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Improving victims' experiences of the justice system: consultation response

Campaign for Complainer Anonymity

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Improving victims' experiences of the justice system: Consultation Response

CAMPAIGN FOR COMPLAINER ANONYMITY

Campaign for Complainer Anonymity
WWW.CALEDONIANBLOGS.NET/CAMPAIGNFORCOMPLAINERANONYMITY/

Who are we?

The Campaign for Complainer Anonymity (CCA) is a law reform campaign established in 2020 by legal academics and law students at Glasgow Caledonian University. We are campaigning to change the law on complainer anonymity in sexual offence cases in Scotland. You can learn more about us here: https://www.caledonianblogs.net/campaignforcomplaineranonymity/

Consultation Response

We welcome this opportunity to share our views on why Scotland should legislate on complainer anonymity and how this should be achieved. We look forward to engaging with the responses of others to the consultation and to working with the Government on this issue going forward.

Why do we support complainer anonymity?

Complainer anonymity both facilitates the administration of justice and protects privacy rights in sexual offence cases.[1] Evidence suggests that sexual offences may be under-reported in part due to privacy concerns.[2] Complainer anonymity laws can therefore play an important role in over-coming these concerns and encouraging disclosure.

Unlike the rest of the United Kingdom, Scotland has no automatic legal right to anonymity for complainers in sexual offence cases. Our research has shown that Scotland is in fact an outlier not only in the United Kingdom, but in much of the common law world.[3]

While it is possible in Scotland for an order to be made prohibiting the identification of complainers under the Contempt of Court Act 1981, this is rare. Instead, we rely largely on press-self regulation to protect the identity of complainers. This is, however, an imperfect system.

The vulnerabilities of the present system are writ large in The Independent Press Standards Organisation (IPSO) case *A Man v Daily Record.*[4] In that case, a complainer was named in a press report and complained to the IPSO. He experienced significant upset and humiliation as a result, and his friends and family found out about the incident through the report. While it was determined that the publication breached relevant provisions of the Editors' Code of Practice and the newspaper was required to publish the Committee's ruling upholding the complaint, it was noted that there is no specific legal provision which grants automatic anonymity within Scotland. In strictly legal terms, the newspaper was free to publish the complainer's name. This case illustrates the lacuna present in Scots law and the dangers of relying solely on press self-regulation.

Social media also has implications in this context. While in the past court cases were generally reported through traditional types of media such as newspapers, television and radio broadcasts,

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[1] See C McGlynn, "Rape, defendant anonymity and human rights: adopting a 'wider perspective" (2011) CrimLR 3 199 – 215 at 213.

[2] For a summary of relevant data concerning reporting of sexual offences, see A Tickell, "How should complainer anonymity for sexual offences be introduced in Scotland? Learning the international lessons of #LetHerSpeak", Forthcoming in the Edinburgh Law Review (2022) at 6-7

[3] Jurisdictions examined in the course of our work include the United States of America, Canada, Australia, New Zealand, Singapore, Hong Kong, India, Bangladesh, the Republic of Ireland, England, Wales, Northern Ireland and Scotland. For a full discussion of jurisdictions explored in our research, see A Tickell, "How should complainer anonymity for sexual offences be introduced in Scotland? Learning the international lessons of #LetHerSpeak", Forthcoming in the Edinburgh Law Review (2022)

[4] Decision of the Complaints Committee 05764-15, *A Man v Daily Record*, decision available at https://www.ipso.co.uk/rulings-and-resolution-statements/ruling/?id=05764-15

the rise of the internet has transformed how information can be relayed and shared. Social media platforms provide us all with the ability to share information that can be accessed globally in a matter of seconds. This reinforces the undesirability of a system modelled on self-regulation of the traditional press.

The evidence also demonstrates that the general public already believe that complainer anonymity is protected by law. In 2021, we obtained funding from the Glasgow Caledonian University Social, Criminal and Legal Justice Research Group to carry out quantitative research. The Diffley Partnership was commissioned to carry out a survey gauging public understanding of the current law and attitudes towards imposing automatic reporting restrictions in sexual offence cases. Our results are based on a survey of 2,115 respondents and fieldwork was conducted between 6th and 10th of September 2021. These data are weighted to the Scottish population by age and gender.

We asked participants:

"[t]hinking about the current laws around naming of people who say that they have been a victim of a sexual offence, which of the following statements comes closest to your understanding?

- The media can identify people who say they have been a victim of a sexual offence in all cases
- The media can identify people who say they have been a victim of a sexual offence in some cases but not in others
- The media can never identify people who say they have been a victim of a sexual offence
- Don't know"

Our survey showed that 42% of respondents believed that the media can never identify people who say they have been a victim of a sexual offence. This indicates a significant lack of public understanding of the current legal position. An assumption that he already benefited from complainer anonymity was also present in *A Man v Daily Record.* In that case, the complainer said "that he had been assured by the police in advance that he would not be identified by the media."[5] This, unfortunately, was not legally accurate, and demonstrates that complainers are surprised and shocked to discover that the law offers no such protection.

Our survey also asked participants:

"Thinking about those who say they are victims of a sexual offence to what extent do you agree or disagree with the following statements:

- People who say they have been the victim of a sexual offence should have the right to anonymity for the rest of their lives, preventing them from being identified in the media or on social media
- Broadcasters (television and radio) and newspapers should have the right to identify people who say they have been the victim of a sexual offence, whether or not they wish to be identified
- Users of social media (such as Twitter, Facebook or YouTube) should have the right to identify people who say they have been the victim of a sexual offence, whether or not they wish to be identified"

[5] Decision of the Complaints Committee 05764-15, *A Man v Daily Record*, decision available at https://www.ipso.co.uk/rulings-and-resolution-statements/ruling/?id=05764-15

Respondents were asked to indicate if they strongly agree; tend to agree; neither agree nor disagree; tend to disagree; or strongly disagree with the statements, or if they do not know.

47% of respondents strongly agreed and, in total, 73% agreed that people who say they have been the victim of a sexual offence should have the right to anonymity for the rest of their lives, preventing them from being identified in the media or on social media.

70% of participants strongly disagreed that broadcasters (television and radio) and newspapers should have the right to identify people who say they have been the victim of a sexual offence, whether or not they wish to be identified. 72% strongly disagreed that users of social media should have the right to identify people who say they have been the victim of a sexual offence, whether or not they wish to be identified.

Our research suggests that the law in this area is poorly understood but that there is strong public support for a right to anonymity for complainers. The law in this area ought to be reformed and an automatic right to anonymity provided for in legislation.

When should complainer anonymity apply?

Complainers in Scottish sexual offences cases should have an automatic right to anonymity. Anonymity should be imposed automatically by law. Complainers should not have to seek court orders to protect their identities.

Currently, orders protecting the identity of a complainer can be made under the Contempt of Court Act 1981 on a case-by-case basis. Courts are under no obligation to make such an order, and in practice such orders are not common.[6] As a result, the overwhelming majority of complainers have no protection.

Making complainers responsible for seeking such an order creates two problems. First, there is a potential window in which a complainer could be identified. Second, it imposes unnecessary economic and social costs on complainers, requiring them to instruct lawyers, potentially secure legal aid, and carry the administrative burden and emotional uncertainty associated with that process.

In terms of when this automatic right should take effect, if the right is only activated when a person is formally charged or when criminal proceedings first call in court, there remains a window in which the complainer can be identified. Given the concerns articulated above, this too is undesirable.

In our submission, complainer anonymity should be imposed at the earliest stage of proceedings, to maximise legal certainty for complainers and those who may report on sexual crime. The international models suggest different jurisdictions adopt different approaches to when reporting restrictions are imposed.

One approach which ensures that anonymity rights accrue early, is to activate the right when a report is made to a police officer that a sexual crime has been committed. This minimises the window of opportunity within which a complainer could be identified. Imposing reporting restrictions when a case calls in court is arguably too late. This also has the benefit of providing legal certainty, as there is a clearly identifiable moment in the legal process which triggers the right. This

[6] For a full discussion of the use of orders under the Contempt of Court Act 1981, see A Tickell. "Why don't sexual offence complainers have a right to anonymity in Scotland?" (2020) Edinburgh Law Review 24(3), 427 – 424 at 430

legal certainty is important for both complainers in understanding their rights and for the media in understanding the restrictions on their reporting.

It is important to recognize, however, that Scotland has, in recent years, seen several high profile civil rape cases. For example, in *AR v Stephen Daniel Coxen*,[7] an order was granted under section 11 of the Contempt of Court Act 1981 anonymising the pursuer. There may be merit in introducing a second trigger for introducing automatic anonymity in civil cases of this nature, accruing upon the commencement of litigation.

Anonymity rights should cease to apply upon the death of the complainer. Extending anonymity rights beyond the natural life of the complainer may seem superficially attractive. However, recent experience of attempts to do this in Australia have generated unforeseen and negative consequences.[8] Family members could be obliged to launch and fund court proceedings in order to identify a loved one who has been killed in the course of a sexual assault and could be subject to potential criminal liability if they chose to identify the complainer without going through this onerous, lengthy and costly process. Equally, this can lead to challenges for activists, campaigners, publishers, historians and researchers who discuss sexual offences as part of their work.

What offences should attract anonymity?

In the majority of jurisdictions that provide for complainer anonymity, anonymity applies to a qualifying list of sexual offences. A similar approach could be adopted in Scots law by relying on section 288C of the Criminal Procedure (Scotland) Act 1995.

However, the law in England and Wales has been criticised for failing to recognise image based sexual abuse as a sexual offence for the purposes of reporting restrictions.[9] It is therefore important that any qualifying list of Scottish offences should include section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. In addition to this, the Scottish Parliament has recently created a new offence of a course of domestic abuse which can be used to prosecute sexual offending. There may be merit therefore, in addition to the qualifying list of offences, to extend anonymity to any other crime with a significant sexual element.

Should there be a right to waive anonymity?

We believe that complainers should have the right to waive their anonymity should they wish to do so. Complainers should be able to set aside their anonymity unilaterally without having to apply for a court order. Requiring a complainer to apply for a court order creates an unnecessary administrative, financial and emotional burden on the complainer. The return to the courtroom environment may in itself be re-traumatising and disempowering and should be avoided. The

[7] *AR v Stephen Daniel Coxen* [2018] SC EDIN 53

[8] For a discussion of the ways in which this has been problematic, see A Tickell, "How should complainer anonymity for sexual offences be introduced in Scotland? Learning the international lessons of #LetHerSpeak", Forthcoming in the Edinburgh Law Review (2022) at 27

[9] McGlynn and Rackley have criticized the lack of anonymity for victims of image-based sexual abuse. See C McGlynn and E Rackley, "Image-based sexual abuse" (2017) *OxJLS* 37(3) 534 – 561. For a full discussion of this issue in the Scottish context see A Tickell, "How should complainer anonymity for sexual offences be introduced in Scotland? Learning the international lessons of #LetHerSpeak", Forthcoming in the Edinburgh Law Review (2022) at 11.

Australian #LetHerSpeak campaign highlighted the perils of creating a system in which complainers were effectively gagged from talking about their own experiences.[10]

The consultation also asks whether the court should have the power to set aside anonymity in certain circumstances. In England, Wales and Northern Ireland it is possible for the court to direct that anonymity will not apply in some cases. Significantly, our research has shown that most jurisdictions have not adopted such an approach[11] – England, Wales and Northern Ireland are outliers. It is therefore unclear why such a provision would be necessary in Scotland and we would suggest that no such provision is adopted.

If the Government takes the view that such a provision is required then there should be a high threshold for deprivation of the right to anonymity, restricted to a narrow set of cases. If a court has the option to set aside anonymity in certain circumstances it should be restricted only to cases where the complainer is convicted for an offence against public justice in relation to the earlier trial.

What penalties should apply?

Breaches of complainer anonymity should be dealt with either using summary criminal proceedings or contempt of court. A breach of complainer anonymity lends itself to determination by a judge sitting alone and therefore in other jurisdictions is generally dealt with through summary proceedings.[12]

Summary offences in Scots law currently attract a maximum fine of £10,000 and/or up to 12 months' in prison. By contrast, breaches of the Contempt of Court Act 1981 attract as a maximum an unlimited fine or 2 years' in prison. While these custodial penalties are likely to be adequate, the maximum fine available for summary cases may represent an inadequate sanction for a large scale breach by a mainstream broadcaster or publication.

There are a variety of solutions available which would allow for a suitable financial penalty to be imposed. Perhaps the most obvious solution would be treating the offence as a summary crime and also as a contempt of court, as has been done in other jurisdictions.[13] In those cases, where it was felt that a summary fine was inadequate, it would be possible to treat the offence as one of contempt. There are also other possibilities available to the Government here[14] and we would suggest that these should be explored in order to ensure that the maximum penalties for bodies corporate match the magnitude of the potential violation.

What defences should be available?

In terms of defences that ought to be available, largely this is a question of how the complainer anonymity provision is framed. In England, Wales and Northern Ireland, publication by third parties

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[10] See https://www.letusspeak.com.au/

[11] See A Tickell, "How should complainer anonymity for sexual offences be introduced in Scotland? Learning the international lessons of #LetHerSpeak", Forthcoming in the Edinburgh Law Review (2022) at 20.

[12] A Tickell, "How should complainer anonymity for sexual offences be introduced in Scotland? Learning the international lessons of #LetHerSpeak", Forthcoming in the Edinburgh Law Review (2022) at 29 – 30.

[13] As is the case in Tasmania. See A Tickell, "How should complainer anonymity for sexual offences be introduced in Scotland? Learning the international lessons of #LetHerSpeak", Forthcoming in the Edinburgh Law Review (2022) at 31.

[14] For a full discussion see A Tickell, "How should complainer anonymity for sexual offences be introduced in Scotland? Learning the international lessons of #LetHerSpeak", Forthcoming in the Edinburgh Law Review (2022) at 31.

is an offence unless the complainer has given written consent; this written consent being the basis for the defence.

There are also other defences available in England, Wales and Northern Ireland, including where, at the time of the alleged offence, a person was not aware and neither suspected nor had reason to suspect that the allegation in question had been made. As noted in the Consultation, this defence may in part be driven by the lack of clarity in the offence as to when an allegation is made.[15] This directly relates to our earlier point about the need for legal certainty – it is important for complainers that they know when their rights are protected and publishers know when they are restricted from publication. This uncertainty is, in our view, undesirable and ensuring clarity as to when the offence applies may remove the need for such a defence.

Other relevant reforms

We believe the Scottish Government should take this opportunity to revisit section 47 of the Criminal Procedure (Scotland) Act 1995. Section 47 currently regulates reporting restrictions in cases involving children. Like the current law on complainer anonymity generally, this provision of the 1995 Act was drafted before the advent of social media and applies in an inconsistent and incoherent manner, imposing restrictions on broadcasters while leaving social media users free to identify accused people and witnesses in cases involving children. As part of a comprehensive review this is an obvious opportunity to modernise and reform section 47.

Conclusion

We welcome this Government consultation and hope that Scotland seizes this chance to reform the law on complainer anonymity. Learning lessons from other jurisdictions, we have the opportunity to create a comprehensive, nuanced right to complainer anonymity. We look forward to engaging with the submissions from other interested parties and are keen to discuss and share knowledge throughout the law reform process.

[15] See Scottish Government, "Improving victims' experiences of the justice system Consultation" (May 2022) at 62.