Annex B: Complainer anonymity – approaches in different jurisdictions

This Annex sets out how law in different jurisdictions around the world is understood to operate in the area of complainer anonymity. It is not intended to be a detailed description of the law in other countries.

England, Wales and Northern Ireland

The law provides for protection of complainant identity as soon as an "allegation" has been made that a sexual offence has been committed against a person. This is lifetime anonymity with the law contained in the Sexual Offences (Amendment) Act 1992 ("the 1992 Act")[1]. The offences covered by the 1992 Act generally constitute sexual offences and can be described as wide ranging.[2] The prescribed list of offences covered by the 1992 Act are contained in section 2 and include rape and the majority of the offences contained in Part 1 of the Sexual Offences Act 2003[3], amongst others.

The effect of the 1992 Act is that after an allegation of a sexual offence is made, a person is prohibited from publishing "any matter" during a complainant's lifetime if it is likely to lead members of the public to identify them.[4] This includes in particular:

- his/her name
- his/her address
- the identity of any school or other educational establishment attended by him/her
- the identity of his/her place of work
- any still or moving pictures of him/her

Publication is widely defined and includes any speech, writing, relevant programme or other communication in whatever form addressed to the public at large or to any section of the public. As such, it is understood social media postings would be covered as well as publication through more traditional forms of media, for example a hard copy newspaper.

The relevant sexual offences to which the ban on the publishing of identifying information applies are set out in section 2 of the 1992 Act[5], and include offences such as rape, assault by penetration, sexual assault and child sex offences.

As section 1 prohibits the publication of any matter when it is "likely to lead" to the identification this also covers what has been termed 'jigsaw identification'.

---

[1] Sexual Offences (Amendment) Act 1992 (legislation.gov.uk)
[2] Automatic reporting restrictions also extend to an offence of human trafficking under section 2 of the Modern Slavery Act 2015: Sexual Offences (Amendment) Act 1992 (legislation.gov.uk)
[3] Sexual Offences Act 2003 (legislation.gov.uk)
[4] Sexual Offences (Amendment) Act 1992 (legislation.gov.uk)
[5] Sexual Offences (Amendment) Act 1992 (legislation.gov.uk)

This refers to the situation where the identity of a person protected by a reporting restriction order may be disclosed as a result of different media reports, none of which breach the terms of any order or statutory provision individually, but which taken together enable the protected person to be identified.

In most cases this may not be an issue, but particular difficulties arise in relation to sexual offences alleged to have been committed against persons within the same family. For example, where publication of information refers to an unnamed defendant convicted of raping his daughter and publication of separate information refers to the name of the defendant, the daughter could be identifiable to the public in breach of the automatic prohibition protecting victims of sexual offences.

This means an assessment requires to be made as to whether the particulars of a publication could prompt speculation and lead to identification.

Another example where care is needed is any publication of information referring to someone's school or workplace if their age is published which could prompt speculation likely to lead to identification. Conversely, naming a large educational established, for example a university, when stating the victim is a student there, will not in itself usually be likely to identify him or her.

When does anonymity cease to apply?

Although the restriction on publication of material that would identify the complainant applies for the whole of a person's lifetime from when the allegation was made, there are circumstances in which the restriction can be lifted. The main exceptions are understood to be where:

- the complainant chooses to reveal his or her identity by written consent

- the complainant's identity is reported as part of subsequent (and separate) criminal proceedings, for example if the complainant were subsequently to be prosecuted for perjury or perverting the course of justice

- the court lifts the restriction (following an application by the defendant) on either of the following grounds –

    - to persuade defence witnesses to come forward and if the court does not lift the restriction the conduct of the applicant's defence at the trial is likely to be substantially prejudiced

    - to help obtain evidence in support of an appeal and that otherwise the appellant is likely to suffer substantial injustice

    - the court is satisfied that the restriction is a "substantial and unreasonable restriction" on the reporting of the trial and it is in the public interest to remove or relax it

The right of the complainant to give written consent to waive their anonymity operates as a defence to the statutory offence of breaching anonymity in section 5 of

the 1992 Act. A complainant must be over the age of 16 to be able to consent to waive their anonymity and it must be ensured that nobody has "interfered unreasonably" with their "peace or comfort" to secure their consent. The law in England, Wales and Northern Ireland therefore guards against someone being pressured into giving consent and makes clear that any child under 16 is regarded as too immature to understand the consequence of being publically identified in this context.

It is only the complainant who has a right to waive anonymity under the 1992 Act. This does not, for example, extend to family members.

It is important to understand that the 1992 Act does not protect Scottish complainers. The 1992 Act does apply to Scotland, but only to prevent Scottish publishers from identifying complainants in sexual offence cases elsewhere in the UK.

United States of America

The United States is, quite unusually, an example of a common law model which does not regulate the media through legislation.

As a result of the constitutional right to a free press enshrined in the First Amendment, it is understood for many years the U.S. Congress and the courts have favoured expanding reporters' rights and the rights of a free press over personal privacy.

This is recognised by Dr Tickell in his research in a forthcoming piece in the Edinburgh Law Review, which explores the international picture of complainer anonymity, where he provides, "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."[6] Dr Tickell further observed, "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."[7]

The First Amendment therefore enshrines the primacy of free speech and the public's 'right to know' over competing rights of privacy and anonymity.

Other international jurisdictions generally either provide for a statutory automatic right to anonymity or provide the court with the power to order such reporting restrictions in sexual offence cases upon application.

Accordingly, it can be said the current position in Scotland, where specific provision is absent in this regard, is out of step with what is the status quo both across the remainder of the United Kingdom and republic of Ireland, and many countries internationally.

---

[6] How should complainer anonymity for sexual offences be introduced in Scotland? Learning the international lessons of #LETHERSPEAK, Andrew Tickell, forthcoming piece in EdinLR: Edinburgh Law Review : (euppublishing.com)

[7] ibid

This has been recognised by Dr Tickell, who noted when examining international practice:

> "Of the other jurisdictions considered, the following automatically impose reporting restrictions in sexual 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."[8]

Tasmania, Australia

In the Australian state of Tasmania, it is understood complainant anonymity was first provided for by section 194K of the Evidence Act 2001[9] ("the 2001 Act").

Section 194K of the 2001 Act prohibited publishing the identity or material likely to identify a victim/ complainant and any witness or intended witness (other than the defendant) in respect of certain listed sexual offences. The only exception to this prohibition was in the event of a court order where it was considered in the public interest to do so.

This meant that even where a complainant was an adult at the time of the publication and had consented to being publically identified, this was not possible without a court permitting it.

As a result of the operation of this law, calls for law reform increased in recent years. This is because of the challenges of navigating through the court process to seek the necessary court order to waive anonymity.

The #LetHerSpeak Tasmania Campaign reported the difficulties of the court process, describing it as, "…costly, stressful, time consuming, disempowering and, at times, re-traumatising." Survivors maintained that, "law should be reformed to bring it into alignment with other jurisdictions so that survivors are not financially penalized or emotionally burdened in order to be able to tell their stories."[10]

The Evidence Amendment Bill 2020 was introduced in response to the calls for reform, which inserted a new section 194K into the 2001 Act. The new section 194K prohibits the publishing of identifying information, or the causing of identifying information to be published, in relation to any proceedings in any court involving a qualifying criminal offence.[11]

Like England, Wale and Northern Ireland, the right of the complainant to give written consent to waive their anonymity operates as a defence to the statutory offence of breaching anonymity under the new section 194K. By virtue of the defence, the identity of a victim may be published with the permission of the victim or with the

---

[8] ibid
[9] View - Tasmanian Legislation Online
[10] eroc-marque-submission-may.pdf (marquelawyers.com.au)
[11] View - Tasmanian Legislation Online

permission of the court. Certain requirements have to be met in order for the victim to give permission, including they must be 18 years old at the time they give consent and at the time the identifying information is published. They must also consent in writing and have understood at the time the consent was given, that he or she may be identified, or identifiable, as a result of the publication of the identifying information. They must also not have been coerced into consenting to the publication. Information identifying the complainant can only be released after the criminal court case is complete.

The legislation provides identifying information in relation to a person includes the name, address, school and place of employment. The prohibition on 'jigsaw identification' is also provided for by prohibiting "any other reference or allusion that identifies, or is likely to lead to the identification of, the person; and a picture or image of the person."[12]

'Publish' is defined widely and means to make available to the public, or a section of the public, by any means, including but not limited to –

(a) publication in a newspaper, journal, periodical, book or other document

(b) broadcast by radio, television, wireless or other telegraphy

(c) publication or broadcast, by means of the internet, in any format

(d) in print, or electronic, communication meant for one or more persons

(e) public exhibition, spectacle or event

(f) such other prescribed means of making information available to the public

India

Automatic anonymity for victims of sexual offences is enshrined in the law of India, which operates a model of absolute prohibition unless the complainer in writing agrees to waive their anonymity.

Under the Indian Penal Code[13], anyone who prints or publishes the name or any matter which may make known the identity of a complainer of a qualifying sexual offence, which includes rape, shall be punished with imprisonment for a term of up to two years and fine.

There are some limited exceptions to this prohibition. It does not extend to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is:

[12] ibid, section 194K(9)
[13] Section 228-A (Disclosure of identity of the victim of certain offences etc.); sub section (1)

- by or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation, or

- by, or with authorisation in writing of, the victim, or

- where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim provided that no such authorisation shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognised welfare institution or organization[14]

There have been increasing calls in India to allow for sexual offence complainers to be able to waive their anonymity and 'go public.' One notable example is a 2012 Delhi case, which was widely reported internationally. Case studies exploring the anonymity debate in the context of the Delhi case have remarked:

> "The extreme violence of the assault turned the case into an overnight firestorm both within the country and in the international press. Despite this publicity—which only increased when she died of her injuries—and the guilty conviction of all five men, the Indian press did not publish her name. Instead, they predominately referred to her as "Nirbhaya," meaning fearless one, or as the Delhi braveheart. Her name was omitted from press coverage not because people did not know who she was—"the train of media persons and politicians to her home made clear almost every person in the vicinity … knew where she lived and what her real name was"—but because to publish her name would be against the law (Bhatnagar, 2016)."[15]

In this case parents of the victim openly came forward and disclosed the name of the victim to an international publication. However, because the parents provided their daughter's name to a journalist and did not give written authorisation through the channels specified by the law set out above, the victim's identity was still artificially hidden by the media in India through fear of legal sanction, even while her name and face was publically available on the internet.

This case, the media response in India and the increasing calls for survivors of sexual offences or their family members to be free to 'go public' if they so wish chimes with the #letherspeak campaign in Tasmania discussed above. Each of these movements raise important questions about the absolute nature of a prohibition on publication of identifying information in sexual offence cases and the balance to be struck in order to preserve the autonomy of survivors/relevant third parties to speak out and 'tell their story' in the public interest.

---

[14] For the purpose of this section, "recognized welfare institution or organization" means a social welfare institution or organization recognized in this behalf by the Central or State Government

[15] Reporting on Sexual Assault in India - Center for Media Engagement - Center for Media Engagement

New Zealand

In New Zealand complainant anonymity in sexual offence cases is provided for in section 203 of the Criminal Procedure Act 2011 ("the 2011 Act") which provides for 'automatic suppression' of the identity of a complainant in specified sexual offence cases.[16]

Section 203 applies where a person is accused or convicted of certain offences under the Crimes Act 1961, which are sexual offences[17]. Anonymity is automatic in these cases and it is explicitly stated that, 'the purpose of this section is to protect the complainant.'[18]

Section 203 provides that no person may publish the name, address or occupation of the complainant unless the complainant is aged 18 years or older and there is a court order which permits publication.

It is important to note that, while only the name, address or occupation of the complainant is referred to as being suppressed under section 203, the interpretation section of the Act makes clear that, 'name in relation to a person, means the person's name and any particulars likely to lead to the person's identification'.

In terms of the waiver process, the court must make an order where the complainant applies for such an order and the complainant is aged 18 years or older, whether or not they were 18 or older when the offence took place. The court must be satisfied that the complainant understands the nature and effect of their decision to apply for the order.

The identity of the defendant is not generally automatically suppressed (although there will be automatic defendant anonymity where the case relates to incest or sexual conduct with a dependent family member, for the purpose of protecting the complainant).

However, it is possible in some cases for an order to be made under section 200 of the 2011 Act[19], which allows for an order to be made to suppress the identity of the defendant in certain specified circumstances, including if publication would be likely to lead to the identification of another person whose name is suppressed by order or by law or endanger the safety of any person. If such an order is in place, then it is not possible for the complainant to apply to waive their anonymity if that would lead to the identification of the defendant. If someone publishes the name, address,

---

[16] Criminal Procedure Act 2011 No 81 (as at 01 April 2021), Public Act 203 Automatic suppression of identity of complainant in specified sexual cases – New Zealand Legislation

[17] Automatic anonymity applies to a person accused or convicted of an offence against any of sections 128 to 142A or 144A of the Crimes Act 1961.

[18] Criminal Procedure Act 2011 No 81 (as at 01 April 2021), Public Act 203 Automatic suppression of identity of complainant in specified sexual cases – New Zealand Legislation

[19] Criminal Procedure Act 2011 No 81 (as at 21 December 2021), Public Act 200 Court may suppress identity of defendant – New Zealand Legislation

occupation or other information in breach of section 203, they have committed an offence and will face penalties under section 211 of the Criminal Procedure Act[20].

Canada

The current law surrounding complainer anonymity in Canada is provided for in section 486.4 of the Criminal Code.[21]

The Criminal Code sets out both a mandatory and discretionary order making power upon application to the court for anonymity in sexual offence cases and which category the application falls under depends on the age of the victim or witness.

For victims or witnesses aged 18 years or over, section 486.4 subsection (1) provides a discretionary order making power by the court to prohibit the publication of any information that could identify the victim or witness in any document, broadcast or any way in which identifying information could be transmitted in relation to a number of what can generally be categorised as sexual offences or offences with a sexual element.

For victims and witness under 18, special rules apply. Section 486.4 subsection (2) provides for a mandatory order making power by the court upon application by the victim, witness or prosecutor. For Victims and witnesses under 18, there is an obligation on the court to inform them of their right to apply for an order restricting publication under section 486.4 at the earliest opportunity and if such an application is made, the order must be granted.

The orders for anonymity therefore rely on an application being made to the court by the victim, witness or prosecutor in order for reporting restrictions to take effect. Where no application is made, however, section 486.5 retains a discretionary order making power by the court to make an order if the court – in Canada referred to as the 'judge' or 'justice' - is of the opinion it is in the "interest of the proper administration of justice" to do so.

An application under section 486.4 must be done in writing to the court and notice of the application must be provided to the prosecutor, the accused and any other person affected by the order that the court specifies. An application for an order must also set out the grounds on which are relied upon to establish that the order is necessary for the proper administration of justice and a hearing may be held to determine whether the order should be made. The Code sets out a non-exhaustive list of various factors to be considered by the court in determining whether to make an order, including:

[20] Criminal Procedure Act 2011 No 81 (as at 05 October 2021), Public Act 211 Offences and penalties – New Zealand Legislation
[21] Canada_Criminal Code.pdf (legislationline.org)

- the right to a fair and public hearing
- whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed
- society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process
- the impact of the proposed order on the freedom of expression of those affected by it

Where an order is made and it is breached, a person is guilty of an offence punishable on summary conviction[22] to a fine of up to $5000 or up to two years less a day imprisonment or both.[23]

Summary of anonymity protections for sexual offence complainers

Jurisdiction	**Legislation or policy**	**Automatic or upon application?**	**Able to be waived by complainer**	**Identifying information prohibited**	**Penalties for individuals[24]**
England, Wales and Northern Ireland	Legislation	Automatic when an 'allegation' is made of a qualifying offence	Yes, prescribed exceptions to the general anonymity rule which includes the written consent of the complainer and following a court order in certain situations	"Any matter" during a complainant's lifetime if it is likely to lead members of the public to identify them. This includes a non-exhaustive list, in particular: the name; address; identity of any school or other educational establishment attended; place of work; and any still or moving pictures.	Unlimited fine
Tasmania, Australia	Legislation	Automatic when court proceedings have been	Yes, through operation of statutory defence, but	name, address, school and place of employment and any other	A fine not exceeding 60 penalty units[25] or imprisonment for a

[22] Section 486.1(1), Canada_Criminal Code.pdf (legislationline.org)
[23] Section 787(1), ibid
[24] Different penalties are generally provided for in respect of corporations
[25] A penalty unit value is **adjusted every year based on** consumer price index (CPI) movements in the previous year

Jurisdiction	Legislation or policy	Automatic or upon application?	Able to be waived by complainer	Identifying information prohibited	Penalties for individuals[24]
		raised in respect of an alleged qualifying offence	only after a recent change in law. Prior to April 2020, a court order was required	reference or allusion that identifies, or is likely to lead to the identification of, the person; and a picture or image of the person	term not exceeding 12 months, or both.
India	Legislation	Automatic when an allegation is made of a qualifying offence	Yes, if the complainer in writing agrees to waive their anonymity.	Name or any matter which may make known the identity of any person against whom a relevant offence is alleged or found to have been committed	Imprisonment for up to 2 years and a fine
New Zealand	Legislation	Automatic when an allegation is made of a qualifying offence	Yes, through court order upon application by the complainer aged 18 or older	Name, address, or occupation and any particulars likely to lead to the person's identification'	For knowingly or recklessly publishing, imprisonment not exceeding 6 months; for publishing, a fine not exceeding $25K
Canada	legislation	Upon application to the court by victim, witness or prosecutor, with the court retaining both mandatory powers (aged under 18) and discretionary powers (aged over 18)	n/a[26]	Any information that could identify the victim or a witness in any document or broadcast or transmitted in any way, in proceedings in respect of the prescribed sexual offences.	On summary conviction a fine of not more than $5,000 or to a term of imprisonment of not more than two years less a day, or both

[26] The Canadian Criminal Code does not contain an explicit power either for the complainer, the court or any other party e.g. prosecutor, to revoke or set anonymity side. However, see R v Adams [1995] 4 S.C.R. 707 for judicial interpretation of the powers of the court to revoke anonymity once an order has been made: R. v. Adams - SCC Cases (scc-csc.ca)