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HOW SHOULD COMPLAINER ANONYMITY FOR SEXUAL OFFENCES BE INTRODUCED IN SCOTLAND? LEARNING THE INTERNATIONAL LESSONS OF #LETHERSPEAK

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In an earlier edition of this journal, I asked why complainers in sexual offence cases do not have the right to anonymity in Scots law.¹ Contrasted with the reporting restrictions which automatically apply to sexual cases in England, Wales and Northern Ireland, I showed that complainers in Scotland have no such rights. In Scotland, complainers must rely on seldom-made orders under the Contempt of Court Act 1981,² press ethics, and social media restraint to prevent their names and identities spilling into the public domain, whether or not they want to “go public.”

While the focus of this first article was a comparative analysis of complainer anonymity rules within the UK, expanding the circle of concern to other jurisdictions suggests that Scotland is not only out of step with the rest of the United Kingdom, but also with much of the rest of the common law world. This study has examined complainer anonymity laws in the United States of America, Canada, Australia, New Zealand, Singapore, Hong Kong, India, Bangladesh, the Republic of Ireland, England, Wales, Northern Ireland and Scotland. Unlike Scotland, the overwhelming majority of comparator jurisdictions incorporate some kind of specific general rules for sexual offence cases and the publicity which surrounds them.³ Drawing on this comparative research, this article considers a second important question: how should complainer anonymity be introduced for sexual offence cases in Scotland?

At time of writing, this is not a hypothetical question. As a result of consciousness-raising in the wake of the case of HM Advocate v Salmond, and high-profile contempt proceedings against

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¹ A Tickell, “Why don’t complainers in sexual offence cases have a right to anonymity in Scotland?” (2020) EdinLR 24(3) 427 – 434.
² Tickell (2020) at 430.
³ The language jurisdictions use to describe people who say they have been victims of sexual offences differs, as do academic conventions about how they should be described. For consistency and simplicity, in this article I will refer to people who say they have been victims of sexual crimes as “complainants” irrespective of the jurisdiction being discussed. Internationally, the language of “complainants” is more common than the Scottish usage. Using this language – instead of “victims” or “survivors” – should not be taken to imply any scepticism about whether these witnesses are testifying honestly about what they say happened to them. The comparative neutrality of the technical Scots law term of “complainer” is helpful, partly to underscore the fact that anonymity attaches to individuals who make allegations they have been victims of sexual wrongdoing, and rights to anonymity are not contingent on those allegations being proven or not proven in terms of the high standard of proof “beyond reasonable doubt.”
individuals who identified complainers in that case, a commitment to introducing complainer anonymity formed part of the Scottish National Party, Liberal Democrat, Scottish Conservative, and Scottish Green manifestos for the Holyrood election of 2021. Enshrining anonymity in law was also supported by the Dorrian review on improving the management of sexual offence cases in Scotland in the spring of 2021. These commitments are welcome. At present, however, they are commitments in principle only. There remain a series of important choices to be made about how this principle should be realised in practice.

Drawing on comparative research from other common law jurisdictions with similar restrictions, this article sketches the main policy choices which the Scottish Government will face in legislating for complainer anonymity, and makes recommendations for how this principle should be enshrined in Scots law. This article is in three main parts. The first considers the basic policy question: why introduce complainer anonymity at all? What is it for and how is it justified? The second section summarises the international picture, fleshing out how complainer anonymity is realised in the laws of the twenty common law jurisdictions considered in this study. The third part of the article considers three key policy questions arising from the international models in greater detail: how should anonymity be granted? When, if ever, should it be set aside? Finally, I consider the form any criminal prohibition should take. Should unauthorised disclosures of a complainer’s identity be treated as a summary criminal offence in Scots law, a contempt of court, or both?

Drawing on the international experience, I argue the following should be critical design-principles for framing complainer anonymity. The main function of automatic reporting restrictions should be to protect the dignity and privacy of people who say they have been victims of sexual crime. This should be the paramount consideration in determining when anonymity accrues and limiting circumstances in which it can be set aside. We know complainers’ experience of the criminal justice process in sexual cases is often a disempowering one. Anonymity laws should therefore minimise the opportunities for complainers to be identified at any stage in the investigation, prosecution and adjudication of the offence, while maximising complainers’ control over whether or not their identities are disclosed in public. The law should empower complainers to make choices about whether they

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4 HM Advocate v Thomson Feb 25, 2021 (Unreported) and HM Advocate v Murray [2021] HCJ 3.
wish to divulge their involvement in a prosecution and to talk about what they say happened to them, whether on their own social media channels, or through the wider media. Given this emphasis on empowering complainers, I argue we should adopt legal regulations which do not require complainers to access or fund legal representation to establish or waive their anonymity rights. This anonymity should be lifelong in duration, and only expire on the complainer’s death unless they consent to being identified during their lifetimes. Examining the detail of legislation elsewhere, I suggest Scots law should resist the moves made in some Australian jurisdictions to automatically extend reporting restrictions beyond the complainer’s natural life. I suggest we should also be sceptical of the idea complainers should be empowered by law to “tailor” their consent to go public. While sympathising with the aspiration of these jurisdictions to extend the control complainers have over how their stories are told by the media, I conclude that giving complainers scope to “tailor” their consent to publish is difficult to reconcile with the complex world of social media publishing and sharing, and may not withstand scrutiny on European Convention on Human Rights grounds. Because of the additional sensitivity which obtains in cases involving children, the Scottish Government may wish to establish a judicial framework to allow the courts to authorise public disclosures by people under eighteen years of age. The overriding principle, however, should be one which privileges complainer autonomy and ensures social and economic costs are not imposed on complainers to establish, defend or waive their anonymity.

A. WHY INTRODUCE COMPLAINER ANONYMITY?

The case for introducing complainer anonymity rests on at least two key interests. As Clare McGlynn has argued, automatic reporting restrictions in sexual cases serve “a dual purpose: privacy and the administration of justice.” In England and Wales, the influential Heilbron report (1975) argued that “the balance of argument seems to us to be in favour of anonymity for the complainant other than in quite exceptional circumstances” on the basis that “public knowledge of the indignity they have suffered “may be extremely distressing and even positively harmful, and the risk of such public knowledge can operate as a severe deterrent to bringing proceedings.” Temkin has argued other relevant environmental 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 extraordinary salaciousness of the press which has time and again revealed itself to be ruthless in its desire to exploit sexual assault cases to the full regardless of the

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victim’s feelings.”¹⁰ As a major Tasmanian study on complainer anonymity identifies, reporting restrictions represent a “minimal incursion into the principle of open justice,” as “the media are still entitled to attend court and to report the facts of the case or the conduct of the trial and the open justice principle is not unduly compromised.”¹¹ While complainer identities are withheld from the public under these rules, it is important to stress they are not withheld from the accused, or the court, or the press at trial.¹²

Judicial understandings of the purpose of complainer anonymity across the twenty jurisdictions considered in this study have generally echoed Heilbron’s emphasis on anonymity mitigating the social stigmatisation complainers face, partially de-escalating the social and psychological consequences of reporting, and Temkin’s concerns about salacious reporting – whether in traditional or new media forums. Which of these factors has been emphasised by courts has varied, conditioned by the cultural context within which they adjudicate. In the case of Nipun Saxena and Another v Union of India and Others,¹³ for example, the Supreme Court of India emphasised the stigmatising effects of widespread reporting stressed the importance of ensuring victims of sexual violence “are not subjected to unnecessary ridicule, social ostracisation and harassment.”¹⁴ “Unfortunately, in our society,” Justice Gupta observed:

| the victim of a sexual offence, especially a victim of rape, is treated worse than the perpetrator of the crime. The victim is innocent. She has been subjected to forcible sexual abuse. However, for no fault of the victim, society instead of empathizing with the victim, starts treating her as “untouchable”. A victim of rape is treated like a “pariah” and ostracised from society. Many times, even her family refuses to accept her back into their fold. The harsh reality is that many times cases of rape do not even get reported because of the false notions of so-called “honour” which the family of the victim wants to uphold.¹⁵ |

The Supreme Court of Canada adopted a different emphasis, determining that the main purpose of anonymity provisions was to:

| foster complaints by victims of sexual assault by protecting them from the trauma of widespread publication resulting in embarrassment and humiliation. Encouraging victims to come |

¹⁴ Saxena at para 1.
¹⁵ Saxena at para 4.
forward and complain facilitates the prosecution and conviction of those guilty of sexual offences. Ultimately, the overall objective of the publication ban imposed ... is to favour the suppression of crime and to improve the administration of justice.\textsuperscript{16}

In \textit{Brown v the United Kingdom}, the European Court of Human Rights held that the reporting restrictions in England and Wales were designed “to protect alleged rape victims from being openly identified. This in turn encourages victims to report incidents of rape to the authorities, and to give evidence at trial without fear of undue publicity.” The Strasbourg court emphasised that they must “pay special regard to these factors when examining the proportionality of the restrictions” under Article \textbf{10}.\textsuperscript{17} The recent Gillen Review into the law and procedures in serious sexual offences in Northern Ireland shared this emphasis on the contribution made by complainer anonymity to addressing under-reporting of sexual victimisation, explaining that “without a guarantee of anonymity, the victim of a rape offence may not be prepared to report it or to give evidence against the perpetrator in court.”\textsuperscript{18}

Like \textit{Brown}, judicial statements about the purpose of complainer anonymity rules have generally been made in the context of challenges to anonymity legislation on fundamental rights grounds. In \textit{Canadian Newspapers Co. v Canada}, the print press argued that automatic rights to anonymity orders in all sexual offence cases represented a disproportionate interference with the freedom of the press and that “the government had failed to demonstrate the need for a mandatory prohibition.”\textsuperscript{19} While the Canadian Supreme Court accepted that the provisions of the Criminal Code “infringed” freedom of the press under section 1 of the Canadian Charter of Rights and Freedoms, in echo of familiar ECHR tests, the Court held that such infringements can be justified with reference to “the importance of the legislative objective which the limitation is designed to achieve”\textsuperscript{20} and if “the means chosen in furtherance of the recognized objective are reasonable and demonstrably justified.”\textsuperscript{21} While recognising that the Canadian restrictions pursued a legitimate aim, the publishers contended that “only a provision which gives to the trial judge a discretion to determine if publication is appropriate in the circumstances of the case would satisfy the second criterion of the proportionality test” – arguing that only imposing reporting restrictions on a case-by-case basis was compatible with Charter rights.\textsuperscript{22}

\textsuperscript{16} \textit{Canadian Newspapers Co. v Canada} [1988] 2 SCR 122 at para 15.
\textsuperscript{17} \textit{Brown v the United Kingdom} (2002) 35 EHRR CD197.
\textsuperscript{19} \textit{Canadian Newspapers} at para 11.
\textsuperscript{20} \textit{Canadian Newspapers} at para 15.
\textsuperscript{21} \textit{Canadian Newspapers} at para 16.
\textsuperscript{22} \textit{Canadian Newspapers} at para 17.
This argument was rejected. Justice Lamer held that “an absolute ban on publication is the only means to reach the desired objective” on the basis that a case-by-case approach would mean that “a sexual assault victim could rarely predict” whether or not an order repressing their identity would be made by the court. Contextualising this decision, the Court observed that “of the most serious crimes, sexual assault is one of the most unreported” as a result of complainers’ “fear of treatment by police or prosecutors, fear of trial procedures and fear of publicity or embarrassment,” holding that “since fear of publication is one of the factors that influences the reporting of sexual assault,” only automatic restrictions would give complainers legal certainty, while deciding on anonymity case-by-case “would be counterproductive, since it would deprive the victim of that certainty.” He could have been describing the legal status quo in Scotland, and its limitations. Discussing the purpose of contempt orders prohibiting identification in *HM Advocate v Salmond*, Lady Dorrian drew a parallel between closed courts in sexual offence cases and the broader rationale for repressing the identity of complainers, echoing Heilbron’s dignitarian concerns and the importance of the wider public interest in the more effective prosecution of sexual crime:

complainers should be protected from the distress and indignity which might arise from public knowledge of their identity as complainers in a sexual offence, and to make it less difficult for other complainers to come forward.

Synthesising these themes, it is clear anonymity protects not only a zone of privacy for complainers, but also aims to reduce the social costs of disclosing sexual offence allegations, including the scope for a complainer to be publicly identified, and so “prevent secondary victimisation” and encourage disclosures. Like other jurisdictions, there is strong evidence that allegations of sexual offending are underreported in Scotland, and that anxieties about publicity and a loss of privacy contribute to decisions not to report sexual crime. Social data confirms that that victims of sexual violence in this jurisdiction experience a range of barriers to bringing criminal complaints to the attention of the authorities. In recent years, the Scottish Government’s Scottish Crime and Justice

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23 *Canadian Newspapers* at para 18.
24 *Canadian Newspapers* at para 18.
25 *Canadian Newspapers* at para 18.
26 *HM Advocate v Salmond* [2021] HCJ 1 at para 16.
27 *Salmond* at para 46.
Survey has incorporated questions on why people in Scotland did not report serious sexual offences to the police. The latest data distinguishes between “serious sexual assault” and “less serious sexual assault.” For the purpose of the survey, “serious sexual assault” includes forced or attempted sexual intercourse, or other forced sexual activity including oral sex, while “less serious assault” included “unwanted sexual touching, indecent exposure, and sexual threats.”30 The 2019/20 survey found that of those who had experienced forced sexual intercourse, only 22% reported this to the authorities, falling to 13% of incidents of attempted forced intercourse, 17% of other forced sexual activity, and 5% of other attempts.31 Exploring the reasons for these non-disclosures, the most common reason for not disclosing forced sexual intercourse was “fear it would make matters worse” (47%), while 20% told researchers it was a “private, family or personal matter.” 17% of respondents reported dealing “with the matter myself or ourselves,” while 15% thought the “police would not have taken it seriously.”32

These data suggest that victims do not disclose serious sexual assaults for a range of different reasons, and that a loss of privacy is just one of the anxieties involved, including concerns about being disbelieved or treated poorly by criminal justice authorities, uncertainty about outcomes if a disclosure is made, concerns about secondary harms and re-traumatisation as a result of how allegations are handled in court, and the risks of experiencing social stigmatisation as a result of disclosures of sexual victimisation in the wider social space. These findings are echoed in the international and national scholarship which recognises that decisions to disclose or not disclose sexual victimisation is coloured by a range of influences and anxieties, including individual and social factors.33 The recent Gillen Review, for example, identifies a range of factors contributing to non-disclosure in Northern Ireland, including “somehow feeling responsible for what happened,” a “general feeling” complainers will not be believed, family and social pressures not to disclose, concern about the impact of a disclosure on the perpetrator, a perception “that the chances of convicted are very low,” fears about a court procedure at the end of a “long, protracted” criminal justice process, and “concern about publicity, social media coverage and exposure to the public gaze.”34 One recurring theme in recent qualitative research on the experience of sexual offence complainers in Scotland is the experience of “loss of control,” both as a result of the sexual offences they experienced, but also

32 Scottish Government (2021) at figure 9.15.
34 Gillen (2019) a para 2.54.
because of a pervasive sense of having “little control over the criminal justice process,” and a sense complainers “were marginal to it.”

Automatic complainer anonymity can therefore contribute to the mitigation of some of these anxieties, and restores some control to complainers about their representation in public narratives about a case.

**B. THE INTERNATIONAL PICTURE: IS COMPLAINER ANONYMITY PROVIDED FOR IN LAW?**

This study compares complainer anonymity regimes in Scotland, England and Wales, Northern Ireland, the Republic of Ireland, the United States of America, Canada, Hong Kong, India, Singapore, Bangladesh, New Zealand, and all of the states and internal territories of Australia, including Victoria, Tasmania, New South Wales, Queensland, South Australia, Western Australia, the Australian Capital Territory, and Northern Territory. These twenty jurisdictions were chosen because of their shared common law traditions and adversarial approach to criminal justice. As Cameron has observed, “an adversarial conception of the criminal trial,” has tended to treat complainers:

> essentially, as outsiders rather than as participants. Vindicating their interests was not the central objective of the trial, and their stake in the outcome was secondary to that of the state and the notional community at large.

All of these jurisdictions place complainers in a similar situation in terms of the criminal justice process. Nineteen of the twenty jurisdictions considered have legislative frameworks which are susceptible to comparative analysis. Three in Australia – Victoria, Tasmania and the Northern Territory – have experienced and responded to organised law reform movements since 2018, demanding legislative changes to complainer anonymity rules better to reflect modern understandings of sexual assault in the wake of the international #MeToo movement, and recognising the regulatory implications of social media for updating reporting restrictions designed for an earlier analogue age of broadcasters and publishers. Exploring the experiences of these jurisdictions can furnish lessons for how Scotland should or should not build complainer anonymity into our adversarial system, incorporating the best elements of international models, avoiding their mistakes, and accommodating their ideas to our own working practices.

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37 With the exception of the United States.
My first article on this issue demonstrated that, contrary to some perceptions, Scots law does not recognise an automatic right to anonymity for sexual offence complainers. The law establishes no specific reporting restrictions in these cases, but instead, relies on media conventions and seldom-made orders under section 11 of the Contempt of Court Act 1981 prohibiting the identification of complainers in some limited high-profile cases. In contrast with the approach in Scots law which permits orders to be made on an exceptional basis, almost all of the twenty jurisdictions analysed in this study confer a right to anonymity on complainers and impose automatic reporting restrictions in qualifying sexual offence cases. Of the common law jurisdictions considered, only the United States of America has set its face against any kind of criminal liability arising from the faithful reporting of court proceedings, on 1st Amendment free expression grounds. In a string of cases concerned with restrictions imposed by states on the identification of people involved in criminal cases, the Supreme Court has held that “the government cannot punish the publication of truthful information that is lawfully obtained.” That picture may be less definitive than it seems, however. The majority of the Supreme Court in Florida Star cautioned that they did not hold:

that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order.

No state law has yet been upheld by the Supreme Court which attempts to introduce the kind of reporting restrictions we see across the rest of the common law world. Of the other jurisdictions considered, the following automatically impose reporting restrictions in all sexual offence cases: England and Wales, Northern Ireland, the Republic of Ireland, New Zealand, Victoria, the Australian Capital Territory, Tasmania, New South Wales, Queensland, South Australia, Western Australia, Hong Kong, India, Singapore, and Bangladesh. Notably, very few of these jurisdictions extend anonymity to accused persons, and some of those which do emphasise that the “purpose” of these rules is also to “protect the complainant.” As is explored more fully in the next section, the Canadian Criminal Code

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39 Cameron (2013) at 51.
40 Florida Star at 541.
41 In Ireland, defendants’ identities are automatically repressed until conviction. See: Rape Act 1981 s 8(1).
42 In New Zealand, for example. Criminal Procedure Act 2011 s 201(2).
adopts a compromise position, where anonymity orders are judicially imposed, but complainers automatically have the right to ask for them to be imposed, and they must be imposed if requested.

Most jurisdictions prohibit the publication not only of the most obvious kind of identifying information about complainers – including the publication of their name, address, place of work, place of education, photographs or videos of the complainer – but also of information which is “likely to lead members of the public to identify a person as the person against whom the offence is alleged to have been committed”\textsuperscript{43} or “any particulars likely to lead to the identification of a person against whom a sexual offence” is alleged to have been committed.\textsuperscript{44} In Tasmania, this prohibition on jigsaw identification is framed as “any other reference or allusion that identifies, or is likely to lead to the identification of, the person.”\textsuperscript{45} The relevant provisions of the Indian Penal Code extend to “not only the publication of the name of the victim is prohibited but also the disclosure of any other matter which may make known the identity of such a victim.”\textsuperscript{46}

In the recent case of \textit{Saxena v Union of India}, the Indian Supreme Court gave examples of jigsaw identification, including disclosing the fact a rape victim had “topped the State Board Examination and the name of the State was given,”\textsuperscript{47} or disclosure of photographs where the complainer’s face is blurred “but she is surrounded by identifiable faces of “her relatives, her neighbours, the name of the village.”\textsuperscript{48} The courts have approached the English and Welsh restrictions in a similar fashion. In 2016, for example, the editor of the \textit{Sun} newspaper was prosecuted for breaching the reporting restrictions in the 1992 Act by publishing a photograph of the complainant lifted from her Facebook profile. While \textit{The Sun} pixelated the photograph, because the picture had been available on her social media profile for six weeks, the court concluded the paper had nevertheless “published material which allowed her to be identified,” and found the editor had broken the law.\textsuperscript{49} This approach was approved by the High Court of Justiciary in \textit{Murray}, which held that the legal test for a violation of a contempt order prohibiting identification of a complainer is whether it was likely to give to to their identification “by a particular section of the public.”\textsuperscript{50} Where Scotland is isolated, however, is making the imposition of reporting restrictions wholly discretionary. The lack of

\begin{thebibliography}{9}
\bibitem{footnote43} Sexual Offences (Amendment) Act 1992 s 1(2).
\bibitem{footnote44} Judicial Proceedings Reports Act 1958 s 4(1).
\bibitem{footnote45} Evidence Act 2001 s 194K(9).
\bibitem{footnote46} \textit{Saxena} at para 11.
\bibitem{footnote47} \textit{Saxena} at para 12.
\bibitem{footnote48} \textit{Saxena} at para 12.
\bibitem{footnote49} F Perraudin, “Former Sun editor convicted over Adam Johnson victim picture” \textit{The Guardian} 7\textsuperscript{th} March 2016 accessible here: \url{https://www.theguardian.com/uk-news/2016/mar/07/adam-johnson-former-sun-editor-david-dinsmore-convicted-victim-picture}.
\bibitem{footnote50} \textit{HM Advocate v Murray} [2021] HCJ 2 paras 54 – 58.
\end{thebibliography}
specific legislation dealing with qualifying sexual offences makes Scotland anomalous not only in the UK, but in most of the rest of the common law world.

C. LEGISLATING FOR COMPLAINTER ANONYMITY IN SCOTLAND: CRITICAL POLICY CHOICES

Having established the main features of the twenty comparator jurisdictions, the next section considers critical policy questions the Scottish Government will face in legislation for complainer anonymity in more detail. Which crimes should anonymity extend to? How should it be imposed? When should it be set aside? These final two questions are much more complex than they might appear at first sight. Should anonymity be provided automatically by law, or imposed by the court on a case-by-case basis? Should complainers be able to waive their anonymity unilaterally, or must a court permit them to do so? What about disclosures which risk identifying other complainers? Should child complainers be able to set aside their anonymity too? If so, at what age would they qualify? Should Scotland follow some jurisdictions, and introduce the idea complainers can “tailor” their consent to go public, or resist this development? Should reporting restrictions be limited to complainer’s natural lives, or apply in perpetuity, even after death? And what role, if any, should surviving members of their family have in authorising publication? Drawing on the international experience, the next section considers each of these policy questions in turn.

(1) Which crimes should complainer anonymity extend to?

Most jurisdictions providing for complainer anonymity now associate it with a long list of qualifying sexual offences. Though most jurisdictions initially only recognised these restrictions involving the crime of rape, the general tendency – particularly in systems with criminal codes or codified statutory offences – is for anonymity to attach in modern law to all crimes identified as having a significant sexual element to them. This is reflected in the evolution of the English and Welsh list of qualifying offences, for example. Under current law, reporting restrictions automatically apply in respect of all offences under the Sexual Offences Act 2003, save for charges of sex with an adult relative, intercourse with an animal, and sexual activity in a public lavatory. This distinction is predicated on the fact that consent is not a defence to any of these excepted sexual charges.

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52 Sexual Offences Act 2003 s 64 and 54.
53 2003 Act s. 69.
54 2003 Act s 71.
Further lessons for Scots law can usefully be drawn from crimes which are not protected in the same way in other jurisdictions. 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 criminalised “disclosing private sexual photographs and films with intent to cause distress” in England and Wales.\(^{55}\) They argue this failure to extend anonymity rights to victims of image-based sexual abuse and public disclosure of intimate private photographs or recordings fails to recognise the significant privacy and dignity implications of identifying complainers in these cases.\(^{56}\) Significantly, reporting restrictions based on the subject matter of the charge are not limited to sexual offences in England and Wales, unlike most of the comparator jurisdictions considered. Under the 1992 Act as amended, automatic reporting restrictions now extend to breaches of section 2 of the Modern Slavery Act 2015, which criminalises human trafficking for exploitation.\(^{57}\)

The inclusion of this offence is indicative of the political pressures which may be brought to bear in the Scottish context to extend automatic reporting restrictions more widely, applying not only to sexual crime, but also offences involving similar vulnerabilities and raising similar privacy issues including stalking and domestic abuse.\(^{58}\) If automatic complainer anonymity is restricted to sexual offences, however, section 288C of the Criminal Procedure (Scotland) Act 1995 provides a practical basis for doing so. The provision lists sexual offences where the personal conduct of the defence by an accused person is prohibited, including relevant statutory crimes and historic common law offences.\(^{59}\) Reflecting McGlynn and Rackley’s cogent critique of the situation in England, if taken as a basis for complainer anonymity in Scots law, it would be appropriate for the section 288C list to be extended to include the offence of “disclosing, or threatening to disclose, an intimate photograph or film” under the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.\(^{60}\)

(2) Anonymity: imposed automatically by law, or case-by-case?

How anonymity accrues is one important area of diversity in the international models. At one end of the spectrum are those jurisdictions which automatically apply complainer anonymity by operation of law and make public disclosure a criminal offence. This is the approach adopted in 17 of the 20 jurisdictions considered.\(^{61}\) Precisely when anonymity accrues is, however, subject to some

\(^{55}\) 2015 Act s 33.
\(^{57}\) Sexual Offences (Amendment) Act 1992 s 5
\(^{58}\) Criminal Procedure (Scotland) Act 1995 s 271(1)(c).
\(^{59}\) I am indebted to Professor James Chalmers for this suggestion.
\(^{60}\) Abusive Behaviour and Sexual Harm (Scotland) Act 2016 s 2.
\(^{61}\) Excluding the United States, Canada, and Scotland.
jurisdictional differences. Under the English, Welsh and Northern Irish model, reporting restrictions begin to accrue from the point that a formal “allegation” that a qualifying sexual offence is made.62 Similar provisions apply in Victoria,63 India,64 Hong Kong,65 and in New Zealand which require the allegation to be made to a police constable.66 In other jurisdictions, the reporting restrictions only apply from when the accused person is formally charged67 with a qualifying sexual offence,68 or from the accused person’s first court appearance69 – theoretically at least creating a window of opportunity within which a complainer could lawfully be identified.

At the other end of the spectrum are those jurisdictions which rely on court orders to suppress identifying information, either on the motion of the prosecuting authority, on the court’s own motion, or following an application by the complainer themselves. The current dispensation in Scotland falls on the far end of this spectrum, with section 11 of the Contempt of Court Act 1981 allowing a “name or other matter to be withheld from the public” in any civil or criminal case if the court so orders. Under this model, it is not a criminal offence to identify a complainer unless and until an order is made prohibiting doing so. Between the automatic English model of complainer anonymity and the discretionary Scottish approach falls the Canadian model, the constitutionality of which has been upheld by the Supreme Court in Canadian Newspapers v Canada.70 Under Canadian rules, anonymity is conferred by order of the court rather than by operation of the law – but the provisions of the Criminal Code provide that the judge “shall” make an anonymity order when either the prosecutor or the complainer asks the court to do so.71 The Code also requires that the presiding judge “shall” inform the complainant of the right to make an application for the order “at the first reasonable opportunity”72 in the case. This hybrid – judicially-imposed but non-discretionary model – shares the window of uncertainty we see in separating an allegation being made and a first court appearance or opportunity to seek an order restricting publication, but at least gives Canadian complainers stronger

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62 Sexual Offences (Amendment) Act 1992 s 1(1).
63 For example, in the Australian states of Victoria and Western Australia: Judicial Proceedings Reports Act 1958 s 4(1B), Evidence Act 1906 s 36C.
64 Indian Penal Code s 228A.
65 Crimes Ordinance s 156(7)(a).
66 Criminal Procedure Act 2011 s 203(1).
67 In Singapore, for example: Women’s Charter s 153(1).
68 In the Republic of Ireland, anonymity obtains “after a person is charged” with a qualifying sexual offence. See: Criminal Law (Rape) Act 1981 s 7(1). Similar rules apply in New South Wales (Crimes Act 1900 s 578A) and Western Australia’s Evidence Act 1906 s 36C(3), with reporting restrictions accruing on being formally charged, indicted, or appearing in court.
69 In Australia’s Northern Territory, the prohibition only applies if the “proceeding in relation to the sexual offence that was alleged to have been committed” are “pending.” Sexual Offences (Evidence and Procedure) Act 1983 s 6(2)(a).
71 Canadian Criminal Code s 486.4(2)(b).
72 Canadian Criminal Code s 486.4(2)(a).
guarantees their anonymity will be protected if an order is sought, and underscores a procedural expectation they will be informed by the court about their rights and afforded the opportunity to make representations. The Scottish model incorporates no such rights and imposes no obligation on judges or prosecutors to make complainers aware of the scope to apply to the court for an order suppressing publication of their identity. By international standards, Scottish complainers find themselves in a uniquely precarious position.

The automatic imposition of anonymity by law has clear advantages over both Canadian models and the Scottish status quo, closing the window within which complainers can be publicly identified in association with sexual cases, providing clarity to complainers and to potential publishers at the earliest stage in the process about what they can and cannot publish – and when. This approach also relieves complainers of the uncertainty, responsibility and costs of applying to the court for an order. This approach is also more consistent with the wider body of potential publishers which modern reporting restrictions address. Waiting until a first court appearance would – like the current system in Scotland – rely on the goodwill and cooperation of publishers not to exploit the legal limbo thus created to identify complainers. If legally unenforceable professional regulation by the media is an inappropriate basis for complainer anonymity in an age of social media publishing, it seems equally naïve for the law to defer reporting restrictions and create loopholes in this way, particularly if – like Canada – anonymity is effectively mandatory and the judicial role in imposing restrictions is essentially a formality. This analysis suggests Scotland should legislate for complainer anonymity to be automatically applied to all cases by operation of law and accrue, like in New Zealand and the rest of the UK, from the moment the complainer first makes a formal allegation to a police officer that they have been victim of a qualifying sexual offence.

(3) Under what circumstances should anonymity be set aside?

Another critical policy question is whether anonymity can be set aside, and what role – if any – the courts should have in sanctioning departures from the general rule that complainers should not identified. I suggest our answer to these questions should ultimately turn on our analysis of whose interests the reporting restrictions has been introduced to serve. Seen from this perspective, a new Scottish regime should maximise the autonomy of complainers insofar as it does not impact on the anonymity rights of others, and make it as easy and costless as possible for adult complainers to go public. The international comparisons suggest there are also important secondary questions to consider. What about child complainers? Should complainers be able to “tailor” their consent to publish? And what if the victim of a sexual crime dies without consenting to being identified?
Today, most jurisdictions incorporate rules facilitating public disclosures by complainers about their involvement in a sexual prosecution, if they freely decide to make them. It was not always thus. Historically, a number of jurisdictions adopted blanket rules prohibiting the identification of complainers in all circumstances. In Victoria, Northern Territory and Tasmania, for example, the reporting restrictions applied not only to broadcasters, newspapers and social media publishers – but to complainers themselves – effectively criminalising public disclosures about what happened to them and banning the press from reporting details of sexual cases, even if a complainer had a strong desire to share their experiences. In view of the earlier discussion of the key interests protected by complainer anonymity legislation – and its modern rationale in upholding complainer privacy and autonomy in particular – legal restrictions which criminalise complainers disclosing their experiences are highly problematic.

The injustice and confusion of these restrictions were challenged in Australia during 2020 and 2021 by the high profile #LetHerSpeak campaign. The campaign was particularly catalysed by the global #MeToo campaign and the particular case of Grace Tame, who discovered she could not speak about her experiences of being a victim of sexual abuse by a former teacher without facing potential criminal penalties because of the lack of provisions facilitating complainer disclosure.73 Co-founded by Marque Lawyers, End Rape On Campus Australia and the journalist Nina Funnell, the #LetHerSpeak campaign characterised these provisions as “gag laws” and pushed for reform of the law to facilitate complainers who wish to go public. The Campaign has successfully advocated for legislative reform in Tasmania, the Northern Territory and Victoria, facilitating public disclosures by complainers who wish to do so without the risk of criminal sanctions or the cost and emotional burdens of seeking permission from the courts.

The legislative framework in some jurisdictions providing for anonymity – such as Ireland – still does not incorporate explicit provisions on how reporting restrictions can be set aside by complainers.74 Surprisingly, a recent report from the Republic of Ireland reviewing the legislative framework governing the protections available for vulnerable witnesses in sexual offence cases did not discuss circumstances in which sexual offence complainants could go public, or identify the risk that the current legislation might operate as a “victim gag law.”75 In Canada, the question of whether a mandatory order repressing the identification of complainers can be set aside was the subject of litigation in R v Adams in 1995.76 While the Criminal Code enshrined no explicit power to the court to

73 “Grace Tame: Tasmanian survivor of sexual assault wins the right to tell her story” The Guardian 12th August 2019.
74 Criminal Law (Rape) Act 1981 s 7.
In Adams, the trial judge disapplied the anonymity order on the grounds that he did not find the complainant’s evidence credible. He did so on his own motion. As the Supreme Court explained:

although he was willing to accept that lifting the ban could deter some individuals from reporting sexual assault, the judge expressed the view that the primary purpose of the ban was to protect “innocent” victims. In his view, the protection of s. 486(4) should extend to “honest evidence” only, and should not be applied where the complainant is “a liar” and “a prostitute.”

The subsequent appeal considered whether the courts have any scope to set aside the anonymity provided for in the Canadian Criminal Code. Considering that orders must be made if either the prosecutor of the complainant apply to the court for one, the Court held that if both the Crown and the complainant consent to varying the order, “then the circumstances which make the publication ban mandatory are no longer present and, subject to any rights that the accused may have under s. 486(3), the trial judge can revoke the order,” but if either the prosecutor or the complainant do not consent, the mandatory order must remain in place, notwithstanding the judge’s adverse conclusion about the complainant’s truthfulness in her evidence in the original criminal case. Justice Sopinka held that:

A revocable publication ban, like a discretionary ban, would fail to provide the certainty that is necessary to encourage victims to come forward. If the trial judge were given the power by the legislation to revoke the ban, the complainant would never be certain that her anonymity would be protected. The ban would serve as little more than a temporary guarantee of anonymity.

Two consequences flowed from this decision. Firstly, under Canadian law, complainers have an effective veto on any attempts to identify them, but secondly, the judicial-permission model means that if they do decide to go public, they must apply to the court beforehand. The legal onus — and legal costs — of going public continue to fall on the complainant’s shoulders. They cannot unilaterally decide to share their story on social media or with a newspaper without committing an offence themselves. Prosecutions of complainers for violating publicity bans without applying to the court to vary the order are not unprecedented. In March 2021, an Ontario woman was convicted of breaching the court ordered anonymity by sharing a transcript of reasons from the judge without having applied to the

78 Adams at para 6.
79 Adams at para 32.
court for a variation of the mandatory order prohibiting her identification. She was reportedly fined $2,000.81 A conviction of this kind flies in the face of the rationale for complainer anonymity, but it also demonstrates the real risks of legislation which does not establish a clear framework empowering complainers to share information about their case. This salutary lesson underscores it is vital any Scottish reform proceeds with care.

Jurisdictions can be divided into those where permission of the court is required for anybody to go public including complainers – and those which effectively enshrine in law a right for complainers to identify themselves with a case without returning to court. In addition to pushing for explicit rules facilitating complainer disclosure, another important feature of the #LetHerSpeak campaign has been its advocacy for less paternalistic models for waiving anonymity, arguing for legal frameworks to be adopted which eliminate the expensive and disempowering role of courts in authorising adult complainers to share their stories. As campaign co-founder Nina Funnell has observed, “the victim has to make a case to a judge that their story is in the public interest. They’re made to feel quite powerless throughout the process.”82 The campaign argues that requiring complainers to engage again with judicial processes “can exacerbate underlying trauma by further stripping the survivor of agency and control over their own story and voice,” and subject “the victim-survivor to an additional legal process which may be triggering given past court experiences” and prove “time consuming and costly”, both in terms of potential solicitors’ fees, but also “additional out of pocket expenses for each survivor, such as time off work to attend hearings.”83 These points are equally germane in the Scottish context, and are powerful arguments against imposing legal responsibility on complainers either to seek court orders protecting their anonymity, or requiring them to do so to have reporting restrictions set aside.

The approach in New Zealand is a good example of the kind of paternalism challenged by Funnell, with complainers requiring permission of the court to go public.84 Under New Zealand law, the courts are obliged to make an order permitting publication if the complainant applies for an order, and the court “is satisfied that the complainant understands the nature and effect of his or her decision to apply to the court for the order.”85 This is the mirror image of the judicially-imposed but non-discretionary Canadian rules on granting anonymity, effectively establishing a presumption

82 “Grace Tame: Tasmanian survivor of sexual assault wins the right to tell her story” The Guardian 12th August 2019.
84 Criminal Procedure Act 2011 s 203(3).
85 2011 Act s 203(4)(a)(iii).
86 2011 Act s 203(4)(b).
in favour of sanctioning disclosure if a complainer asks for authority to do so, but nevertheless requiring them to go through the costs and protocols of going to court.

As well as routinely failing to provide legal protection to complainers, the Scottish status quo retains something of the invidiousness the #LetHerSpeak campaign has challenged in Australia. In the overwhelming majority of cases, because there are no legal restrictions on anyone identifying complainers, most are currently free to publicly discuss experiences of sexual victimisation, either by talking to the media, or sharing their experiences directly via social media. This often – erroneously – characterised as “waiving their anonymity” in the Scottish context. The same freedom does not apply to complainers in a case where a section 11 contempt order has been made, however. Consider *HM Advocate v Salmond* by way of illustration. The contempt order prohibiting identification of the complainers was put in place on the second day of the trial diet after an uncontested application by the Advocate Depute. This order applies to anyone publishing information about the case, including the Scottish Parliament, broadcasters, publishers and social media users – but also to the complainers themselves. While this order was sought in their interests, it is not clear whether the Crown communicated its intention to seek the contempt order to the complainers in the case, or consulted them about whether they wished reporting restrictions to apply to them. If any of the complainers in *HM Advocate v Salmond* subsequently decide to disclose their involvement in the case, like Grace Tame they will need to apply to the High Court to vary the contempt order before publication – or expose themselves to the legal jeopardy of contempt for identifying themselves in public.

Scottish complainers’ relative powerlessness and lack of participation in legal decision-making affecting their anonymity rights was further demonstrated by the application by the *Spectator* magazine in February 2021 to vary the terms of the original order prohibiting their identification in connection with the *Salmond* case.87 Lady Dorrian declined to make any substantive changes to her contempt order. Despite the significant implications of this application for complainers’ privacy rights, only the Crown was heard as a respondent in the case. It is not clear whether the complainers were notified about the *Spectator* application, or whether they were afforded the opportunity to instruct independent legal representation before the court as the *Spectator’s* motion was debated. In a formal sense, reflecting the adversarial logic of Scotland’s criminal courts, the complainers were not a party to proceedings, but merely witnesses. Analysed in the context of the contempt order, however, the complainers had an obvious, acute and personal interest in the legal issues being litigated by the *Spectator*. While the Crown appeared to resist the proposed changes to the contempt order, the independent public prosecutor is not the complainers’ legal representative. As a full bench of the Appeal Court recognised in *RR v HM Advocate*, “the complainer’s interests and those of the Crown

87 *HM Advocate v Salmond* [2021] HCJ 1.
would not always align.”88 If any of the complainers in *Salmond* wish to go public, they would have to apply to court for permission to do so, bearing any legal costs, or risk prosecution for contempt for failing to do so. With most complainers having no legal protection, and no effective control or involvement in the decision-making process where contempt orders are made, Scottish complainers currently face the worst of both worlds.

In contrast with the approach in New Zealand, most jurisdictions permit complainers to waive their anonymity without requiring permission of the Court. In England and Wales this is framed as a defence, giving complainers the ability to self-publish or publish their stories in mainstream media without any resort to the courts, and giving their publishers a defence if charges are brought against them for anonymity violations. To ensure that this ability to waive anonymity is not abused, the 1992 Act sets out a number of restrictions to this defence. Written consent does not operate as a defence if “any person interfered unreasonably with the peace or comfort of the person giving the consent”89 to secure it, but otherwise complainers are empowered to “go public” if they choose to do so without seeking judicial permission. Similar provisions apply in India,90 Queensland,91 Western Australia,92 Northern Territory,93 New South Wales,94 the Australian Capital Territory,95 Tasmania,96 Victoria,97 and South Australia,98 generally taking the form of a defence where the publisher can produce evidence of written permission from the complainer to identify them. India and many of the Australian jurisdictions also incorporate a requirement of legal capacity.

In addition to clear rules facilitating disclosures by complainers – or with their permission – English law also incorporates a range of different circumstances permitting the court can decide to dispense with reporting restrictions, irrespective of the complainer’s wishes. Under the Sexual Offences (Amendment) Act 1992, before the trial has begun, anonymity can be displaced by the judge if, on the application of the accused or “another person against whom the complainant may be expected to give evidence at the trial”99 satisfies the judge that that the direction is required for the purpose of inducing persons who are likely to be needed as witnesses at the trial to come forward; and “the conduct of the applicant’s defence at the trial is likely to be substantially prejudiced.”100 The legislation also permits

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89 Sexual Offences (Amendment) Act 1992 s 5(3).
90 Indian Penal Code s 228A(1).
91 Criminal Law (Sexual Offences) Act 1978 s 10(2)(a).
92 Evidence Act 1906 s 36C(6).
94 Crimes Act 1990 s 578A(4)(b).
96 Evidence Act 2001 s 194K(3)(b).
98 Evidence Act 1929 s 71A(2).
99 Sexual Offences (Amendment) Act 1992 s 3(1).
100 1992 Act s 3(1)(a) and (b).
anonymity to be dispensed with if a convicted person satisfies the court that dispensing with reporting restrictions “is required for the purpose of obtaining evidence in support of the appeal” and the appellant “is likely to suffer substantial injustice” if the reporting rules are not set aside.\textsuperscript{101} The third judicial route to dispensing with anonymity is considerably more open, allowing the judge to make a direction at the original trial that the reporting restrictions “shall not apply to such matter as is specified in the direction” if they conclude the effect of the restrictions “is to impose a substantial and unreasonable restriction upon the reporting of proceedings at the trial,” and that “it is in the public interest to remove or relax the restriction.” The 1992 Act is clear that no direction shall be given “only of the outcome of the trial.”\textsuperscript{102} These provisions influenced the language of the Penal Ordinance In Hong Kong, which enshrines almost identical rules and exceptions.\textsuperscript{103} It is striking, however, that most of the jurisdictions considered have not felt it is necessary to adopt this series of exceptions. The scope of judicial discretion to remove anonymity in England has criticised by some commentators as “too broad,” though it remains unclear in practice “how often or for what reasons judges are prepared to override the anonymity provisions” of the 1992 Act.\textsuperscript{104}

As the Canadian Supreme Court recognised in \textit{Canadian Newspapers}, a “discretionary provision under which the judge retains the power to decide whether to grant or refuse the ban on publication would be counterproductive, since it would deprive the victim of that certainty.”\textsuperscript{105} Reporting restrictions present no bar to prosecutors raising criminal proceedings for perjury or attempting to pervert the course of justice against a complainer who it can be established beyond reasonable doubt has made false allegations about being the victim of a sexual offence. If any provision of this kind is necessary in Scots law – and the international comparisons suggest it probably is not – then any elimination of anonymity should be restricted to cases where a complainer has been convicted of such an offence in respect of the earlier trial. The notion that the acquittal of an accused person necessarily means a complainer was giving perjured testimony reflects a basic misunderstanding of the criminal justice process, the nature of the evidence in most sexual offence prosecutions, and the high threshold of proof beyond reasonable doubt.

(4) What about disclosures which risk identifying other complainers?

\textsuperscript{101} 1992 Act s 3(4).
\textsuperscript{102} 1992 Act s 3(3).
\textsuperscript{103} Hong Kong Penal Ordinance s 156.
\textsuperscript{104} J Temkin, (2002) at 310.
\textsuperscript{105} \textit{Canadian Newspapers Co. v Canada} [1988] 2 SCR 122 at para 18.
There are complexities in cases when one complainer forms part of a mutually corroborating chain of complainers under the Moorov doctrine and one complainer waiving their anonymity is highly likely, in context, to give rise to the jigsaw identification of other complainers in the case. If a prosecution concerned allegations of the historic sexual abuse of siblings by a parent or other form of defined relative, for example, one sibling going public can be tantamount to identifying the other complainer as well as themselves. This dynamic may be even more acute in Scottish cases than elsewhere as a consequence of the corroboration rule, which often result in historic sexual offence proceedings relying on the Moorov doctrine, and therefore a series of complainers whose allegations similar in time, character and circumstance so as to suggest a course of conduct systematically pursued by the accused.106 New Zealand and a number of Australian states explicitly limit the ability of complainers to go public to this extent, prohibiting publication unless every affected complainer consents, leaving complainers who do “go public” open to potential prosecution where their disclosures disclose the identity of someone who does not consent.107 This kind of potential jigsaw identification can be more easily managed in jurisdictions like New Zealand which make going public contingent on judicial permission. In the less paternalistic approach advocated here, it will ultimately be matter for the judgment of publishers whether the material they decide to put in in the public domain risks jigsaw identification of other complainers.

(5) Should child complainers be able to set aside their anonymity?

Another flashpoint for controversy in the international models is what age complainants must reach before they are lawfully able to make a public disclosure. Across the piece, most jurisdictions establish the threshold of 18 years of age to make or authorise secondary publishers to disclose identifying information. This is consistent with international definitions of childhood in the criminal justice context – international definitions which have increasingly shaped Scottish criminal justice legislation during the last decade.108 Jurisdictions adopting this approach include India,109 Tasmania,110 New Zealand and a number of Australian states explicitly limit the ability of complainers to go public to this extent, prohibiting publication unless every affected complainer consents, leaving complainers who do “go public” open to potential prosecution where their disclosures disclose the identity of someone who does not consent. This kind of potential jigsaw identification can be more easily managed in jurisdictions like New Zealand which make going public contingent on judicial permission. In the less paternalistic approach advocated here, it will ultimately be matter for the judgment of publishers whether the material they decide to put in in the public domain risks jigsaw identification of other complainers.

106 Moorov v HM Advocate 1930 JC 68.
107 Such as Victoria, for example, which provides that although a complainer can go public, it will be an offence if “the publication is likely to lead to the identification of another victim who does not give permission to publish” (Judicial Proceedings Reports Act 1958 s 4BB).
108 See, for example, the Victims and Witnesses (Scotland) Act 2014, s 1A and the 2021 United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill.
109 Protection of Children from Sexual Offences Act 2012 s 2(d).
110 Evidence Act 2001 s 194K(4)(a).
Zealand,\textsuperscript{111} the Australian Northern Territory,\textsuperscript{112} Queensland,\textsuperscript{113} and South Australia.\textsuperscript{114} In England and Wales, by contrast, complainants must be sixteen years of age to authorise publication.\textsuperscript{115} In New South Wales, they must be at least fourteen years of age.\textsuperscript{116} The state of Victoria takes a slightly more nuanced approach. The publishing offence “does not apply to a victim of an alleged offence,”\textsuperscript{117} but if the publisher is a third party newspaper or broadcaster in Victoria, the complainant must be at least eighteen years old, have given the publisher permission, and the publication must have been “in accordance with the limits, if any, set by the victim” to be lawfully published.\textsuperscript{118}

In effect, this means a Victorian complainer could lawfully identify \textit{themselves} in connection with a sexual offence case on their own social media accounts without committing a criminal offence, but the law would require them to reach the age of majority to authorise a broadcaster or newspaper to share this information. Quite how this provision interacts with the “share” or “retweet” function available on almost every form of social media is not entirely clear. On the face of the Act, however, a complainer who identified themselves via Twitter would not commit an offence, but secondary publishers who retweeted this information would appear to be in violation of reporting restrictions. It is critical any Scottish legislation does not incorporate this kind of ambiguity and the legal rules are tailored towards the free exchange of information the internet facilitates, anchored realistically in established social practices, including information and content sharing. Social users sharing content from a complainer’s account which voluntarily identified themselves as a complainer in a sexual case would have a legitimate expectation this was a lawful thing to do.

While most jurisdictions prohibit children consenting to publication, it is highly questionable whether it would be appropriate to prosecute a child complainer who shared their involvement in a sexual offence case on Facebook, particularly if the information is shared only with family and friends. This could be addressed by way of prosecutorial discretion, but given the importance of these restrictions, and the different considerations obtaining in respect of child complainers, it may be more appropriate if specific provision was written into any Scottish Bill to permit a child complainer to apply to the court for permission to disclose their identity in connection with a case, irrespective of whether or not adult complainers can do so without judicial involvement.

(6) Should complainers be able to “tailor” their consent to be identified?

\begin{itemize}
\item \textsuperscript{111} Criminal Procedure Act 2011 s 203(3).
\item \textsuperscript{112} Sexual Offences (Evidence and Procedure) Act 1983 s 6(2)(b)(ii).
\item \textsuperscript{113} Criminal Law (Sexual Offences) Act 1978 s 10(2)(b)(i).
\item \textsuperscript{114} Evidence Act 1929 s 71A(4).
\item \textsuperscript{115} Sexual Offences (Amendment) Act 1992 s 5(3).
\item \textsuperscript{116} Crimes Act 1900 s 578A(4)(c).
\item \textsuperscript{117} Judicial Proceedings Reports Act 1958 s 4(1BA).
\item \textsuperscript{118} 1958 Act s 4(1BB).
\end{itemize}
Another consideration is how much control to give complainers over the manner, form and forum in which they are identified if they decide to waive their anonymity. While most of the jurisdictions considered have straightforward binary provisions requiring consent to publication, some of the Australian jurisdictions influenced by the #LetHerSpeak campaign have incorporated much more expansive powers into law for complainers to specify the manner and form in which their identities can be disclosed by publishers. Under the new Victorian rules which have been in force since November 2020, for example, complainers can specify “limits” which publications must observe if they are to have a defence to criminal charges of violating that anonymity. The legislation provides the following examples of the kind of “limits” complainers might require publishers to observe in reporting their stories:

Limits might include the type of identifying particulars to which the permission to publish is given, the re-publication of the identifying particulars or where and by whom the identifying particulars are to be published, such as permission for the victim’s name to be published but not their image or permission to a particular television program or newspaper or journalist, but not others or for a first name to be published but not a last name.

Similar rules apply now apply under the reformed Tasmanian Evidence Act 2001, which require that any “identifying information is published in accordance with that consent” before a defence will be available to publishers. The net effect of these kinds of restrictions is that it might be lawful, for example, for one newspaper to publish identifying information about a complainer, but unlawful for other newspapers to share the same information. Quite how these provisions interact with social media users sharing content from a particular news source on Twitter or Facebook is not clear. Although responses to modern demands for law reform, the Victorian and Tasmanian provisions seem rooted in the regulation of more traditional media outlets than responsive to the new media environment and how its proliferation of potential “publishers” interact with more traditional news sources. In principle, however, the idea that a social media user or newspaper could be prosecuted for sharing the same – publicly available – information about a complainer which was lawfully published by another news sources seems problematic.

If the imposition of reporting restrictions is principally justified to protect the private life of complainers from public scrutiny, the rationale for imposing continuing restrictions on publications

120 1958 Act s 4(1BB)(b).
121 Evidence Act 2001 s 194K(3)(b)(iii).
must be considerably weaker when a complainer decides to public disclose their association with the case, whether on their own social media accounts, or via more traditional broadcasters and news-outlets. While the desire to maximise the control complainers have over how they relate their experiences is a sympathetic one, conditional consent which would permit the Guardian to identify a complainer but prohibit the Daily Mail is arguably a disproportionate interference with Article 10 of the European Convention which is only weakly justified by the Article 8 considerations which justify the blanket imposition of anonymity in these cases. This kind of regime of tailored consent may also raise Article 14 questions about discrimination in the enjoyment of Convention rights. Article 14 provides that Convention rights:

shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

If reporting restrictions apply consistently to all publishers, the restrictions can be justified as the proportionate pursuit a legitimate aim. It is difficult, however, to justify the criminalisation of one outlet publishing identical material about a sexual offence complainer which has already been made available to the public with the consent of the complainer elsewhere. Australian academics have also identified further problematic practical consequences of these provisions: the risk that the law mandates media outlets and social media users to make persistent and potentially unwelcome contact with complainers to establish a legal basis for publication. As Burgin, Powell and Flynn explain, the Victorian rules mean that:

Media and third-party-generated social media posts wanting to name a victim-survivor would need to seek written permission from them each time. This potentially leaves victim-survivors who have already given permission to share their identity exposed to repeated requests for written confirmation of that permission.122

Although intended to maximise complainer anonymity, one unforeseen consequence of this approach is the risk of the law mandating persistent intrusion into a complainer’s private life, as well as challenges of effective enforcement in a social media age, where anyone can become a publisher by sharing content online. As a result, I argue there should be a clear defence of lawful publication

available to all publishers where an adult complainer has clearly consented to being publicly identified, and Scotland should not follow Tasmania and Victoria in imposing additional conditions on how far lawfully published information about a complainer may lawfully circulate. Complainers should have absolute autonomy to determine whether they are identified, but if they do decide to go public, then the reporting restrictions should fall away, with complainer privacy being protected by the general law, with opportunities to raise civil proceedings for breach of confidence where relevant. Such an approach would also provide legal certainty for potential publishers, which must also be a relevant consideration in framing such legislation.

(7) What if the complainer is deceased?

One further consideration is what effect, if any, the death of the victim of a sexual offence should have on the reporting restrictions in their case. So far, the discussion has assumed that the complainer is alive at the time legal proceedings are brought and has a live, direct and continuing interest in their identity not being disclosed. In some instances, however, the victim will have died in advance of any trial, or been killed in the course of the sexual assault. The question is also important where a complainer dies many years after the case they were involved in. Should the law prohibit obituaries or biographies identifying a deceased person as a complainer in a sexual offences case, even many years after the offence was allegedly committed? The 2019 Gillen Review in Northern Ireland recommended prohibitions on identifying complainers “should be made permanent” on the basis that the possibility of disclosure after death “could deter some victims coming forward if, for example, they have a terminal illness. Moreover it might also be extremely distressing for their families.”

While this approach may seem attractive in the abstract, Gillen’s recommendation overlooks the problematic practical implications of permanent restrictions recently encountered in India, Tasmania and Victoria.

Most of the jurisdictions considered as part of this project adopt the approach to privacy rights articulated by the European Court of Human Rights, conceptualising privacy rights as “eminently personal and non-transferable” to “relatives or next-of-kin unless they are personally affected by the interference at issue.” Some anonymity regimes clearly extinguish the reporting restrictions on the death of the complainer – such as England, Wales and Northern Ireland. Some Australian jurisdictions echo the English approach, while others are silent on the effect of the death of the

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123 Gillen (2019) at para 3.65
125 Sexual Offences (Amendment) Act 1992 s 1(1).
126 New South Wales in the Crimes Act 1900 s 578A(4)(f).
complainer on reporting restrictions, suggesting restrictions will continue to obtain whether or not
the complainer is alive or deceased—though those jurisdictions like New Zealand which invest the
courts with authority to set aside restrictions would permit a newspaper or author to apply to the
court to identify a deceased complainer with judicial permission provide an effective route to
publication.\textsuperscript{127}

The regulation under the Indian Penal Code is particularly strict in terms of post-mortem
disclosures. Section 228A(2)(b) of the Code provides that identifying a deceased victim of sexual crime
is prohibited, unless the “next of kin” grant authority to “the Chairman or the Secretary of recognised
welfare institutions or organisations” to identify the victim. As the case of \textit{Nipun Saxena} highlighted,
however, neither the Central Government nor any State Government has recognised any such welfare
institution or organisation. This has the legal consequence that it is a criminal offence in India for
anyone to publicly identify the victim of a sexual offence, including next of kin, where the victim is
dead and cannot consent to being identified. In practice, victims have been identified by their families
in foreign media, evading the national restrictions, but this position is clearly unsatisfactory.\textsuperscript{128} Any
Scottish regime for complainer anonymity must take care not to replicate this predicament, which
could easily arise if anonymity is not expressly limited to the lifetime of the complainer and the only
lawful route to disclosure relies on the complainer’s consent rather than the involvement of the
courts.

These matters are more easily dealt with by jurisdictions like New Zealand which make the
disclosure of complainer identities contingent on judicial permission. This opens the door for surviving
family members and other interested parties to apply to the court for permission to publish otherwise
prohibited material. However, this approach also generates problems. Consider recent experience in
the Australian state of Victoria. Victoria now makes specific provision about the anonymity of
deceased persons, which unlike English law extends beyond their natural life. Under the new
provisions, in cases involving deceased victims of sexual crime,\textsuperscript{129} anyone with a “sufficient interest,”
apart from the person accused of the sexual offence, may apply to the court for permission to publish
identifying information about a complainer.\textsuperscript{130} In deciding whether or not to authorise publication,
Victorian judges must take account of “the views of the deceased victim, if those views are known
following reasonable enquiries,”\textsuperscript{131} but also ensure “the views of any family members of the deceased

\textsuperscript{127} Criminal Procedure Act 2011 s 203(3)(b).
\textsuperscript{128} G V Bhatnagar, “Disclosing the Identity of Rape Victim Remains a Grey Area in the Justice System” (2016)
The Wire 28\textsuperscript{th} July 2016 accessible at: \url{https://thewire.in/law/identity-of-rape-victims}.
\textsuperscript{129} Judicial Proceedings Reports Act 1958 s 4(1BF)(b).
\textsuperscript{130} 1958 Act s 4(1BH)(a).
\textsuperscript{131} 1958 Act s 4(1BF)(b)(i).
victim are taken into account” before deceased complainants can be identified. There is also an overriding “public interest” test.

This approach suggests that complainer anonymity should be understood to serve wider social and family considerations than the complainer’s privacy alone, limiting the circulation of identifying information about the complainer which may impact on their family members, partners, colleagues and friends, independently of the implications for the privacy rights of complainers themselves. In their application, however, these new rules have also generated controversy in the state, as they require family members to seek judicial permission to identify relatives who are the victim of sexually-motivated homicide. In addition to the financial and emotional costs of going to court, in the immediate aftermath of the rape and murder of a relative, Victorian law currently prohibits family members from talking publicly about who the victim was until judicial permission is secured. In the wake of high profile cases in the state where next of kin have been highly critical of these requirements to go to law, further reforms are now promised to relieve relatives of the need to seek judicial permission before talking publicly about a deceased victim of sexual crime.

There are also wider questions of principle here about whether the law should be extended to impose reporting restrictions in respect of the dead for the benefit their surviving relatives. Like Victoria, under the amended Tasmanian rules, if the complainer is “deceased and likely to be identified or identifiable,” the next of kin, or legal representative of the deceased person must be “given a reasonable opportunity to inform the court of the wishes of the deceased person, if known, in respect of being identified.” There are subtle but important differences here between the Victorian and Tasmanian provisions. In Tasmania, the function of family consultation is to ascertain the wishes of the deceased person, while in Victoria, the attitude of family members to the publicity is framed as an independent factor informing the court’s decision to permit or refuse identification “in the public interest.” In effect, this means family members could attempt to retain reporting restrictions about a now dead complainer, on the basis of their own preference not to be identified collaterally in connection with a prosecution.

This enlarged conception of privacy rights is unusual in the context of Article 8 of the ECHR, but may seem intuitively plausible. While the primary beneficiary of automatic reporting restrictions

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135 Evidence Act 2001 s 195K(SB)
is the complainer themselves, by repressing their identity, we also allow their wider family groups to avoid public exposure in connection with a case. As the Scottish rape campaigner “MissM” has observed,\textsuperscript{138} drawing on her own experiences of the justice system, “one person is raped but their whole family is affected.”\textsuperscript{139} Complainant anonymity benefits not only the primary victim, but those personally connected with them. It is important to remember, however, that reporting restrictions of this kind are exceptions to the general principle of open justice in our courts,\textsuperscript{140} and represent an infringement with Article 10 free expression rights. These infringements can clearly be justified on the basis of pursuing a legitimate aim in respect of living complainers, and Strasbourg has held that blanket prohibitions satisfy the demands of proportionality.\textsuperscript{141} Whether or not the same proportionality analysis would apply to perpetual post-mortem prohibitions on publicity in the interests of surviving members of a complainer’s family is open to question.

Overall, I suggest the balance of convenience favours the simpler approach adopted in New South Wales, with reporting restrictions automatically falling on the complainer’s death. As the Victorian experience has demonstrated, in models which rely on complainer consent to be set anonymity aside, attempts to extend the law beyond life’s natural span inevitably results in surviving family members and others being subject to court processes and restrictions on reporting being imposed in circumstances where the victim dies in the course of or in the aftermath of a sexual assault. The only effective way of avoiding these restrictions is to regard complainer anonymity rights as personal, non-transferable and extinguished on death. This approach has the additional benefit of giving legal certainty to potential publishers, researchers, and historians that their future work will not inadvertently be compromised, while protecting the legitimate interests of complainers during their lifetimes.

(8) Breaching anonymity: a summary offence, a contempt of court, or both?

Deciding when anonymity accrues and when it can be set aside are critical issues in designing complainer anonymity legislation. However, here are ancillary but important considerations any Scottish reform will have to address. What is the appropriate mode of trial? Should breaching reporting restrictions be a crime of summary or solemn jurisdiction, or alternatively, treated as a new form of statutory contempt of court? And corollatively, what should the maximum penalty for

\textsuperscript{138} MissM was the pursuer in the civil rape case of AR v Coxen [2018] SC EDIN 53. A section 11 contempt order was made in her case, prohibiting her identification.

\textsuperscript{139} MissM, Twitter (2020) available at https://twitter.com/missmjustice/status/1314635924907720706

\textsuperscript{140} A v British Broadcasting Corporation [2014] UKSC 25.

\textsuperscript{141} Canadian Newspapers at para 15.
infringements of complainer anonymity be? The next section considers each of these questions in turn.

The overwhelming majority of comparator common law jurisdictions treat unauthorised disclosures as summary offences or a species of contempt of court.\(^\text{142}\) This reflects an assessment of the seriousness of the offence, and an assessment of whether allegations of violating anonymity are best decided summarily by judges or by a jury after trial on indictment. The Tasmanian Law Institute makes the case for employing summary proceedings on the basis that:

the task of balancing the legal principles of freedom of speech, open justice and the proper administration of justice seems to require the application of the particular legal experience and expertise of a judge rather than the application of the common sense of the jury.\(^\text{143}\)

In terms of penalties, most jurisdictions allow courts to impose financial and custodial penalties. Recent Tasmanian reforms, for example, provide for financial penalties and a maximum of twelve months imprisonment.\(^\text{144}\) Two years imprisonment is the maximum penalty provided for in the Indian,\(^\text{145}\) Bangladesh,\(^\text{146}\) and Queensland legislation.\(^\text{147}\) In Hong Kong,\(^\text{148}\) New Zealand,\(^\text{149}\) New South Wales,\(^\text{150}\) and the Australian capital territory, the maximum period of imprisonment is for six months.\(^\text{151}\) In Canada, the maximum penalties for summary offences are “a fine of not more than $5,000 or to a term of imprisonment of not more than two years less a day, or to both.”\(^\text{152}\) Under the Irish rules, punishments are capped at “a fine not exceeding £10,000 or, at the discretion of the court, to imprisonment for a term not exceeding 3 years or to both such fine and such imprisonment.”\(^\text{153}\) The same maximum penalty applies in Singapore.\(^\text{154}\) Under the Sexual Offences (Amendment) Act 1992, by contrast, identifying complainers in a sexual offences cases in England, Wales and Northern Ireland is prosecutable summarily-only with a maximum penalty of a fine of level 5 on the standard scale –

\(^{142}\) With some very limited exceptions. In the Republic of Ireland, for example, proceedings can be taken on indictment. Criminal Law (Rape) Act 1091 s 11(1).

\(^{143}\) Tasmania Law Reform Institute (2013) at para 4.4.8.

\(^{144}\) Evidence Act 2001 s 194K(1).

\(^{145}\) Indian Penal Code s 228A(1).

\(^{146}\) Prevention of Women and Children Repression Act 2000 s 14(ii).

\(^{147}\) Criminal Law (Sexual Offences) Act 1978 s 10(1).

\(^{148}\) Hong Kong Penal Ordinance s 188.

\(^{149}\) Criminal Procedure Act 2011 s 211(4).

\(^{150}\) Crimes Act 1900 s 578A(2).

\(^{151}\) Evidence (Miscellaneous Provisions) Act 1991 s 74(1).

\(^{152}\) Canadian Criminal Code s 787.

\(^{153}\) Criminal Law (Rape) Act 1981 s11(1).

\(^{154}\) Women’s Charter s 153(5).
currently £5,000.¹⁵⁵ In South Australia too, the penalties for disclosing complainer identities are purely financial, with penalties ranging from a fine of $10,000 for offences committed by a natural person, and up to $120,000 in cases involving a body corporate.¹⁵⁶ This international picture suggests the maximum penalties available for violations of complainer anonymity in England, Wales and Northern Ireland are strikingly lower than the other comparable common law jurisdictions, including the Scottish status quo.

In my submission, the Tasmania Law Reform Institute is correct. Questions of whether a publication has violated anonymity is a decision best taken by judge alone. This suggests either a new crime of summary jurisdiction, recognising anonymity violations as a new statutory form of contempt of court – or a hybrid model. If breaching complainer anonymity was treated as a summary offence, it would be prosecutable be way of complaint in the Sheriff Court and a maximum fine of £10,000 and imprisonment of up to 12 months. However, this contrasts unfavourably with the penalties currently available under the Contempt of Court Act 1981, which provides a maximum penalty of two years’ imprisonment or a fine in contempt of court arising from solemn criminal cases, and a maximum of three months’ imprisonment and a fine of up to £2,500 for contempt arising in summary criminal and civil cases.¹⁵⁷

In Scotland, we currently have only the 2021 cases of Thomson and Murray for guidance on the court’s attitude to sentencing instances of infringing complainer anonymity. After the section 11 order was made in HM Advocate v Salmond, Thomson named five complainers on Twitter. Thomson had only a modest number of social media followers, admitted his guilt promptly, and was sentenced to 6 months’ imprisonment for contempt.¹⁵⁸ Craig Murray, by contrast, was found to have used his blog to effect a “substantial” dissemination of information concerning four complainers which was likely to give rise to their identification. The Lord Justice Clerk suggested Murray was “relishing the task he set himself,” and held that his publications created “a real risk that complainers may be reluctant to come forward in future cases, particularly where the case may be high profile or likely to attract significant publicity,” striking “at the heart of the fair administration of justice.”¹⁵⁹ Murray received eight months’ commitment to prison.¹⁶⁰ While both of these cases would fit comfortably within the sentencing range available under summary criminal procedure, it is less clear that the

¹⁵⁵ Sexual Offences (Amendment) Act 1992 s 5.
¹⁵⁶ Evidence Act 1929 s 71A(2).
maximum fine of £10,000 would be adequate, particularly where the violation of anonymity was committed by a major publishing concern with significant social impact.

There are different ways this inadequacy might be addressed. One approach might be to recognise the identification of complainers as both a crime of summary jurisdiction in the first instance, and residually as a contempt of court. This is the Tasmanian approach, which could be adapted to our own context. Tasmanian law now provides that that identifying a complainer is a crime of summary jurisdiction, while also providing that any person who ‘person who publishes or causes to be published anything’ covered by the anonymity provisions ‘commits a contempt of court and is liable to punishment for that contempt as if it had been committed in the face of the court against which the contempt is committed.’ Legislating for complainer anonymity in this way would establish a framework for dealing with routine summary cases, but also a way for the Crown to raise a petition and complaint for contempt where, for example, the maximum financial penalties available to the Sheriff sitting summarily appear inadequate, perhaps in circumstances where a large media organisation breaches complainer anonymity in a particularly flagrant way.

Alternative approaches would also be viable. Sheriffs could simply be authorised by Parliament to impose financial penalties on large publishing companies or broadcasters in excess of the ordinary £10,000 limit for this offence if circumstances warrant it. The Criminal Procedure (Scotland) Act 1995 could be amended to allow sheriffs to remit summary cases to the High Court for disposal where “the sheriff holds that any competent sentence which he can impose is inadequate” in anonymity cases. A third strategy might be to follow the approach of some other jurisdictions, and create a limited summary jurisdiction for the High Court to adjudicate these cases. There is no reason in principle why this new jurisdiction could not be established, with prosecutors retaining their right to select the appropriate forum for proceedings based on the public interest, reflecting the impact of unauthorised publications on complainers’ interests. It seems likely, however, that resort to any of these forums for enhanced penalties would be exceptional. There is a fourth alternative. Amending the Contempt of Court Act 1981 to make violations of complainer anonymity a new statutory form of contempt might achieve the desired outcomes most simply. This approach would lead to trials by judge alone, with a maximum tariff of up to two years’ imprisonment, and an unlimited fine.

162 Evidence Act 2001 s 194K(8).
163 Criminal Procedure (Scotland) Act 1995 s 195(1).
164 Contempt of Court Act 1981 s 15.
C. CONCLUSION: A SCOTTISH APPROACH TO COMPLAINER ANONYMITY

Scotland needs to establish a clear legislative framework for complainer anonymity. The status quo is not only out of step with the rest of the UK and other common law jurisdictions – it also incorporates many of the worst features of the international models analysed. Complainer anonymity is not routinely imposed in Scotland, but where it is imposed, it is imposed in court processes in which complainers are not independently represented. If an individual complainer wishes to vary the reporting restrictions, they must instruct their own lawyers to make an application to the court to avoid prosecution for contempt. Reviewing the experience of other jurisdictions – particularly those like Victoria and Tasmania which have reformed their laws recently – highlights some of the pitfalls Scots law would do well to avoid.

Any Scottish framework for anonymity should be legislated for in a way which ensures there are no lengthy periods in the course of a criminal investigation during which the legal status of identifying complainers changes. The law should also be concerned to minimise the indirectly discriminatory implications of making complainers responsible in law for making the case in court for anonymity rights to be recognised. This automatic framework of complainer anonymity should apply automatically to all modern and historical sexual crimes, accruing from first complaint in a sexual case to the end of the complainer’s lifetime, unless they decide to share their story. Attempting to extend reporting restrictions beyond the complainer’s lifetime is questionable in principle. The experience in Victoria also suggests it creates uncertainties and anomalies in practice. Otherwise, decision-making on waiving anonymity should be framed in law to maximise complainer autonomy and minimise restrictions on complainers deciding to publicly disclose what they say happened to them.

Because anonymity draws much of its force from the complainer’s privacy rights, the law should empower and facilitate complainers to “go public” with their stories unilaterally if they choose to do so. As the #LetHerSpeak campaign has persuasively argued, we should not subject adult complainers to paternalistic requirements to gain sanction of the court to do so. The law should instead facilitate such disclosures, minimising the financial, social and emotional costs for complainers of doing so. A model of complainer anonymity which relies on complainers showing initiative in applying to the court for reporting restrictions to be applied or set-aside is a model of anonymity which is likely to indirectly exclude or incidentally criminalise indigent complainers and those with limited understanding of the law. A framework for judicial permission may be more appropriate in cases involving complainers who are still children, but overall, any new framework must be rooted in the recognition of the importance of complainer autonomy. People will use their autonomy in different ways. Some complainers will value their privacy and preserve their anonymity, while others have an equally legitimate desire to share their experiences more widely. Ultimately, the law should recognise
there is no wrong way to be the victim of sexual crime. As the law in Scotland currently stands, it does not do so. S sensitively and thoughtfully reformed, it can.