

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

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1. Further to the oral evidence session of 31 January 2024 where we gave evidence on **Part 6 of the Bill** to introduce automatic **anonymity for complainers in sexual and other qualifying offences**, we thought it may be helpful to provide the Committee further detail and clarification on certain issues which arose in that discussion. Having had the benefit of hearing from other witnesses on this issue, we also thought it would be beneficial to offer brief comment in response to issues that have been explored in other sessions.

**The qualifying offences**

2. In our written submission on the Bill, we noted that the Bill is drafted more broadly than in England and Wales, and welcomed this breadth. In particular, the inclusion of anonymity rights for victims of image-based sexual abuse is welcome given the critique of the equivalent provision in England and Wales from McGlynn and Rackley. They have noted that victims are often reluctant to report “not surprisingly, in view of the fact that the harm is the distribution of the images, and the publicity following a police report is only likely to amplify that harm.”<sup>1</sup>
3. Both Rape Crisis Scotland and Victim Support Scotland have called for further extension of the right to anonymity, to include stalking and domestic abuse. Similar issues concerning privacy and vulnerability often also arise in these cases.<sup>2</sup> Dr Emma Forbes has also called for an extension of

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<sup>1</sup> C McGlynn and E Rackley, “Image-based sexual abuse” (2017) *Oxford Journal of Legal Studies* 37(3) 534 – 561, at 557.

<sup>2</sup> As we reflected in our evidence, the definition of vulnerable witnesses in Scotland is defined by s.271 Criminal Procedure (Scotland) Act 1995 in part by reference to a list of offences, which includes both stalking *and* domestic abuse. See: A Tickell (2022) “How should complainer anonymity for sexual offences be introduced in Scotland? Learning the international lessons of #LetHerSpeak” *Edinburgh Law Review* 26(3) 355 – 389, accessible here: <https://researchonline.gcu.ac.uk/en/publications/how-should-complainer-anonymity-for-sexual-offences-be-introduced>.

anonymity to all vulnerable victims, including domestic abuse cases.<sup>3</sup> In England and Wales a campaign has called for extending existing anonymity provisions there to cover domestic abuse.<sup>4</sup>

4. We understand the rationale behind these arguments for extending these protections, given the particular vulnerabilities at play for victims in these cases. Given the discussion around this issue, we want to highlight our understanding that domestic abuse cases which involved a sexual element *would* be captured by the proposed reporting restrictions, while cases characterised by violent, threatening or coercive controlling behaviour would not. This creates a potential discrepancy in the framework. As the Scottish Government have set out in the *Policy Memorandum* accompanying the Bill, however, extending anonymity to all domestic abuse prosecutions would necessarily involve anonymising the accused person to avoid jigsaw identification of the victim given domestic abuse offences are relationship-based by definition<sup>5</sup> – unlike sexual crime, stalking or other offences.<sup>6</sup>

#### **Defences: Clause 106(F)(5)**

5. In our evidence session, there was some discussion concerning Clause 106F(5) which states:

*“A person charged with an offence under this section has a defence if it is established that they were not aware, and neither suspected nor had reason to suspect, that the publication included relevant information.”*

6. Concerns were raised that this was a very broad defence. We want to emphasise that this defence does not amount to being able to plead ignorance of the law. Instead, it seeks to prevent criminalisation of individuals who innocently share a publication unaware that there was relevant information in that publication which could identify a victim. This position is adopted in other jurisdictions such as England and Wales and Northern Ireland. The *Policy Memorandum* accompanying the Bill confirms that this is the intention behind this defence.<sup>7</sup>

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<sup>3</sup> Emma Forbes, *Victims’ Experiences of the Criminal Justice Response to Domestic Abuse Beyond Glass Walls* (Emerald Publishing Limited, 2022), 163.

<sup>4</sup> See, for example: <https://www.independent.co.uk/news/uk/home-news/domestic-abuse-sexual-violence-anonymity-media-courts-a9524711.html>

<sup>5</sup> Under the Domestic Abuse (Scotland) Act 2018, the offence of a course of abusive behaviour may only be perpetrated against a “partner or ex-partner.”

<sup>6</sup> Victims, Witnesses and Justice Reform (Scotland) Bill Policy Memorandum, paras 408 – 411.

<sup>7</sup> Victims, Witnesses and Justice Reform (Scotland) Bill Policy Memorandum, para 468.

## **Defences: The public domain defence and application to child victims**

7. Another issue discussed during our evidence was the scope and efficacy of the proposed public domain defence in the Bill and its application to child victims. In the light of that discussion, we have gone back and considered the language of the Bill in terms of the Committee's concerns about its application to situations where someone under 18 creates an Instagram post or TikTok video identifying themselves as the victim of a sexual offence, and others share this content.
8. The relevant part of the Victims, Witnesses and Criminal Justice (Reform) (Scotland) Bill states:

### **106F(4)**

*A person charged with an offence under this section has a defence if it is established that—*

*(a) the information published was in the public domain (having already been published by the person to whom the information relates or otherwise), and*

*(b) where the information was in the public domain as a result of it being published by a person other than the person to whom it relates, there was no reason for the person charged to believe that the conditions mentioned in subsection (3) were not met in relation to that prior publication.*

Subsection **106F(3)** of the Bill provides that:

*(a) the person to whom the relevant information relates—*

*(i) had given written consent to the publication of information in relation to an offence listed in section 106C(5),*

*(ii) was at least 18 years of age when that consent was given, and*

*(iii) had not, before the information was published, given written notice of the withdrawal of that consent, and*

*(b) the information published relates to the offence to which that consent relates.*

9. We expressed anxieties during our evidence that an unduly restrictive public domain defence could nevertheless risk criminalising third parties – including family members – who shared a child's social media content where they spoke about being a victim of a sexual offence. Our initial

reading of the Bill was that third parties might not benefit from the public domain defence as the conditions in subsection (3) must be satisfied. Not only can children not provide written consent to publish – it would also be unlikely that a third party, particularly a family member, could show that they “no reason” to believe the victim was under 18 years of age.

10. On further reflection in the light of the Committee’s close reading of these provisions, we now think the defence as framed in the Bill *could* arguably be available to a third party who shared a child victim’s own social media content about sexual offences.
11. Section 106F(4)(b) of the Bill provides that it is only where the information is in the public domain as a result of being published by a person *other than the person to whom it relates* (i.e. someone other than the child victim), that the conditions in subsection (3) become relevant. Therefore, if a family member – or a news outlet – was to share a child’s own content, they would not need to show that they had no reason to believe that the written consent was not in place or that the child was under the age of 18 and could share the relevant content without facing criminalisation.
12. In the light of our evidence session, we have also taken the opportunity to compare the language in this Bill with the Children (Care and Justice) Bill – which incorporates a similar public domain defence where third parties share content published by child beneficiaries of reporting restrictions.
13. Stage 2 amendments to the Bill made by the Education, Children and Young People Committee have now substantially aligned most of the new reporting restrictions with those proposed for sexual crime under this Bill. However, on revisiting the legislative language in the two proposals, we have identified a potentially problematic degree of inconsistency in how the public domain defence could operate for non-sexual crime.
14. Under the Children (Care and Justice) Bill, the public domain defence for third parties who share content created by child publishers is set out in **sections 106BB(4)(a) and 47E(4)(a)**. This provision states that the new public domain defence will only be available if third parties republish material about a child involved in a criminal case which has “already been published by the person, *being a person aged 18 or over*, to whom the information relates or otherwise.”
15. This is a more qualified position than is found in section 106F(4) of the Victims Bill. As discussed at Committee, this provision would have the consequence of potentially criminalising family

members or others – knowing or suspecting a publisher is under 18, who share content they create identifying them in connection with non-sexual criminal cases.

16. In the light of this, we suggest a reconciliation and clarification of the intended impact of these provisions is undertaken by the Scottish Government to ensure that this innovative and generally welcome public domain defence achieves its intended consequences, forestalling the possibility that well-meaning people could be criminalised for the legitimate sharing of content created by young people who choose to speak publicly about their experiences.