and the "salaciousness of the press."[10] To this, the impact of social media must now be added.

15. Security that complainers cannot lawfully be identified without their consent secures not only an enhanced degree of privacy in connection with sexual allegations – it also de-escalates some of the social consequences of reporting sexual violence, potentially increasing the number of disclosures made to criminal justice authorities about these generally under-reported crimes.

16. However, recent Australian experience has highlighted the importance of adopting reporting restrictions which respect not only the privacy but also the **autonomy** of survivors of sexual violence. The #MeToo campaign has highlighted that making public disclosures can be empowering for survivors, help raise awareness, challenge stereotypes, and collectivise and destigmatise experiences of sexual violence.

17. It is critical that Scots law respects the legitimate autonomy of complainers in these cases and facilitates their decisions to share – or not to share – their experiences, without imposing additional legal or economic costs on going public, or by requiring survivors to undergo potentially disempowering and retraumatising court procedures to receive judicial permission to share what happened to them. Finding the right balance between these competing interests may be particularly challenging in terms of child complainers who wish to disclose their experiences. Our evidence deals first with the Bill's proposals in terms of adult complainers, before addressing the special rules for child complainers set out in section 106D.

[9] C McGlynn, "Rape, defendant anonymity and human rights: adopting a 'wider perspective" (2011) *Criminal Law Review* 3 199 – 215 at 213.
[10] J Temkin, *Rape and the Legal Process* (2002) at 306.

The Bill's proposals

18. The Bill proposes to introduce complainer anonymity by way of an amendment to the Criminal Justice (Scotland) Act 2016.[11] This takes the form of reporting restrictions which prohibit the **publication of any information "likely to lead" to a person's identification as a victim** of a sexual or other qualifying offence.[12]

19. This provision will prohibit not only the unauthorised naming or picturing of complainers but will extend to what is often described as "jigsaw" identification, criminalising the publication of indirect information about an individual which could allow them to be constructively identified. This approach is consistent not only with the courts' approach to breaches of the Contempt of Court Act,[13] but also international practice, which typically extends to the publication of any information "likely to lead to the identification of the person" involved.[14]

20. The Bill proposes that these reporting restrictions will apply during the complainer's "**lifetime**" and will only automatically cease "on that person's death."[15] We support this approach. First, it is consistent with the general legal principle than an individual's privacy and reputational rights extinguish at the end of their natural life and are not transferable. Our research suggests most comparator jurisdictions with similar reporting restrictions limit their application in this way. This approach gives journalists, court reporters, writers, biographers and historians legal certainty that if they write about a deceased person, they are not at risk of committing a criminal offence under the legislation.

21. While some jurisdictions have introduced legal rules extending reporting restrictions *beyond* the complainer's natural lifetime, these have proven much more problematic than they might superficially appear. Under Victorian law, for example, if the victim of a sexual offence did not waive their anonymity during their lifetime, it was necessary for anyone wishing to identify them **to apply and gain permission from the court**. Similar rules still apply in New Zealand. These rules mean it was a criminal offence for family members to disclose that it was their daughter, sister or partner who had been killed in the course of a sexually-motivated homicide – unless the family first applied to the court to lift reporting restrictions, paying the associated legal costs out of their

[11] Victims, Witnesses and Justice Reform (Scotland) Bill, section 63.
[12] Section 106C(1).
[13] *Murray v HM Advocate* [2022] HCJAC 14.
[14] This is the language, for example, used in Tasmanian law.
[15] Section 63(3).

own pockets, and waiting until judges had been able to consider the case before going public. Restrictions framed in this way – although notionally aimed at respecting the victim's autonomy – understandably caused considerable upset and prompted demands for legislative reform in Victoria.[16] The approach taken by the Scottish Government avoids this problem, and the secondary trauma well-intentioned but badly thought-out rules have caused elsewhere.

22. The international comparisons suggest a range of different triggering events can be used to ground the **start of this right to anonymity.** Initially, we thought that reporting an allegation to the police met these needs. However, we have now changed our minds. The proposed statutory language clarifies that it will always be unlawful to identify someone as a victim of a sexual or other qualifying offence – unless they consent, another relevant defence applies, or the court has decided to remove reporting restrictions under s.106E.

23. The Scottish Government's approach is characterised by its legal certainty, welcome simplicity and early application. No procedural steps will be required of the complainer to activate the proposed reporting restrictions. No procedural steps will be required of reporters to establish reporting restrictions apply to their publications. This approach has the advantage that no windows of time are artificially created by the law during which identifying a complainer might be lawful – as would be established, for example, if reporting restrictions commenced only after the accused person was indicted, or made their first court appearance. The Scottish Government's approach should also answer anxieties articulated by Rape Crisis Scotland that allegations which may *never* be reported to the police – or which give rise only to civil rather than criminal proceedings – should also benefit from the law's protection.

24. In terms of **qualifying offences**, the Bill is drafted more broadly than the equivalent restrictions in England and Wales – but this breadth is welcome. McGlynn and Rackley have criticised the failure to introduce anonymity rights for English and Welsh complainants in cases brought under the Criminal Justice and Courts Act 2015, which criminalises "disclosing private sexual photographs and films with intent to cause distress."[17] They persuasively argue the failure to extend anonymity to victims of image-based sexual abuse fails to recognise the significant privacy and dignity implications of these cases. We agree.

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[16] ABC News, "Government moves to protect families who want to speak about dead sexual assault victims" 3rd August 2021 accessible at: https://www.abc.net.au/news/2021-08-03/laws-to-allow-families-of-deadsexual-assault-victims-to-speak/100344416.

[17] C McGlynn and E Rackley, "Image-based sexual abuse" (2017) *Oxford Journal of Legal Studies* 37(3) 534 – 561.

25. Against this backdrop, it is very positive to see the equivalent Scottish offence of disclosing intimate images or footage without consent under the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 included this Bill – alongside other key sexual offences, and other intimate crimes including female genital mutilation, virginity testing, hymenoplasty and offences under section 1 of the Human Trafficking and Exploitation (Scotland) Act 2015.

Waiving anonymity

26. The Bill makes clear that the proposed reporting restrictions will "not prevent the person to whom the information relates from publishing information which is likely to lead to their own identification as being a victim" of sexual crime or other qualifying offence.[18] This provision means **a complainer cannot face any legal sanctions** for disclosing their own experiences of being a victim of a sexual or other qualifying offence – affording them legal certainty about their freedom to speak, subject only to the potential for their disclosures to identify other complainers.

27. In terms of third-party publishers who share information capable of identifying someone as a victim of a protected offence, the Bill proposes three key **defences**:

    a. Being **unaware** – or not having suspected or had reason to suspect – that your publication included information "likely to lead to the identification of the person as being a victim" of a qualifying offence;[19]
    b. Publishing identifying information **with an adult complainer's written consent**;[20] and
    c. A **public domain** defence, on the basis the publisher shared information about a complainer which was already in the public domain, published by another person, and there was **no reason** for the publisher to believe the complainer had **not consented** to the disclosure.[21]

28. The first two defences are in keeping with the approach to restrictions adopted internationally – and in our view the third clearly improves on existing international models, recognising the fact that social media users are likely to (a) re-publish material produced by victims themselves, and (b) share apparently legitimate third party sources which may include identifying information

[18] Section 63(4).
[19] Section 106F(5).
[20] Section 106F(3).
[21] Section 106F(4).

about the victim of a sexual offence, with little expectation that doing so may constitute a criminal offence, unaware that repetition might be problematic or require due diligence on their part to establish that disclosure of this information was and remains consensual.

29. These provisions provide safe harbour for social media publishers who share information identifying someone in good faith – perhaps by posting a link to an article published by a newspaper or broadcaster, or by sharing a TikTok video of a complainer talking about their experiences. This is extremely important in practice and will avoid incidentally criminalising people innocently sharing relevant information.

30. Framing the relevant defences in this way will avoid the costly mistakes other jurisdictions have made by limiting the scope of lawful publication to publishers who secure an anonymous complainer's explicit consent for *them* to publish the relevant information. In reforming reporting restrictions in the wake of the #MeToo campaigns, some legal systems have adopted much more convoluted rules allowing complainers to "tailor" their consent to publish identifying information about them, conditioning this consent on written consent to every particular publication, or placing even more wide-ranging restrictions on what kinds of disclosures are permitted.

31. While a legal requirement for written consent to every publication may appear to empower complainers and give them control over the narrative, experience suggests similar rules in Australia have exposed sexual assault victims to repeated, uninvited and unwelcome intrusions into their lives by media professionals undertaking the legal compliance work necessary to publish follow-up stories mentioning sometimes already high-profile victims of sexual crime.

32. Instead of maximising complainer autonomy and control over whether they are identified with their story in the media, the practical effect of this kind of rule has been that reporters end up badgering victims for repeated statements of their consent to re-publish information already in the public domain – even if their identity is already widely known.[22]

33. Under the Scottish Government's proposals, this will not be necessary and should not happen. By incorporating an innovative **public domain** defence into the Bill, these proposals neatly avoid this

[22] See: R Burgin, A Powell, A Flynn, "Why is Victoria fast-tracking reforms to sexual violence 'gag laws' and to what effect?" *The Conversation* 28 October 2020 accessible at: https://theconversation.com/explainer-why-isvictoria-fast-tracking-reforms-to-sexual-violence-gag-laws-and-to-what-effect-148905.

problem – while ensuring that bad-faith publishers sharing private information without the consent can still face legal consequences for doing so.

Identifying complainers under 18 years of age

34. In terms of complainers **under 18 years of age**, the Bill proposes (a) that it will not be a criminal offence for them to identify themselves in connection with an qualifying offence.[23] In our view, this approach is extremely positive and is consistent with the aspiration for this legislation to safeguard the autonomy of adults, children and young people, and respect their right to share their experiences in public free of the risk of any criminal sanction for doing so.[24]

35. However, under the current proposals, third party publishers wishing to publish identifying information about people under 18 must first satisfy the sheriff that the child complainer "understands" the nature of the order disapplying reporting restrictions, "appreciates" the effect of make such an order, and "gives consent" to the publication.[25] In addition to this, the proposals give the sheriff the ability to take into account any other "good reason" to refuse to dispense with reporting restrictions.[26]

36. In terms of the other jurisdictions we have examined, most impose some restrictions on the ability of children or third parties to disclose their connection to sexual offending, involving the court as a safeguard against immaturity and media manipulation of potentially vulnerable people. As drafted, the Bill's provisions seem designed to address situations where mainstream media outlets wish to identify a child complainer in connection with a criminal case – perhaps in a newspaper, other publication or broadcast.

37. In practice, however, it seems much more likely that third parties will publish material identifying a complainer under 18 years of age by *sharing* media content created by the complainer themselves on social media platforms, unaware that there may be legal restrictions applying to them doing so, or that it is a criminal offence to republish this content.

[23] Section 106C(4).
[24] This was a key point of controversy in Australia after Grace Tame discovered Tasmanian law prohibited her from publicly identifying herself with the sexual abuse she suffered. These provisions were criticised as "victim gag laws." ABC News (2019) "#LetHerSpeak: Grace Tame finally wins right to share her story of abuse" 11th August 2019 accessible at: https://www.abc.net.au/news/2019-08-12/grace-tame-speaks-about-abuse-from-schoolteacher/11393044.
[25] Section 106D(4)(a).
[26] Section 106D(4)(b).

38. Police and prosecutorial discretion may be used to address this issue – the public interest in prosecuting individuals innocently sharing content made available by the victim themselves seems likely to be elusive – but there is scope for this element of the Bill to be improved and clarified. As drafted, the Bill would criminalise a family member, friend – or stranger – who shared a child victim's social media post disclosing they were the victim of a sexual crime. They would not necessarily benefit from the **public domain** defence already discussed – as this is only available if the publisher has "no reason" to believe the complainer is under 18 years of age. The Committee may wish to consider whether this is approach is appropriate – or whether stronger legal guarantees should be given to social media users sharing a child complainer's social media posts in good faith.

39. In our judgement, perhaps the most potentially contentious aspect of this aspect of the Bill is the choice of the **age threshold** for children to waive their anonymity and allow third parties to share their experiences without resort to the supervision of the court.

40. Most of the legal systems we studied establish the threshold of 18 years of age for child victims to authorise other publishers to waive their anonymity, whether this is the national broadcaster or a single social media account. In its favour, this approach is consistent with international definitions of childhood in the criminal justice context –definitions which have increasingly shaped Scottish criminal justice legislation during the last decade under the influence of the UN Convention on the Rights of the Child.

41. Jurisdictions adopting this approach include India, New Zealand, Tasmania, South Australia, and Queensland. In England and Wales, by contrast, complainants must currently be sixteen years of age to waive their anonymity under the 1992 Act – reflecting the fact that other areas of the law recognise the autonomy and capacity for self-determination which sixteen and seventeen-year-olds can exercise. Some jurisdictions set the threshold even earlier. In New South Wales, for example, anonymity can be waived by children from the age of 14.

42. We are not children's rights specialists. Colleagues with more experience of working with children and young people in these contexts may be able to assist the Committee further in exploring which threshold seems most appropriate for Scots law.