Protecting the Anonymity of Child Victims

Constitutionality of Section 154(3) of the South African Criminal Procedure Act, 1977

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Intellectual property

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EXECUTIVE SUMMARY

(a) Introduction

1. OPBP has been asked by the Centre for Child Law ('CCL'), South Africa, to prepare a report on the inadequacy of anonymity protections afforded to children in criminal proceedings under the South African Criminal Procedure Act, 1977.

2. CCL is preparing a constitutional challenge to Section 154(3) of the South African Criminal Procedure Act, 1977. This section provides: *No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorize the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person.* Thus, **the section provides anonymity protections only to defendants and witnesses below the age of 18**.

3. The constitutionality of the provision is being challenged because (a) it does not contain any protection for children who are victims of crime, and are unavailable, unable, or unwilling to testify at trial; and (b) The anonymity protections afforded by section 154(3) automatically terminate as soon as a child turns 18, even if the trial is ongoing.

4. OPBP had prepared a report for CCL on this theme in 2016. This report provides an update, by examining changes in the position of the law from 2016, to the present. The report also explores two additional research questions. This report looks at the following five jurisdictions: (a) England and Wales (b) Scotland (c) Canada (d) New South Wales (Australia) (e) New Zealand. The United Kingdom is not a unitary criminal jurisdiction; there are distinct criminal jurisdictions (and procedural and evidential rules) in England and Wales, Northern Ireland, and Scotland, including different provisions for children. This report has been expanded to encompass Scotland, whereas the 2016 report addressed only the law in England and Wales.

5. In this report the term "complainant" or "alleged victim" has generally been used rather than "victim" (unless a particular statute otherwise provides), because (a) anonymity provisions usually apply before the trial, at which point it is frequently unclear whether a criminal offence has been committed against the person to whom the complaint relates, and (b) because the anonymity provisions often apply beyond the trial, notwithstanding that a verdict of acquittal may have been rendered by the court.

(b) The research questions

Question 1(a): Have there been any significant developments in the law in the UK, Canada, Australia and New Zealand since the 2016 report in respect of anonymity protections afforded to children who are victims / complainants in criminal proceedings?

6. Currently, all five jurisdictions provide anonymity protections to child victims/complainants. This applies to criminal proceedings both before children's courts/ youth courts and criminal courts of general jurisdiction.

7. ***Automatic*** **anonymity protections** for child victims are available in: New South Wales; with respect to proceedings before youth courts in Canada and in England and Wales; and with respect to proceedings before youth courts *and* general criminal courts in New Zealand and Scotland. Such protection can be denied only under certain exceptional circumstances statutorily provided for in these jurisdictions. In the case of sex offences, in England and Wales lifelong anonymity for the complainant of any age is automatic.

8. **Anonymity protections** for child complainants are available ***on application*** with respect to proceedings before general courts in Canada and in England and Wales (in the Crown Court). In these cases, the protection is not automatic. However, in Canada, once an application is made, the court does not have the discretion to deny it; thus the anonymity protection is mandatory on application. In England and Wales, while deciding whether such protection is to be granted to child complainants, the welfare of the child is a relevant consideration.

9. There also exist legal frameworks in New South Wales, Scotland, and England and Wales that grant anonymity protections generally, which as a consequence also apply to children. For instance, in New South Wales, the Crimes (Domestic and Personal Violence) Act 2007, the Crimes Act, 1900, and the Court Suppression and Non-publication Orders Act, 2010 provide anonymity protection, extendable to child victims. In Scotland, in Scotland, the Contempt of Court Act, 1981, and The Criminal Procedure (Scotland) Act 1995, Section 271N (added by the Vulnerable Witnesses Act, 2004) provides courts the discretion to order anonymity protections to child victims under specific situations. Similarly, in England and Wales the Sexual Offences

(Amendment) Act 1992, as amended by the Youth Justice and Criminal Evidence Act 1999 provides lifelong anonymity protections to complainants of rape or other sexual offences (even where there is a verdict of acquittal), so as noted earlier this automatically includes child complainants.

Question 1(b): Have there been any significant developments in the law in the UK, Canada, Australia and New Zealand since the 2016 report in respect of anonymity protections afforded to child victims, witnesses or offenders after they turn 18?

10. New South Wales, New Zealand, Canada, and England and Wales allow lifelong reporting restrictions to child complainants, thus extending beyond the age of 18. In New South Wales and New Zealand, such protection is automatic, and does not require a separate application. In Canada, with respect to proceedings before youth courts, lifelong anonymity protection to child complainants is automatic. However, with respect to proceedings before general courts (courts other than youth courts), lifelong anonymity protection is granted to child victims only on application. In England and Wales, lifelong anonymity protection for child victims is not automatic- whether before youth courts or crown courts- and is available on discretion of the court.

11. Scotland provides anonymity protection - for children who are complainants, witnesses and defendants - only until the age of 18. Further, in England and Wales, lifelong anonymity protection is available only for child complainants and witnesses, and not (controversially) child defendants. However, in England and Wales and Scotland, the court has inherent jurisdiction to provide anonymity protections in these cases, that is, to provide lifelong anonymity protection to child defendants in England and Wales, and to extend anonymity protection beyond the age of 18 in Scotland. In fact, courts in England and Wales have used their inherent jurisdiction to provide anonymity protection to persons who had been convicted of crimes when they were children. A similar application of inherent jurisdiction can be envisaged in Scotland as well.

Question 3: In the UK, Canada, Australia and New Zealand, are the anonymity protections afforded to children coupled with any requirement or discretion to hold proceedings behind closed doors (*in camera*)? In other words, are anonymity protections <u>in addition to</u> existing *in camera* rules or are these protections seen as an <u>alternative</u> to *in camera* rules?

12. All jurisdictions considered have several statutory provisions permitting *in camera* or private proceedings, both before children's courts/ youth courts and general courts. Some of these apply to children only, some apply generally (and hence to children as well) and some are offence specific. However, in all jurisdictions, these provisions for in-camera proceedings exist alongside statutory provisions granting anonymity protection. Thus, in all the jurisdictions considered in this report, anonymity provisions are in addition to *in camera* rules, rather than alternatives to them.

Question 4: In the UK, Canada, Australia and New Zealand, precisely when do anonymity protections for child victims / complainants in criminal proceedings begin to operate? (i.e. from the moment the crime is committed, from the time that the crime is reported, from the beginning of the criminal trial, or some other time?)

13. In all jurisdictions considered, anonymity protections generally apply only from the point of commencement of the proceedings. However, in some jurisdictions, they begin to apply from an earlier point, under specific circumstances. For instance, witness anonymity orders in New Zealand can be granted from the time the charges are framed. Anonymity protections under the Youth Justice and Criminal Evidence Act 1999 in England and Wales apply during the stage of criminal investigation. Further, an application for pre-trial investigation anonymity orders for potentially intimidated witnesses can be made under the Coroners and Justice Act 2009 of England and Wales.

ENGLAND & WALES

I. HAVE THERE BEEN ANY SIGNIFICANT DEVELOPMENTS IN THE LAW IN THE UK, CANADA, AUSTRALIA AND NEW ZEALAND SINCE THE 2016 REPORT IN RESPECT OF:

(a) Anonymity protections afforded to children who are victims / complainants in criminal proceedings[1].

i. The Youth Courts

1. These are Magistrates' Courts, the lowest level of courts in the hierarchy, which hear cases where a child or young person is charged with a criminal offence within their jurisdiction.[2] In any proceedings in the youth courts, **automatic anonymity protection** is provided to persons below the age of 18 under the Children and Young Persons Act, 1933 section 49, which prohibits the publication of information relating to a "child"[3] or "young person"[4] if it is likely to lead members of the public to identify him as someone "concerned in the proceedings".[5] The "child" or "young person" is defined as being the defendant, or a witness, or a person in respect of whom the proceedings are being brought (usually the alleged victim).[6] The restricted information includes name, address, school, place of work and any still or moving picture of that person.[7] In certain instances, the courts are permitted to dispense with this protection in relation to a child or young person who has been convicted of an offence, if it is in public

[1] For a general overview on reporting restrictions with respect to victims, witnesses and defendants below the age of 18 in England and Wales refer to: 'Reporting Restrictions: Children and Young People as Victims, Witnesses and Defendants', https://www.cps.gov.uk/legal-guidance/reporting-restrictions-children-and-young-people-victims-witnesses-and-defendants#an08, accessed 17 February 2019; 'Do reporting restrictions apply?', http://scyj.org.uk/wp-content/uploads/2015/10/1926-SCYJ-Guidance-for-YOTs-FLOWCHART_1-4_FINAL_WEB_ONLY.pdf?utm_medium=email&utm_campaign=SCYJ+Weekly+E-Bulletin+13th+October+2015&utm_content=SCYJ+Weekly+E-Bulletin+13th+October+2015+CID_b17bf3d32aaac8e7c22a401a872b0c24&utm_source=HTML%20Email&utm_term=flow%20chart, accessed 17 February 2019.

[2] Children and Young Persons Act, 1933, s. 45, 46 (constitution and jurisdiction of Youth Courts).

[3] Judicial College, *Youth Court Bench Book*, (2017), page 1: child has been defined as a person below the age of 14.

[4] Judicial College, *Youth Court Bench Book*, (2017), page 1: young offender has been defined as a person between the ages of 14 and 17.

[5] Children and Young Persons Act, 1933, s. 49(1): "No matter relating to any child or young person concerned in proceedings to which this section applies shall while he is under the age of 18 be included in any publication if it is likely to lead members of the public to identify him as someone concerned in the proceedings."

[6] Children and Young Persons Act, 1933, s. 49(4).

[7] Children and Young Persons Act, 1933, s. 49(3A).

interest to do so.[8] The anonymity protection can also be dispensed with under other circumstances listed in the Act.[9]

2. Regarding lifting of reporting restrictions in the Youth Courts, section 49(7) of the Children and Young Persons Act 1933 provides for such applications in the following circumstances: to avoid injustice to the child or young person; or when a child[10] or young person[11] who has been charged or found guilty of an offence is unlawfully at large and it is necessary to bring him or her back before the court; or where a child or young person has been found guilty of persistent offending and the court is satisfied it is in the public interest to do. However, the Youth Court Bench Book (revised edition 2017) cautions that the power to dispense with anonymity should be exercised with great care and caution, as identification may conflict with the welfare of the child or young person. It should not be seen as an additional punishment.[12]

3. Thus, the rule with respect to the Youth Courts is that anonymity protection is **automatic**, and can be lifted under exceptional circumstances provided for under the Act.

ii. The Crown Court

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[8] Children and Young Persons Act, 1933, s. 49(4A):
(4A) If a court is satisfied that it is in the public interest to do so, it may, in relation to a child or young person who has been convicted of an offence, by order dispense to any specified extent with the restrictions imposed by subsection (1) above in relation to any proceedings before it to which this section applies by virtue of subsection (2)(a) or (b) above, being proceedings relating to—
(a) the prosecution or conviction of the offender for the offence;
(b) the manner in which he, or his parent or guardian, should be dealt with in respect of the offence;
(c) the enforcement, amendment, variation, revocation or discharge of any order made in respect of the offence;
(d) where an attendance centre order is made in respect of the offence, the enforcement of any rules made under section 222(1)(d) or (e) of the Criminal Justice Act 2003**]**; or
(e) where a detention and training order is made, the enforcement of any requirements imposed under section 103(6)(b) of the Powers of Criminal Courts (Sentencing) Act 2000.

[9] Children and Young Persons act, 1933, s. 49(5):
(5)Subject to subsection (7) below, a court may, in relation to proceedings before it to which this section applies, by order dispense to any specified extent with the requirements of this section in relation to a child or young person who is concerned in the proceedings if it is satisfied—
(a) that it is appropriate to do so for the purpose of avoiding injustice to the child or young person; or
(b) that, as respects a child or young person to whom this paragraph applies who is unlawfully at large, it is necessary to dispense with those requirements for the purpose of apprehending him and bringing him before a court or returning him to the place in which he was in custody.
Children and Young Persons act, 1933, s. 49(7):
(7)The court shall not exercise its power under subsection (5)(b) above—
(a) except in pursuance of an application by or on behalf of the Director of Public Prosecutions; and
(b) unless notice of the application has been given by the Director of Public Prosecutions to any legal representative of the child or young person.

[10] Judicial College, *Youth Court Bench Book*, (2017), page 1: child has been defined as a person below the age of 14.

[11] Judicial College, *Youth Court Bench Book*, (2017), page 1" young offender has been defined as a person between the ages of 14 and 17.

[12] Judicial College, *Youth Court Bench Book*, (2017) 10.

4. This is where the most serious cases, charged by indictment, are tried, invariably before a jury of laypersons picked at random from the electoral roll**.**

5. **Children tried in the Crown Court do not have an automatic right to anonymity**.[13] The appellate courts have emphasised that Parliament intended to preserve the distinction between juveniles in Youth Court proceedings and in the adult courts.[14]

6. However, a judge or magistrate can make orders in **any** criminal proceedings under Section 45 of the Youth Justice and Criminal Evidence Act 1999[15] to prohibit reporting of the identity of

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[13] Standing Committee for Youth Justice, Anonymity for Children in Trouble- Guidance for YOTs, http://scyj.org.uk/wp-content/uploads/2015/10/1926-SCYJ-Guidance-for-YOTs-4-page-A4_FINAL_WEB_ONLY.pdf, accessed 17 February 2019.

[14] R*(Y) v Aylsbury Youth Court* [2012] EWHC 1140 (Admin).

[15] Youth Justice and Criminal Evidence Act 1999, s 45.

45. Power to restrict reporting of criminal proceedings involving persons under 18.
(1) This section applies (subject to subsection (2)) in relation to—
(a) any criminal proceedings in any court (other than a service court) in England and Wales or Northern Ireland; and
(b) any proceedings (whether in the United Kingdom or elsewhere) in any service court.
(2) This section does not apply in relation to any proceedings to which section 49 of the Children and Young Persons Act 1933 applies.
(3) The court may direct that no matter relating to any person concerned in the proceedings shall while he is under the age of 18 be included in any publication if it is likely to lead members of the public to identify him as a person concerned in the proceedings.
(4) The court or an appellate court may by direction ("an excepting direction") dispense, to any extent specified in the excepting direction, with the restrictions imposed by a direction under subsection (3) if it is satisfied that it is necessary in the interests of justice to do so.
(5) The court or an appellate court may also by direction ("an excepting direction") dispense, to any extent specified in the excepting direction, with the restrictions imposed by a direction under subsection (3) if it is satisfied—
(a) that their effect is to impose a substantial and unreasonable restriction on the reporting of the proceedings, and
(b) that it is in the public interest to remove or relax that restriction;
but no excepting direction shall be given under this subsection by reason only of the fact that the proceedings have been determined in any way or have been abandoned.
(6) When deciding whether to make—
(a) a direction under subsection (3) in relation to a person, or
(b) an excepting direction under subsection (4) or (5) by virtue of which the restrictions imposed by a direction under subsection (3) would be dispensed with (to any extent) in relation to a person,
the court or (as the case may be) the appellate court shall have regard to the welfare of that person.
(7) For the purposes of subsection (3) any reference to a person concerned in the proceedings is to a person—
(a) against or in respect of whom the proceedings are taken, or
(b) who is a witness in the proceedings.
(8) The matters relating to a person in relation to which the restrictions imposed by a direction under subsection (3) apply (if their inclusion in any publication is likely to have the result mentioned in that subsection) include in particular—
(a) his name,
(b) his address,
(c) the identity of any school or other educational establishment attended by him,
(d) the identity of any place of work, and
(e) any still or moving picture of him.
(9) A direction under subsection (3) may be revoked by the court or an appellate court.
(10)An excepting direction—
(a) may be given at the time the direction under subsection (3) is given or subsequently; and

victims, witnesses and defendants in **any** court. Thus, anonymity protection can be granted under this provision. Further, Section 44 of the Children and Young Persons Act 1933 requires all courts, including the Crown Courts, to have regard to the welfare of any child or young person brought before it, "either as an offender or otherwise". The *Equal Treatment Bench Book 2018* notes that even with reporting restrictions, children and vulnerable adult witnesses continue to remain concerned that enough detail will be published to make them identifiable, especially in small communities.[16]

7. Since 2016, there is new case law recognizing the UK's legal obligations to grant anonymity protections to children and young people who are forced to commit crimes as a result of being exploited by traffickers.[17] In the case of *R v L; R v N*,[18] two victims of trafficking were granted anonymity protection by the Court of Appeal. The applicants applied for anonymity on the basis that the principles in the Practice Note for the Court of Appeal (Civil Division) [2006] 1 WLR 2461, which provides anonymity to asylum seekers, should apply to their criminal case.[19] The court accepted that it would, in principle, be desirable for the Court of Appeal Criminal Division to follow the practice adopted by the Civil Division and the Tribunals of anonymising the applicant in cases raising asylum and international protection issues. However, the court highlighted how other important issues are at stake in a criminal case and, in the absence of representations from the press, declined to give general guidance, instead deciding to address each case on the facts. For both applicants the court was satisfied that their Article 2[20] and 3[21] rights under the European Convention on Human Rights, 1950 were potentially engaged in

(b) may be varied or revoked by the court or an appellate court.
(11) In this section "appellate court", in relation to any proceedings in a court, means a court dealing with an appeal (including an appeal by way of case stated) arising out of the proceedings or with any further appeal.

[16] Judicial College, Equal Treatment Bench Book (2018) 2-32.
[17] Obligations derive from Council of European Convention on Action against Trafficking in Human Beings 2005, EU Directive 2011/36 on Preventing and Combating Trafficking in Human Beings.
[18] *R v L; R v N* [2017] EWCA Crim 2129.
[19] This Practice Note directs that if judgment is given in an asylum appeal in the Civil Division there will be a presumption that the asylum seeker's anonymity will be preserved unless the court gives a direction to the contrary effect.
[20] European Convention on Human Rights 1950, art. 2: Right to Life
1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
1. (a) in defence of any person from unlawful violence;
2. (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
3. (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

[21] European Convention on Human Rights, 1950, art. 3: Prohibition of torture
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

this case and that it was necessary in the interests of justice to make an anonymity order. Anonymity is now provided for in the Modern Slavery Act 2015 section 46 amongst other special measures available to vulnerable and intimidated witnesses generally under the Youth Justice and Criminal Evidence Act 1999.

8. Another significant ruling in 2016 was the UK Supreme Court decision in *R (on the application of C) v Secretary of State for Justice*.[22] While the case concerned anonymity provisions with respect to mentally ill persons detained under the Mental Health Act 1983, the principles examined in the case struck a balance between the open justice principle and the interests of the individual. These principles are thus of wider relevance in criminal cases, where anonymity is granted to children through reporting restrictions.[23] The principles laid down by the Supreme Court were as follows:

> 'The principle of open justice is one of the most precious in our law. It is there to reassure the public and the parties that our courts are indeed doing justice according to law. In fact, there are two aspects to this principle. The first is that justice should be done in open court, so that the people interested in the case, the wider public and the media can know what is going on. … The second is that the names of the people whose cases are being decided, and others involved in the hearing, should be public knowledge.' (at [1]).
>
> '[I]n many, perhaps most cases, the important safeguards secured by a public hearing can be secured without the press publishing or the public knowing the identities of the people involved. The [media] interest protected by publishing names is rather different…' (at [18])
>
> 'The public's right to know has to be balanced against the potential harm, not only to this patient, but to all the others whose treatment could be affected by the risk of exposure.' (at [36)]
>
> '[The applicant] is much more likely to be able to lead a successful life in the community if his identity was not generally known.' (at [39])
>
> 'Putting all these factors into the balance, I conclude that an anonymity order is necessary in the interests of this particular patient… Without it there is a real risk that his long years of treatment will be put in jeopardy and his reintegration into the community …will not succeed.' (at [40]).

9. The court also has relevant powers under the Sexual Offences (Amendment) Act 1992, as amended by the Youth Justice and Criminal Evidence Act 1999, schedule 2. The alleged victim in a case of rape or one of the sexual offences listed in the 1992 Act is entitled to anonymity

[22] R *(on the application of C v Secretary of State for Justice* [2016] UKSC 2.
[23] Youth Justice Legal Centre, Supreme Court Landmark Ruling on anonymity of mental health patients on release from life sentences, http://yjlc.uk/supreme-court-landmark-ruling-on-anonymity-of-mental-health-patients/, accessed 17 February 2019).

in any medium. Under the Sexual Offences (Amendment) Act 1992, alleged victims of a wide range of sexual offences[24] are given lifetime anonymity. The offences listed in the 1992 Act include most offences under the Sexual Offences Act 2003, Part 1 except sections 64, 65, 69 and 71.[25] This Act imposes a lifetime ban on reporting any matter likely to identify the victim or complainant of a sexual offence, from the time that such an allegation has been made and continuing after a person has been charged with the offence and after conclusion of the trial.[26] The prohibition imposed applies to "any publication"; therefore, it includes traditional media as well as online media and individual users of social media websites, who have been prosecuted and convicted under this provision.[27]

10. Anonymity in such cases can be lifted in three circumstances. First, where the complainant (if above the age of 16) consents freely in writing[28] (for example in writing memoirs). Second, it may be lifted before the trial if it is required for the purpose of inducing persons who are likely to be needed as witnesses at the trial to come forward, such that the conduct of the defence at the trial is likely to be substantially prejudiced if this does not happen.[29] Third, it may be lifted during the trial where the restriction is substantial and unreasonable and it is in the public interest to remove it.[30]

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[24] Sexual Offences (Amendment) Act 1992, s 2.

[25] Sexual Offences (Amendment) Act 1992, s 2(1)(da) inserted (1.5.2004) by Sexual Offences Act 2003 (c. 42), s. 141, Sch. 6 para. 31(2)(a); S.I. 2004/874, art. 2.

[26] Sexual Offences (Amendment) Act 1992, s 1 which states: "Anonymity of victims of certain offences - (1) Where an allegation has been made that an offence to which this Act applies has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication**]** if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed.
(2) Where a person is accused of an offence to which this Act applies, no matter likely to lead members of the public to identify a person as the person against whom the offence is alleged to have been committed ("the complainant") shall during the complainant's lifetime be included in any publication
(3)This section—
(a) does not apply in relation to a person by virtue of subsection (1) at any time after a person has been accused of the offence, and (b) in its application in relation to a person by virtue of subsection (2), has effect subject to any direction given under section 3.
(3A) The matters relating to a person in relation to which the restrictions imposed by subsection (1) or (2) apply (if their inclusion in any publication is likely to have the result mentioned in that subsection) include in particular— (a)the person's name, (b)the person's address, (c)the identity of any school or other educational establishment attended by the person, (d)the identity of any place of work, and (e)any still or moving picture of the person.
(4) Nothing in this section prohibits the inclusion in a publication of matter consisting only of a report of criminal proceedings other than proceedings at, or intended to lead to, or on an appeal arising out of, a trial at which the accused is charged with the offence.

[27] Sexual Offences (Amendment) Act 1992, s 6.

[28] Sexual Offences (Amendment) Act 1992, s 5(2).

[29] Sexual Offences (Amendment) Act 1992, s 3(1).

[30] Sexual Offences (Amendment) Act 1992, s 3(2).

(b) Anonymity protections afforded to child victims, witnesses or offenders after they turn 18.

11. Section 45A of the Youth Justice and Criminal Evidence Act 1999 gives the criminal courts the power to grant **life-long anonymity to alleged victims and witnesses who were under 18 at the time of the proceedings**.[31] This provision applies to (a) any criminal proceedings in any court in England and Wales or Northern Ireland, and (b) any proceedings (whether in the United Kingdom or elsewhere) in any service court (i.e. a court martial).[32] Thus, it would also apply to proceedings before Youth Courts, for which anonymity provisions have otherwise been provided for under the Children and Young Persons Act, 1933.[33] Crucially, the protection **does not extend to defendants** under this provision. However, the courts have inherent power to make exceptions to the principle of open justice by withholding certain information, including the identity of defendants, from public disclosure where that was necessary in the interests of justice.[34] This will be further discussed below.

12. Section 39, Children and Young Person Act, 1933[35] provides courts the power to prohibit the publication of certain matters in newspapers, with respect to any proceeding in court. However, in *JC and RT v Central Criminal Court*,[36] it was held that the protection under section 39 "*cannot extend to reports of the proceedings after the subject of the order has reached the age of majority at*

[31] Youth Justice and Criminal Evidence Act 1999, s 45A inserted by s 78 of Criminal Justice and Courts Act 2015 which states: Power to restrict reporting of criminal proceedings for lifetime of witnesses and victims under 18. (1)This section applies in relation to— (a) any criminal proceedings in any court (other than a service court) in England and Wales, and (b)any proceedings (whether in the United Kingdom or elsewhere) in any service court. (2)The court may make a direction ("a reporting direction") that no matter relating to a person mentioned in subsection (3) shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as being concerned in the proceedings.

With regard to the introduction of Section 45A, see: Ministry of Justice, Reporting Restrictions applying to under 18-s: Youth Justice and Criminal Evidence Act 1999 and Criminal Justice and Courts Act 2015 (Circular No. 2015/02), 23 March 2015, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/421538/moj-circular-youth-reporting-restrictions.pdf, accessed 17 February 2019.

[32] Youth Justice and Criminal Evidence Act 1999, s. 45A (1).

[33] Children and Young Persons Act, 1933, s. 49.

[34] *A v British Broadcasting Corporation (Secretary of State for the Home Department intervening)* [2014] UKSC 25

[35] Children and Young Persons Act 1933, s. 39: Power to prohibit publication of certain matter in newspapers. In relation to any proceedings in any court . . . the court may direct that—
(a) no newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of any child or young person concerned in the proceedings, either as being the person [by or against] or in respect of whom the proceedings are taken, or as being a witness therein:
(b) no picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid;
except in so far (if at all) as may be permitted by the direction of the court.

[36] R *(JC and RT) v Central Criminal Court and Crown Prosecution Service* [2014] EWCA Crim 1777 [456].

18."[37] Notably, the decision of the court in *JC and RT v Central Criminal Court* was restricted to criminal proceedings; Section 39 continues to apply to civil and family proceedings. Section 45A of the Youth Justice and Criminal Evidence Act 1999 was enacted in 2015, after the decision in *JC and RT v Central Criminal Court*. Thus, currently, Section 39 protection applies to civil and family proceedings, while lifetime anonymity protection can be granted to the person against whom an offences alleged to have been committed and to witnesses in criminal proceedings under section 45A but not, controversially, to a child accused.

13. Therefore, under existing law, with regard to criminal proceedings, any Court in England and Wales has the discretion to order, under specific circumstances, a lifetime reporting restriction in respect of a **complainant** or **witness** under the age of 18. As noted earlier, this protection **does not apply to defendants** once they have reached 18 years.[38]

14. However, the court has inherent civil jurisdiction to grant lifelong reporting restrictions in relation to defendants in the form of an injunction against the world, prohibiting the publication of identifying information. In *Thompson and Venables*,[39] the defendants, at the age of ten, kidnapped, tortured and murdered James Bulger, then aged two. The details of his death were horrifying, of 'unparalleled barbarity',[40] and were the subject of worldwide media commentary due to the potential link between the crime and violent video games the defendants were playing at the time. On turning 18 years of age, the defendants sought an injunction good against the world to prevent anything that might identify them from being published. They had received hate mail during their detention, public interest in the case remained high, their respective families had had to move, a person believed to be Thompson's mother was subjected to threats of arson, and the media reporting on the

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[37] Ibid., ¶ 38.

[38] Judicial College, *Youth Court Bench Book*, (2017) 10; Youth Justice and Criminal Evidence Act 1999, s. 45A which provides for lifelong anonymity protection does not apply to defendants- it is restricted to victims and witnesses; Further, the Youth Criminal Justice and Evidence Act 1999, s. 45, which provides reporting restrictions- even for defendants- with respect to proceedings other than proceedings covered under the Children and Young Persons Act 1933, s. 49, states (s. 45(3)):

> The court may direct that no matter relating to any person concerned in the proceedings shall ***while he is under the age of 18*** be included in any publication if it is likely to lead members of the public to identify him as a person concerned in the proceedings.

Thus, here, the protection applies only as long as the defendant is under the age of 18. The provision does not make mention of extending protection beyond the age of 18, or providing lifelong immunity to defendants.

[39] [2001] Fam 430

[40] *R. v Secretary of State for the Home Department Ex p. Venables* [1997] 2 W.L.R. 67

prospect of their release explicitly denied their right to live.[41] The judge concluded that this was an exceptional case, and granted the injunction:

> That risk is *potentially extreme* if it became known what they look like, and where they are. The risk might *come from any quarter*, strangers such as vigilante groups, as well as the parents, family and friends of the murdered child (at [78]).
>
> The evidence… demonstrates to me the *huge and intense media interest* in this case, to an almost unparalleled extent, not only over the time of the murder, during the trial and subsequent litigation, but also that *media attention remains intense seven years later*. Not only is the media interest intense, it also demonstrates continued hostility towards the claimants. I am satisfied from the extracts from the newspapers: (a) that the press have accurately reported the horror, moral outrage and indignation still felt by many members of the public; (b) that there are members of the public, other than the family of the murdered boy, who continue to feel such hatred and revulsion at the shocking crime and a desire for revenge that some at least of them might well engage in vigilante or revenge attacks if they knew where either claimant was living and could identify him. … (c) that some sections of the press support this feeling of revulsion and hatred to the degree of encouraging the public to deny anonymity to the claimants (at [90]).

15. In the recent cases of *Attorney General v Tina Malone*,[42] and *Attorney General v Richard Mckeag and Natalie Barker,*[43] three individuals were held to be in contempt of court for publishing information about Thompson and Venables, in breach of the above injunction granted by the court, and were given custodial sentences of 12 months and 8 months respectively. (The court suspended each of the three custodial sentences due to strong personal mitigation, noting that otherwise immediate prison sentences would have been imposed.)

16. In *Mary Bell,*[44] the defendant had strangled two young boys to death when she was eleven years old. She then returned to mutilate one of the bodies. The judge stated the case for the applicant for continued anonymity for herself and her family after the expiry of a previous court order in the following way:

> The *exceptional circumstances* set out in the various submissions to the court in support of a grant of lifetime protective injunction to X are in summary:
>
> - The young age at which she committed the offences.
> - The finding by the jury of diminished responsibility based upon solid evidence of her abusive childhood and the damage she had suffered as a child.
> - The length of time which has expired since the offences were committed.

[41] "They took a baby's life. So why should they be allowed a life of their own?" *Sunday Mirror,* (27 August 2000)
[42] *Attorney General v Tina Malone* [2019] 3 WLUK 255 (QB Divisional Court)
[43] *Attorney General v Richard Mckeag and Natalie Barker* [2019] EWHC 241 (QB Divisional Court)
[44] *X (formerly known as Bell) v SO* [2003] EWHC 1101 (QB).

- The need to support rehabilitation into society and the redemption of the offender.
- Her semi-iconic status and the effect of publicity on her rehabilitation.
- The serious risk of potential harassment, vilification and ostracism, and the possibility of physical harm.
- Her present mental state.
- Her concerns for the welfare of her daughter.

It is a highly relevant factor that X was only 10/11 at the time that she killed the two small children 35 years ago, and that she had suffered in her own childhood to an extent that the jury brought in a verdict of manslaughter by reason of diminished responsibility. She was a damaged child and the effects of her abusive experiences have remained with her. X remains on lifetime licence and is liable to be recalled to prison for any offences committed. She has therefore to remain in touch with the relevant authorities, such as the Probation Service. It can be said with some degree of certainty that she has, since her release, been rehabilitated into society and has not subsequently offended (at [36]-[37]).

17. The Court concluded, taking into account the balancing exercise which must be undertaken between the right to privacy under Article 8 of the ECHR and the right to freedom of expression under Article 10 of the same, that a general injunction *contra mundum* was to be granted on the facts:

I agree however with the Attorney General there are special features to this case which require the balancing of articles 8 and 10 to be resolved in favour of recognising the confidentiality of some information in order to protect both X and Y. There is only a limited amount of information which is in a special category requiring protection. There is sufficient information in the public domain for the press and other parts of the media to be able to comment freely on the relevant aspects of the case of Mary Bell. The only point at which the media is inhibited from comment is in the detail of the success of the rehabilitative process achieved by X. Even in that aspect of her life, there is sufficient information now available for proper reporting and commenting on that success without knowing what her present name is or exactly where she is living. There are exceptional reasons which I have listed above in support of taking this exceptional course.

Among those exceptional reasons is the state of X's mental health and the important fact that she is suffering from a recognised mental health illness which would undoubtedly be seriously exacerbated if she were to be identified and pursued by the press or members of the public. The age at which X offended, and her semi-iconic status, demonstrated by continuing press and media publicity 35 years after she committed her crimes, make the risk of publicity, absent restraining orders, a very real one. The positions of the mother and the daughter are so intertwined that it is effectively impossible to look at either of them in isolation. To grant an injunction to one and refuse it to the other is in reality unworkable.

Balancing the restriction upon the press and others not to be able to publish details of present names and addresses of X and Y against the serious risk of public identification

> of X and Y if no injunctions are in place, the factors I set out above, in particular the fragile mental health of X set out in the medical reports, tip the balance firmly in favour of granting the relief sought. As Lord Woolf CJ said in *A v B plc*, both article 8 and article 10 are qualified expressly in a way which allows the interests under the other article to be taken into account. In the exceptional circumstances of this case I am entirely satisfied that the grant of these injunctions to X and to Y can be justified under article 10(2) as being in accordance with the law, necessary in a democratic society and proportionate to the need to protect the confidentiality of the limited amount of information the subject of these proceedings (at [60]-[61]).

18. The High Court also recently exercised its inherent jurisdiction, in the case of *A and B v Persons Unknown*[45], to protect the identities of two people who had been convicted of crimes committed when they were children. The Court found that for an application for such injunction to be successful, there must "be an intense focus on the nature and extent of the risks under articles 2 and 3, and on the comparative gravity of those risks and of the rights under article 8 and 10 of the ECHR in the individual case. The justifications for interfering with articles 8 and 10 or for restricting each of those rights must be taken into account, and a proportionality test must be applied."[46]

19. There is also recent case law on disclosure in criminal record checks of offences committed as a child or young person; particularly the disclosure of youth reprimands. In the landmark UK Supreme Court judgment in 2019 in *R (on the application of P, G and W) v Secretary of State for the Home Department,*[47] it was found to be a disproportionate interference with article 8 rights[48] for a youth reprimand – a rehabilitative and diversionary measure – to be disclosed in an advanced criminal record check to enable the subject of the disclosure to work with children and other vulnerable groups.

20. Further, there is case law under section 39, Children and Young Persons Act 1933 (prior to the implementation of section 45A), regarding lifting of anonymity protection for child defendants, below the age of 18. Though these cases do not deal with lifetime anonymity protection for child defendants, the principles laid down in in these cases might be relevant in deciding whether to grant child defendants lifetime anonymity or not.

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[45] *A and B v Persons Unknown* [2016] EWHC 3295; See also *X v O'Brien* [2003] EWHC 1101; *Maxine Carr v News Group Newspapers Limited* [2005] EWHC 971.
[46] *A and B v Persons Unknown* [2016] EWHC 3295 at [35].
[47] R *(on the application of P, G and W) v Secretary of State for the Home Department* [2019] UKSC 3.
[48] European Convention on Human Rights 1950, art. 8. incorporated into the law of England and Wales by the Human Rights Act 1998.

In *C v Winchester Crown Court*[49], the Court of Appeal was dealing with judicial review of a decision to revoke a section 39 order, thus making the child's name public. It was argued that the young offender "is a dangerous offender with a bad previous record who has just been convicted of a very serious offence. There is a public interest in knowing the identity of the offender. Secondly, the claimant may already have trouble in custody. Also, local people are aware of his behaviour. In those circumstances publishing the claimant's name will not cause great additional harm for him". However, the court refused to allow publication, holding:

> It seems to us that there is a powerful interest in promoting the rehabilitation of this offender. He has an appalling criminal record for one so young. He is still aged only 17 years and three months. Fortunately, those who are fellow prisoners with him do not at the moment know the nature of the offences for which he has been convicted. The Recorder [judge at first instance] appears to have been wrong in thinking otherwise. Furthermore, those who live in his locality, as we understand it, do not currently know that he is the person who has been convicted of these two most unpleasant offences. If his identity is made public, it will no doubt go onto the internet, word will go around his own locality, and word will go around prisons and detention centres. Life for the claimant will be made very much more difficult. There is a strong public interest in promoting his rehabilitation, if that can possibly be achieved. Otherwise, he is looking at a long career of crime and spending most of his future years in prison. (at [10]).

Similarly, in *R v F and D*,[50] (Leeds Crown Court), the court considered whether an order under section 39 should be lifted, regarding F and D, two girls who had been convicted of murder. In holding that the order should not be lifted, the court stated:

> The public interest argument is weakened as the full facts of this case have been able to be reported and a debate about the background to the crimes remains possible without knowing the precise identities of the defendants. (at [56])
>
> Due to the nature of the offence in this case, the deterrent effect of naming the defendant is limited due to the rarity of such a crime being committed. (at [57])
>
> The effect of lifting anonymity is likely to result in the identification of juvenile witnesses, the families of the defendants, their careers and their schools. (at [59])

[49] *C v Winchester Crown Court* [2014] EWCA Crim 339.
[50] Youth Justice Legal Centre, Anonymity granted for child defendants in Angela Wrightson murder trial, http://yjlc.uk/anonymity-granted-for-child-defendants-in-angela-wrightson-murder-trial/, accessed 17 February 2019).

> 'Article 2 is engaged, specifically in your case F and possibly in your case, too, D as well as what Mr. Wise refers to as "the upper reaches" of your Article 8 rights.' (at [62])
>
> There is a 'heightened real risk that identification followed by a press blitz will elevate the risk to your life to such an extent that I am satisfied that there is a real and immediate risk to your life were you to be identified'. (at [63])
>
> Although more robust, there is no justification for naming D if F is not named. D is also vulnerable to outside pressures and naming in public is one such pressure. (at [64])

This case is important because the court recognised that lifting anonymity would have an impact on the children's welfare, and that their welfare is a relevant consideration when balancing the children's interests (ECHR Articles 2 and 8) against the public interest (Article 10(2)).

21. Finally, regarding life-long anonymity of child defendants, in December 2016, the Taylor Review of the Youth Justice System in England and Wales[51] recommended that the Ministry of Justice give further consideration to whether reporting restrictions should apply automatically in the Crown Court (as they currently do in the Youth Court), to children and young people involved in investigations, **and for the lifetime of young defendants**. These recommendations contribute to ongoing commentary in favour on more extensive anonymity protections for defendants and particularly child and young person defendants.

II. IN ENGLAND AND WALES, ARE THE ANONYMITY PROTECTIONS AFFORDED TO CHILDREN COUPLED WITH ANY REQUIREMENT OR DISCRETION TO HOLD PROCEEDINGS BEHIND CLOSED DOORS (*IN CAMERA*)? IN OTHER WORDS, ARE ANONYMITY PROTECTIONS IN ADDITION TO EXISTING *IN CAMERA* RULES OR ARE THESE PROTECTIONS SEEN AS AN ALTERNATIVE TO *IN CAMERA* RULES?

22. The statutory framework in England and Wales allows courts to order private or *in camera* proceedings, under specific circumstances.

[51] Ministry of Justice, *Review of the Youth Justice System in England and Wales,* (Cm 9298, 2016) 107.

23. The Criminal Procedure Rules Part 6 and the Criminal Practice Directions Part 6, pursuant to the Youth Justice and Criminal Evidence Act 1999 allow deviations from the principle of open justice, by allowing courts to order that a trial, or part of a trial, be held in private.[52] Such orders can be made on application by a party who must apply by notice in writing as soon as reasonably practicable, explaining what power the court has to make the order and why an order in the terms proposed is necessary. This is commonly done where: for the testimony of a complainant in a sexual offence or modern slavery or trafficking case; or where a witness may be subject to intimidation; or where a child witness is testifying, all in accordance with special measures ordered by the court; or there has been a witness anonymity order under the Coroners and Justice Act 2009 section 86.[53] The court may direct that other persons be given an opportunity to make representations. Importantly, any order to close the public gallery must provide for a nominated representative of the newsgathering or reporting organisation to attend, to ensure open justice; the media of course will be bound by any anonymity order. Any order for a trial entirely in private must explain why no measures other than trial in this way would suffice, such as reporting restrictions, or admission of facts between the prosecution and defence, the introduction of hearsay evidence, Special Measures Directions under the Youth Justice and Criminal Evidence Act 1999 section 19, a witness anonymity order under The Coroners And Justice Act 2009 Section 86, or arrangements for the protection of a witness.[54] Therefore trials in the Crown Court heard entirely in private or extremely rare.

24. The Reporting Restrictions Guidelines (2015, revised in 2016) issued by the Judicial College of England and Wales provide details on when private trials may be ordered:

> *Circumstances which may justify hearing a case in private include situations where the nature of the evidence, if made public, would cause harm to national security e.g. by disclosing sensitive operational techniques or identifying a person whose identity for strong public interest reasons should be protected e.g. an undercover police officer. The application to proceed in private should be supported by relevant evidence and the test to be applied in all cases is whether proceeding in private is necessary to avoid the administration of justice from being frustrated or rendered impractical. Disorder in court may also justify an order that the public gallery be cleared. Again, the exceptional measure should be no greater than necessary. Representatives of the media (who are unlikely to have participated in the disorder) should normally be allowed to remain.*[55]

25. Under the Children and Young Persons Act 1933, the court may exclude the public during the testimony of witnesses aged under 18 in any proceedings relating to an offence against, or

[52] Criminal Procedure Rules rule 6.6(1).
[53] YJCEA 1999 section 25 and Modern Slavery Act 2015 section 46(3).
[54] Criminal Procedure Rules rule 6.6.
[55] The Reporting Restrictions Guidelines 2016, https://www.judiciary.uk/wp-content/uploads/2015/07/reporting-restrictions-guide-may-2016-2.pdf, page 9.

conduct contrary to "decency and morality".[56] This does not operate to exclude *bona fide* representatives of the media.[57] The powers conferred on a court by this section shall be in addition and without prejudice to any other powers of the court to hear proceedings *in camera*.[58]

26. Further, with respect to Youth Courts, the Children and Young Persons Act 1933 generally bars the public from attending Youth Court proceedings[59], but makes specific exception for *bona fide* representatives of newspapers of news agencies.[60] The court also has residual powers to specially authorize any other person to be present.[61]

27. Finally, the Administration of Justice Act 1960 defines a number of situations where publication of information about proceedings (or parts of proceedings) held in private itself constitutes contempt of court.[62] However, in all other cases, to publish information about proceedings held *in camera* is not a contempt of court unless it causes substantial risk of serious prejudice to the administration of justice[63]. This means that reporting restrictions may be necessary to prevent publication of identifying information, even if proceedings are held in private.

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[56] Children and Young Persons Act 1933, s. 37(1).
[57] Children and Young Persons Act 1933, s. 37(1).
[58] Children and Young Persons Act 1933, s. 37(2).
[59] Children and Young Persons Act 1933, s. 47(2).
[60] Children and Young Persons Act 1933, s. 47(2) (c).
[61] Children and Young Persons Act 1933, s. 47(2) (d).
[62] Administration of Justice Act 1990, s. 12:
Publication of information relating to proceedings in private.
(1)The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say—
(a)where the proceedings—
(i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;
(ii) are brought under the Children Act 1989 or the Adoption and Children Act 2002 ; or
(iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor;
(b) where the proceedings are brought under the Mental Capacity Act 2005, or under any provision of the Mental Health Act 1983 authorising an application or reference to be made to the First-tier Tribunal, the Mental Health Review Tribunal for Wales or the county court;
(c) where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published;
(d) where the information relates to a secret process, discovery or invention which is in issue in the proceedings;
(e) Where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.
(2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.

[63] *Hodgson v Imperial Tobacco* [1998] [1998] EWCA Civ 224; *AF Noonan Limited v Bournemouth &Boscombe Athletic Community Football Club* Limited [2006] EWHC 2113.

28. Thus, in England and Wales, reporting restrictions operate in addition to restrictions on what is said in open court ('anonymity orders')[64], measures excluding some or all members of the public, and orders that part of the proceedings should take place in private; they are not an alternative.[65] It may be that one or other form of protection is adequate in the circumstances of a particular case to achieve a given objective; the general approach of the English and Welsh courts is to adopt the least restrictive measure possible. As noted earlier, keeping in mind the importance of the open justice principle, under Rule 6.6(3) of the Criminal Procedure Rules, the applicant requesting a private trial is required to prove why other protective measures - such as reporting restrictions- could not be used instead of the private trial. This demonstrates how the statutory framework views private trials and reporting restrictions as available alternatives. The fact that proceedings take place fully or partially in private, or subject to restrictions as to what is said in open court, does not on its own preclude the possibility of reporting restrictions being granted, or vice versa.

III. IN ENGLAND AND WALES, PRECISELY WHEN DO ANONYMITY PROTECTIONS FOR CHILD COMPLAINANTS IN CRIMINAL PROCEEDINGS BEGIN TO OPERATE? (I.E. FROM THE MOMENT THE CRIME IS COMMITTED, FROM THE TIME THAT THE CRIME IS REPORTED, FROM THE BEGINNING OF THE CRIMINAL TRIAL, OR SOME OTHER TIME?)

29. Automatic reporting restrictions under section 49 of the Children and Young Persons Act 1933 apply when any person under the age of 18 is "*concerned in the proceedings*" before the Youth Courts.[66] A person is said to be "concerned" in the proceedings if he or she is (a) a person against or in respect of whom the proceedings are taken, or (b) a person called, or proposed to be called, to give evidence in the proceedings.[67] Since the reporting restriction applies only to "concerned" persons, who have been defined as persons involved in the proceedings (whether as defendants, complainants or witnesses), it could be read as meaning that the protection applies only from the start of the proceedings, which is when such persons would

[64] *Khuja v Times Newspapers Limited* [2017] UKSC 49 at [14] – [16]. Care must be taken with language: in England and Wales, 'anonymity orders' operate to restrict what is said in open court, while reporting restrictions operate to restrict what the media can report about what has been said in open court.

[65] Judicial College, <https://www.judiciary.uk/wp-content/uploads/2015/07/reporting-restrictions-guide-may-2016-2.pdf> which lists (a) *in camera* proceedings (b) automatic reporting restrictions and (c) discretionary reporting restrictions as various options, which function as exceptions to the open justice principle.

[66] Children and Young Persons Act 1933, s 49(1).

[67] Children and Young Persons Act 1933, s 49(4).

become "concerned" in the proceedings. A similar interpretation applies in relation to discretionary reporting restrictions under section 45 of the Youth Justice and Criminal Evidence Act 1999.[68]

30. The Youth Justice and Criminal Evidence Act 1999, provides certain protection during the criminal investigation, before the commencement of court proceedings.[69] Section 44(2) states that, "no matter relating to any person involved in the offence shall while he is under the age of 18 be included in any publication if it is likely to lead members of the public to identify him as a person involved in the offence."[70] A "person involved in the offence" means the person by whom the offence is alleged to have been committed, as well as a witness or victim, subject to the terms of that order.[71] This protection applies as soon as a criminal investigation has begun, under section 44(1); it ceases to apply once there are proceedings in a court, as the other relevant protections mentioned above then come into play. A court can also dispense with this restriction, if the court is satisfied, in relation to a person, that it is necessary in the interests of justice to do so.[72] However, when deciding whether to make such an order dispensing (to any extent) with the restrictions imposed in relation to a person, the court shall have regard to the welfare of that person.[73]

31. In relation to female genital mutilation, the Female Genital Mutilation Act, 2003, states that when an allegation of FGM has been made, "*No matter* likely to lead members of the public to identify the person, as the person against whom the offence is alleged to have been committed,

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[68] Youth Justice and Criminal Evidence Act 1999, s. 45(3); Youth Justice and Criminal Evidence Act 1999, s. 45(7) states:
For the purposes of subsection (3) any reference to a person concerned in the proceedings is to a person—
(a) against or in respect of whom the proceedings are taken, or
(b) who is a witness in the proceedings.
See also https://www.cps.gov.uk/legal-guidance/reporting-restrictions-children-and-young-people-victims-witnesses-and-defendants

[69] Youth Justice and Criminal Evidence Act 1999, s. 44(1).
[70] Youth Justice and Criminal Evidence Act 1999, s. 44(2), 44(6).
The matters relating to a person in relation to which the restrictions imposed by subsection (2) apply (if their inclusion in any publication is likely to have the result mentioned in that subsection) include in particular—
(a) his name,
(b) his address,
(c) the identity of any school or other educational establishment attended by him,
(d) the identity of any place of work, and
(e) any still or moving picture of him.

[71] Youth Justice and Criminal Evidence Act 1999, s. 44(5).
[72] Youth Justice and Criminal Evidence Act 1999, s. 44(7).
[73] Youth Justice and Criminal Evidence Act 1999, s. 44(8).

may be included in *any publication* during the person's lifetime". Since "any publication" is barred, it could be read as meaning publication from the point in time the allegation is made.[74]

32. Further, applications for witness anonymity can be made *pre-trial* under sections 74 to 85 of the Coroners and Justice Act 2009. The orders known as investigation anonymity orders can be requested at the very start of an investigation, thus providing early certainty to people who may have relevant information that their identities will not be disclosed.[75]

33. Investigation anonymity orders are only available in limited circumstances, which are:

    1. That a qualifying offence has been committed (currently, murder or manslaughter where the death was caused by being shot with a firearm or injured with a knife)[76];

    2. That the person likely to have committed the offence was at least 11 but under 30 years old at the time the offence was committed[77];

    3. That the person likely to have committed the offence is a member of a group engaging in criminal activity and the majority of its members are at least 11 but under 30 years old[78]; and

    4. The person in respect of whom the order would be made has reasonable grounds to fear intimidation or harm if they were identified as assisting the investigation.[79]

34. Applications for such anonymity orders can be made by police officers or prosecutors[80]. The granting of an investigation anonymity order does not guarantee that anonymity will be granted at the trial. A separate application has to be made for a trial anonymity order under sections 86 to 90 of the Coroners and Justice Act 2009.[81]

35. The Director's Guidance on Witness Anonymity (Crown Prosecution Service) sets out the procedure to be followed when considering whether to apply to the court for a witness anonymity order. The Act and the Guidance apply to all witnesses, including undercover police

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[74] Female Genital Mutilation Act, 2003, s. 4A, read with Schedule 1.
[75] Witness protection and anonymity, https://www.cps.gov.uk/legal-guidance/witness-protection-and-anonymity, accessed 14 February 2019.
[76] Coroners and Justice Act 2009, s 74.
[77] Coroners and Justice Act 2009, s 78.
[78] ibid
[79] Coroners and Justice Act 2009, s 78.
[80] Coroners and Justice Act, s 77.
[81] Witness protection and anonymity, https://www.cps.gov.uk/legal-guidance/witness-protection-and-anonymity, accessed 14 February 2019

officers and police officers involved in test purchase operations. Applications for witness anonymity at trial must be authorized by Crown Prosecution Service's Complex Casework Unit Heads or Heads of Division.[82]

[82] ibid

SCOTLAND

I. HAVE THERE BEEN ANY SIGNIFICANT DEVELOPMENTS IN THE LAW IN THE UK, CANADA, AUSTRALIA AND NEW ZEALAND SINCE THE 2016 REPORT IN RESPECT OF:

(a) Anonymity protections afforded to children who are victims / complainants in criminal proceedings.

i. Children's Hearings

36. The age of criminal responsibility in Scotland is 8.[83] Despite this, prosecution for a criminal offence can only be brought against a child aged 12 years old or above[84] and a bill is currently in progress through the Scottish Parliament to raise the age of criminal responsibility to 12.[85]

37. In general, anonymity protections do exist for children who are currently participating in the criminal justice system.

38. Section 182 of the Children's Hearing (Scotland) Act 2011 makes it an offence to publish any matter likely to identify a child concerned in proceedings at a Children's Hearing.[86] The Children's Hearing system, internationally renowned, is an alternative justice system that is used for the vast majority of children accused of criminal offences. It is undertaken in a summary procedure and focuses primarily on the welfare of the child, and focuses on the child's environment which caused him or her to offend, and remedial measures to be taken to prevent reoffending .[87]

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[83] Criminal Procedure (Scotland) Act 1995, s 41

[84] Criminal Procedure (Scotland) Act 1995, s 41A

[85] Age of Criminal Responsibility (Scotland) Bill 1999, s 1

[86] Children's Hearing is not clearly or exhaustively defined, but generally covers situations where the child is the accused. The power of referral to a Children's Hearing is discretionary in terms of section 49 of the Criminal Procedure (Scotland) Act.
Children's Hearing (Scotland) Act 2011, **s. 182 Publishing restrictions**
(1) A person must not publish protected information if the publication of the information is intended, or is likely, to identify—
(a) a child mentioned in the protected information, or
(b) an address or school as being that of such a child.
(2) A person who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding level 4 on the standard scale.
(3) It is a defence for a person ("P") charged with a contravention of subsection (1) to show that P did not know or have reason to suspect that the publication of the protected information was likely to identify a child mentioned in the protected information, or, as the case may be, an address or school of such a child.

[87] Children's Hearing (Scotland) Act 2011 s .25.

39. The definition of "publish" in section 182 is an inclusive definition that includes print publications, television broadcasts, and online communications such as tweets and blog posts.[88] Furthermore the definition of "child" under the statute is any person who is under 16 years old;[89] however when a person involved in the hearing is subjected to or awaiting a judgment in respect of a compulsory supervision order, the definition of child extends until he or she turns 18 years old.[90] These restrictions can be lifted by the Scottish Ministers, a Sheriff (i.e. a judge with criminal jurisdiction), or the Court Session under specific circumstances.[91]

40. Furthermore, section 178 provides that, notwithstanding any statutory requirement to the contrary, a children's hearing need not disclose to a person any information about the child to whom the hearing relates or about the child's case if disclosure of that information to that person would be likely to cause significant harm to the child.[92]

ii. General Court Hearings

41. A similar scheme exists under section 47of the Criminal Procedure (Scotland) Act (1995), with respect to any criminal proceedings that occur within Scotland.[93] This provision thus applies to general court hearings. Under this provision, the child defendant, complainers (the Scottish

[88] ibid s 182 (9).
[89] ibid s 199(1).
[90] ibid s 199(7) (b).
[91] Children's Hearing (Scotland) Act 2011, s 182(4) (5):
(4) In relation to proceedings before a children's hearing, the Scottish Ministers may in the interests of justice—
(a) dispense with the prohibition in subsection (1), or
(b) relax it to such extent as they consider appropriate.
(5) In relation to proceedings before the sheriff under Part 10 or 15, the sheriff may in the interests of justice—
(a) dispense with the prohibition in subsection (1), or
(b) relax it to such extent as the sheriff considers appropriate.
(6)In relation to proceedings in an appeal to the Court of Session under this Act, the Court may in the interests of justice—
(a) dispense with the prohibition in subsection (1), or
(b) relax it to such extent as the Court considers appropriate.
[92] Children's Hearing (Scotland) Act 2011, s 178(1).
[93] Criminal Procedure (Scotland) Act 1995, s. 47: **Reporting Restrictions**
(1)Subject to subsection (3) below, no newspaper report of any proceedings in a court shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of any person under the age of **[F1**18**]** years concerned in the proceedings, either—
(a)as being a person against or in respect of whom the proceedings are taken; or
(b)as being a witness in the proceedings.
(2)Subject to subsection (3) below, no picture which is, or includes, a picture of a person under the age of **[F2**18**]** years concerned in proceedings as mentioned in subsection (1) above shall be published in any newspaper in a context relevant to the proceedings.

term for complainants) are all given anonymity protections in respect of criminal proceedings within the court.

42. There are exceptions to these general rules. Where the child is a witness and no one against whom the case is directed is under 18, then the requirements will only apply if the court directs.[94] In addition, the Sheriff Court or High Court of Justiciary, at any stage of the proceedings, and the Secretary of State, after completion of the proceedings, retain the power to lift these restrictions if they feel it is in the public interest to do.

43. The Act is ambiguous in terms of to whom it applies. While section 47(1) specifies that newspapers are specifically prohibited from identifying children involved in the proceedings , section 47(4) extends the protection to broadcasting and television. The Act does not specify, however, whether internet-based services or information displayed by an independent party on social media are covered by this provision, and no extant case law has addressed this gap. This means that in Scottish law there remains a grey area in the provision of anonymity protections to children in this regard.

44. Furthermore, there are several additional discretionary orders that a court may use to restrict the reporting or identification of children concerned in a court proceeding. Section 4(2) of the Contempt of Court Act 1981 empowers a court to make an order to prohibit the publication of any report concerning the proceedings for as long as they deem necessary to avoid the substantial risk of prejudicing the administration of justice.[95]

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[94] Criminal Procedure (Scotland) Act 1995, s 47(3), which reads:
(3) The requirements of subsections (1) and (2) above shall be applied in any case mentioned in any of the following paragraphs to the extent specified in that paragraph—
(a) where a person under the age of **[F3**18**]** years is concerned in the proceedings as a witness only and no one against whom the proceedings are taken is under the age of **[F3**18**]** years, the requirements shall not apply unless the court so directs;
(b) where, at any stage of the proceedings, the court, if it is satisfied that it is in the public interest so to do, directs that the requirements (including the requirements as applied by a direction under paragraph (a) above) shall be dispensed with to such extent as the court may specify; and
(c) where the Secretary of State, after completion of the proceedings, if satisfied as mentioned in paragraph (b) above, by order dispenses with the requirements to such extent as may be specified in the order.

[95] Contempt of Courts Act 1981 s. 4: Reporting restrictions
(1) Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.
(2) In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.

45. The Vulnerable Witnesses Act (2004) also modified the Criminal Procedure (Scotland) Act (1995) and created what are known as Witnesses Protection Orders. Now section 271N of the Criminal Procedure (Scotland) Act (1995) allows courts to make a special order which allows for certain facts about a witness to be withheld, such as their name or identifying features, or allows the courts to authorise the use of a pseudonym.[96] It should be noted that these provisions can apply to any person giving evidence in the process including the accused.[97] These provisions can apply only where the court is satisfied that: it is necessary to protect the witness or another person from harm; it is consistent in all the circumstances with a fair trial; and if the evidence of the witnesses so important that is in the interests of justice for him or her to testify and here she would not do so without such an order. This then is the equivalent of anonymous witness orders in England and Wales.

46. The Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill, 2018 makes provisions for further special measures for taking the evidence of child witnesses in criminal proceedings. These measures apply to offences, inter alia, murder, culpable homicide and assault to the danger of life.[98] The Court must enable all the child witness's evidence to be given in advance of hearing, subject to exceptions.[99] Similar provisions for prerecording of examination in chief and cross-examination are being implemented on an incremental basis in England and Wales under section 28 of the Youth Justice and Criminal Evidence Act 1999. As the child witness would never appear in court under this procedure, the chances of accidental disclosure of identity are reduced. Even if the court is satisfied that an exception is justified under the above section, an order made by the court under this section must not have the effect of requiring

[96] Crimnial Procedure (Scotland) Act 1997 s. 271N: **Witness anonymity orders**
(1)A court may make an order requiring such specified measures to be taken in relation to a witness in criminal proceedings as the court considers appropriate to ensure that the identity of the witness is not disclosed in or in connection with the proceedings.
(2)The court may make such an order only on an application made in accordance with sections 271P and 271Q, if satisfied of the conditions set out in section 271R having considered the matters set out in section 271S.
(3)The kinds of measures that may be required to be taken in relation to a witness include in particular measures for securing one or more of the matters mentioned in subsection (4).
(4)Those matters are—
(a)that the witness's name and other identifying details may be—
(i)withheld,
(ii)removed from materials disclosed to any party to the proceedings,
(b)that the witness may use a pseudonym,
(c)that the witness is not asked questions of any specified description that might lead to the identification of the witness,
(d)that the witness is screened to any specified extent,
(e)that the witness's voice is subjected to modulation to any specified extent
[97] Criminal Procedure (Scotland) Act 1997 (c.46) s.271P(1)
[98] Scotland vulnerable witnesses bill, 2018, s 271 BZA
[99] Scotland vulnerable witnesses bill, 2018, s 271 BZA(3)

the child witness to be present in the courtroom to give evidence unless the court is satisfied with reasons specified under the section.[100]

(b) Anonymity protections afforded to child victims, witnesses or offenders after they turn 18.

47. In Scotland the general anonymity protections provided under statutory law protect a child from being identified only until they turn 18. In contrast to England and Wales, as yet there are no automatic lifetime anonymity protections for victims of certain offences such as female genital mutilation, sexual offences and modern slavery or human trafficking in Scotland.[101] There is however a robust convention of long-standing in Scotland that the media do not report the names of alleged victims of sexual offences, but this lacks statutory underpinning.[102] This is an issue acknowledged recognised by the Scottish Government, and in their consultation on tackling F.G.M. they re-affirm their desire to retain the law as it currently stands until there is further evidence that the courts need more powers than they currently hold to ensure the protection of a victim's identity and any relevant case.[103]

48. Despite this lack of legal protection, as noted there appears to exist an uncodified convention amongst news organisation that complainants or witnesses in sexual assault cases will not be named. This is noted in the B.B.C. press briefing on court restrictions in Scotland.[104] Further, some self-regulatory press bodies, such as the Independent Press Standards Organisation (I.P.S.O.), have disciplined Scottish members for identifying sexual assault victims, despite the fact no legal prohibitions exist against doing this.[105] There does not, however, appear to be any extant judgment or commentary to suggest whether news organisations would honour this convention if, during the trial, the person involved in the proceedings turned 18 and lost their general anonymity protections.

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[100] Scotland Vulnerable Witnesses Bill,,2018, s. 271BZB 10(d)
[101] Sexual Offences (Amendment) Act 1992 (c.34), s.2
[102] [102] Scottish Government *Strengthening protection from Female Genital Mutilation (FGM): A Scottish Government Consultation 2018*, <https://consult.gov.scot/violence-against-women-team/female-genital-mutilation/user_uploads/sct09186270561-1.pdf> accessed 8 February 2019, page 18.
[103] Scottish Government *Strengthening protection from Female Genital Mutilation (FGM): A Scottish Government Consultation 2018*, <https://consult.gov.scot/violence-against-women-team/female-genital-mutilation/user_uploads/sct09186270561-1.pdf> accessed 8 February 2019 pages 18-19.
[104] B.B.C. Academy Contempt and Reporting Restrictions. (2019),
: https://www.bbc.co.uk/academy/en/articles/art20130702112133630, accessed 8 February 2019
[105] *A Man v Daily Record* I.P.S.O. 05764-15.

49. However, the powers of the Scottish courts must be interpreted in light of the decision in *Venables v News Group Newspapers*[106], which held that the courts of England and Wales retain the inherent jurisdiction to grant a permanent injunction on the reporting of the identities of certain parties to a criminal proceeding if the court is required to do so in order to remain compatible with rights guaranteed by the European Convention on Human Rights, 1950. Although there is no direct case law on this subject in Scotland, given the Human Rights Act (1998) applies to Scotland through the Scotland Act (1998),[107] the underlying jurisprudential justification for such an injunction would apply in Scottish Courts as they do in English courts. This means that *Venables v News Group Newspapers*, although not binding on Scottish courts, would likely be highly persuasive should a comparative case arise in that jurisdiction.

II. IN SCOTLAND, ARE THE ANONYMITY PROTECTIONS AFFORDED TO CHILDREN COUPLED WITH ANY REQUIREMENT OR DISCRETION TO HOLD PROCEEDINGS BEHIND CLOSED DOORS (*IN CAMERA*)? IN OTHER WORDS, ARE ANONYMITY PROTECTIONS IN ADDITIONTO EXISTING *IN CAMERA* RULES OR ARE THESE PROTECTIONS SEEN AS AN ALTERNATIVE TO *IN CAMERA* RULES?

50. Scotland provides discretionary powers to courts to authorise proceedings to occur in a quasi-*in camera* setting away from the general public, for children or other vulnerable persons. These powers were added to the Criminal Procedure (Scotland) Act (1995) by the Vulnerable Witnesses Act (2004) and later extended by the Victims and Witnesses (Scotland) Act (2011). These provisions may be applied for in respect of any person who is to give testimony in the course of the trial including the accused.[108] These provisions state:

> ***S.271 Vulnerable witnesses: main definitions***
>
> ***[F2****(1)For the purposes of this Act, a person who is giving or is to give evidence at, or for the purposes of, a hearing in relevant criminal proceedings is a vulnerable witness if—*
>
> *(a) the person is under the age of 18 on the date of commencement of the proceedings in which the hearing is being or is to be held,*
>
> *(b) there is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of—*

[106] *Venables v News Group Newspapers* [2001] Fam 430.
[107] Scotland Act 1998 (c.46) Schedule 5.
[108] Criminal Procedure (Scotland) Act 1997 (c.34), s 271C.

(i) mental disorder (within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003), or

(ii) fear or distress in connection with giving evidence at the hearing.

S.271A Child and Deemed Vulnerable Witnesses

(1)Where a child witness ***[****or a deemed vulnerable witness****]*** *is to give evidence at or for the purposes of* ***[****a hearing in relevant criminal proceedings****]****, the ... witness is entitled, subject to—*

(a)subsections (2) to (13) below, and

(b)section 271D of this Act,

to the benefit of one or more of the special measures for the purpose of giving evidence.

51. These special measures include provisions to exclude the public from the courtroom (thus permitting *in camera* hearings), to allow children to provide evidence from a video-link (though this in and of itself does not amount to an *in camera* hearing), to have an informal evidence gathering session performed by a chosen Child Commissioner who takes evidence in an informal setting which is then recorded and shown to the court:

S.271H The special measures

(1) The special measures which may be authorised to be used under section 271A, 271C or 271D of this Act for the purpose of taking the evidence of a vulnerable witness are—

(a) taking of evidence by a commissioner in accordance with section 271I of this Act,

(b) use of a live television link in accordance with section 271J of this Act,

(c) use of a screen in accordance with section 271K of this Act,

(d) use of a supporter in accordance with section 271L of this Act,

(e) giving evidence in chief in the form of a prior statement in accordance with section 271M of this Act, and

[*(ea)excluding the public during the taking of the evidence in accordance with section 271HB of this Act*

52. There are also further considerations for the court to take into account when dealing with the wishes of children witnesses under the age of 12.[109]

53. The consequence of these provisions when coupled with the already existing automatic anonymity protections means that anonymity rules exist <u>in addition to</u> *in camera* rules rather as an alternative to them.

[109] Criminal Procedure (Scotland) Act 1995, s 271B.

III. IN SCOTLAND, PRECISELY WHEN DO ANONYMITY PROTECTIONS FOR CHILD COMPLAINANTS IN CRIMINAL PROCEEDINGS BEGIN TO OPERATE? (i.e FROM THE MOMENT THE CRIME IS COMMITTED, FROM THE TIME THAT THE CRIME IS REPORTED, FROM THE BEGINNING OF THE CRIMINAL TRIAL, OR SOME OTHER TIME?)

54. The application of s.47 of the Criminal Procedure (Scotland) Act only extends to the court proceedings themselves and does not apply to criminal justice activity prior to the operation of a criminal trial. This was affirmed by the High Court of Justiciary in the case of *Frame v Aberdeen Ltd*[110] where it was held that a newspaper report that identified a 15-year-old accused who had been arrested by the police was not in contempt of section 47 anonymity provisions as the report did not cover any proceeding that took place within the court. The court held that:

> "In our opinion the words 'newspaper report of any proceedings in a court' are perfectly clear and comprehensible; and, when these words are considered in the context of the newspaper article in question, it cannot be said that the article is a report of 'proceedings in a court'. What is reported in the article was undoubtedly, of course, brought about in response to earlier proceedings in a court; but that does not mean, in our opinion, that the arrest and charge by the police were themselves a part of such proceedings."[111]

55. It should be noted that in *obiter* the court stressed their reticence to define the scope of the anonymity protection, and that the provision should be interpreted considering the facts of every individual case. They stated:

> We wish to stress, however, that we consider that it is unnecessary, and would be unwise, for us to attempt to express any general view as to what will, or will not, constitute 'proceedings in a court' in the context of sec 47(1). Every case will turn on its own facts, and it is for that reason that we have earlier set out in full the facts of the present case as found by the sheriff.[112]

56. This suggests the court is open to altering the rule to extend the scope in a specific factual circumstance, but this is mere speculation, and the law, as it stands, suggests that anonymity protection will in general only apply to proceedings within the context of a criminal trial and not to any events that occur before.

[110] Frame v Aberdeen Ltd [2005] S.L.T. 949.
[111] ibid 952.
[112] ibid 952-953.

57. There is no comparable case law discussing the application of section 182 of the Children's Hearing (Scotland) Act 2011. Thus, it is not clear when the protections begin in these cases. On the other hand, it must be noted that the wording of the relevant provision is that the anonymity protection extends to any "information in relation to a children's hearing"[113] rather than to any proceeding, which may suggest a wider scope of application than the Criminal Procedure (Scotland) Act. However, this is again speculative, and it will depend on any future case law to properly define the scope of the protection.

[113] Children's Hearing (Scotland) Act 2011 (asp1), s.182(9)(a)(i).

CANADA

I. HAVE THERE BEEN ANY SIGNIFICANT DEVELOPMENTS IN THE LAW IN THE UK, CANADA, AUSTRALIA AND NEW ZEALAND SINCE THE 2016 REPORT IN RESPECT OF:

(a) Anonymity protections afforded to children who are complainants in criminal proceedings.

i. Youth Courts

58. In Canada, youth courts deal with offences committed by defendants aged between 12 and 18[114] years at the time of the alleged offence.[115] The principle is that all persons aged under 18 at the time of the alleged crime involved in criminal proceedings in the youth courts – whether they are alleged victims, witnesses or defendants –receive ***automatic*** and ***indefinite*** **anonymity protection**.[116] It means that '…the communication of information, by making it known or accessible to the general public through any means, including print, radio or television broadcast, telecommunication or electronic means',[117] of the name or any other information that would identify the person under 18 years is prohibited.[118]

59. There are **exceptions** to the ban on identifying information **for defendants** who were under the age of 18 at the time of the alleged offence. The protection does not apply:

> '(a) in a case where the information relates to a young person who has received an adult sentence; or
>
> (b) in a case where the information relates to a young person who has received a youth sentence for a violent offence and the youth justice court has ordered a lifting of the publication ban under s. 75(2)'[119]

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[114] Youth Criminal Justice Act 2002 s. 2(1) ('YCJA') which states: *young person* means a person who is or, in the absence of evidence to the contrary, appears to be twelve years old or older, but less than eighteen years old and, if the context requires, includes any person who is charged under this Act with having committed an offence while he or she was a young person or who is found guilty of an offence under this Act. (*adolescent*).

[115] ibid, s. 2(1) and 14(1)
[116] ibid, s 110 and 111.
[117] ibid s 2.
[118] ibid s 110 and 111.
[119] ibid s 111(2).

> The protection will also not apply 'where the publication of information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community.'[120]

ii. General Courts

60. When the defendant is tried outside the youth courts, alleged victims who were less than 18 years old at the time of the alleged crime must be informed that they can make an application (or have the prosecutor make an application) under the Criminal Code 1985 of Canada for an order 'directing that any information that could identify [them] shall not be published in any document or broadcast or transmitted in any way'. Subsections 486.4(1) (2) (2.1) and (2.2) of the Criminal Code provides that the presiding judge or justice shall, at the first reasonable opportunity, inform the complainant of the opportunity to apply for the order; **if an application is made by the complainant or the prosecutor, the judge shall make the order**.[121] Thus, the anonymity order is **mandatory on application, with respect to child victims in general courts**.

61. When the defendant is tried outside the youth courts, the protection afforded to **witnesses** who were less than 18 years old at the time of the alleged crime differs depending on the type of crime with which the defendant is charged. When the charge is a sexual offence, the regime is the same as the one for victims aged less than 18 years: the judge must inform the witness that he or she can make an application and, once an application is made, the judge must grant it and make the order.[122] With respect to child pornography, the Criminal Code 1985 section 486.4(3) provides that a judge or justice 'shall' make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography, shall not be published in any document or broadcast or transmitted in any way.[123]

62. A minor limitation applies to orders made under s. 486.4 (i.e. those applying to victims under the age of 18, and witness under 18 in cases involving sexual offences). This is outlined in subsection 486.4(4):

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[120] ibid s 112(2) (c).
[121] Criminal Code 1985 s 486.4(1), (2), (2.1), (2.2).
[122] ibid s 486.4(1) (2).
[123] Criminal Code 1985, s 486.4(3).

'An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is **not the purpose of the disclosure to make the information known in the community**.'

63. The regime is less generous for witnesses under 18 years in non-sexual cases, but there are two separate forms of protection. *First*, under subsection 486.31(1) the prosecutor or witness may apply for an order 'directing that any information that could identify the witness not be disclosed in the course of the proceedings' provided that the 'judge or justice is of the opinion that the order is in the interest of the proper administration of justice.' This means that the identity of the witness would not be made known during the trial, meaning that the information is effectively precluded from being published. Subsection 486.31(3) lays down certain factors which the judge or justice shall consider in considering whether to make the order.[124]

64. *Second*, where the identity of the witness is disclosed during the trial and it is a non-sexual offence, the prosecution or witness can apply under s. 486.5[125] for an order restricting publication of 'any information that could identify…the witness' to the effect that this 'shall not be published in any document or broadcast or transmitted in any way if the justice is of the opinion that the order is in the interest of the proper administration of justice.' This provision could thus be used to prevent publishing of information which has been disclosed.

65. The test for making such an order largely codifies the common law framework developed by the Supreme Court of Canada in *Dagenais* v *Canadian Broadcasting Corp* [1994] 3 SCR 835 and *R* v *Mentuck* [2001] SCC 76 (the "Dagenais/Mentuck framework"[126]). However there are some

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[124] Factors to be considered - (3) In determining whether to make the order, the judge or justice shall consider (a) the right to a fair and public hearing; (b) the nature of the offence; (c) whether the witness needs the order for their security or to protect them from intimidation or retaliation; (d) whether the order is needed to protect the security of anyone known to the witness; (e) whether the order is needed to protect the identity of a peace officer who has acted, is acting or will be acting in an undercover capacity, or of a person who has acted, is acting or will be acting covertly under the direction of a peace officer; (e.1) whether the order is needed to protect the witness's identity if they have had, have or will have responsibilities relating to national security or intelligence; (f) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; (g) the importance of the witness' testimony to the case; (h) whether effective alternatives to the making of the proposed order are available in the circumstances; (i) the salutary and deleterious effects of the proposed order; and (j) any other factor that the judge or justice considers relevant.

[125]Order restricting publication — victims and witnesses - 486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

[126] The Dagenais/Mentuck framework requires a balancing process between the freedom of the press (a right protected in the Canadian Charter of Rights and Freedoms which is part of the Constitution of Canada) and the other rights, values or interests at stake, to decide whether a publication ban would be in the interest of the proper

differences. Rather than considering only factors under the Dagenais/Mentuck framework, s. 486.5(7)[127] specifies the seven factors the court must consider. As of July 20 2015, the ban must be 'in the interest of the proper administration of justice'. It is therefore not a test of necessity; rather than deciding whether an order is 'necessary to prevent serious risk to the administration of justice' (as in *Dagenais*), s. 486.5(7) requires consideration of whether 'there is a real and substantial risk the applicant would suffer harm if their identity was disclosed.'[128]However, a recent judgment by the Ontario Native Council of Justice, holds that even if the applicant fails on this count, the court may still grant the section 486.5 order if 'it is in the interests of justice to issue a publication ban' (*R v Dhami* [2019] ONCJ 10 [19]).[129]

(b) Anonymity protections afforded to child victims, witnesses or offenders after they turn 18.

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administration of justice. A hierarchical approach to rights, which places some rights over others, must be avoided. Charter principles require a balance to be achieved that fully respects the importance of both sets of rights. In *Dagenais*, a case dealing with publication bans, the Chief Justice of Canada Lamer, as he then was, made a point to note that rather than simply focusing on the fact that publication bans always limit freedom of expression and usually aim to protect the right to a fair trial of the accused, it should be recognized that ordering bans may protect broader interests than the ones of the accused person. As examples, he listed the following interests that could be competing with the public accessing information : "- maximize the chances that witnesses will testify because they will not be fearful of the consequences of publicity; - protect vulnerable witnesses (for example, child witnesses, police informants, and victims of sexual offences); - preserve the privacy of individuals involved in the criminal process (for example, the accused and his or her family as well as the victims and the witnesses and their families); - maximize the chances of rehabilitation for "young offenders"; - encourage the reporting of sexual offences; - save the financial and/or emotional costs to the state, the accused, the victims, and witnesses of the alternatives to publication bans (for example, delaying trials, changing venues, and challenging jurors for cause); and - protect national security." - Dagenais, 883

[127] Criminal Code 1985 s 486.5(7) which states: Factors to be considered -(7) In determining whether to make an order, the judge or justice shall consider (a) the right to a fair and public hearing; (b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed; (c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation; (d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process; (e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant; (f) the salutary and deleterious effects of the proposed order; (g) the impact of the proposed order on the freedom of expression of those affected by it; and (h) any other factor that the judge or justice considers relevant.

[128] Criminal Code 1985 s 486.4(8) : The order may be made 'subject to any conditions that the judge or justice thinks fit.'

[129] Justice S. Caponecchia continues (*R v Dhami [2019] ONCJ 10*) [20] 'The common law may supplement but cannot override statutory provisions in the Criminal Code. Where a specific provision in the Criminal code deals explicitly with an order sought and directs me to the criteria that I am to apply, I should apply the Criminal Code. Therefore, while the Dagenais and Mentuck cases are instructive, I have determined that I am governed specifically by the provisions of section s. 486.5.

[21] Pursuant to s. 486.5(1) the test that I must apply is whether the publication ban of the victim's identity is *in the interest of the proper administration of justice*. The balancing of multiple interests must occur. Fair trial interests and freedom of the press are one aspect of the administration of justice. There are other values comprising the proper administration of justice that I am statutorily obliged to consider pursuant to s. 486.5(7). All of the criteria are meant to answer the same question: whether the ban is in the interest of the proper administration of justice. A ban should not be imposed to avoid mere discomfort or to secure an advantage unrelated to the proper administration of justice. It is the avoidance of real harm, not speculative, that the ban seeks to achieve.'

i. Youth Courts

66. In Canada, as stated earlier, the anonymity protections afforded to all persons aged under 18 years involved in criminal proceedings in the youth courts – whether they are victims, witnesses or defendants – are automatic and indefinite. The application of the provision is governed by the age of the person at the time of the alleged crime rather than the age of the person at the time of the trial.[130] Accordingly, turning 18 years old does not change the protection granted by the Youth Criminal Justice Act 2002. The only difference is that the person aged 18 years old in the youth court has the right to waive his or her own anonymity protection by publishing information identifying himself or herself.[131]

ii. General Courts

67. With respect to general courts, alleged victims that were less than 18 years old when the adult defendant committed the offence are entitled to be granted a court order banning publication **under simple application**.[132] Its protection never expires. Failure to comply with it is an offence.[133]

68. For sexual offences[134], the Alberta Provisional Court in *Re JF* [2018] ABPC 36 (Honourable D.G. Redman Assistant Chief Judge) held that the complainant may submit an application to

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[130] Youth Criminal Justice Act 2002, s 2.

[131] Youth Criminal Justice Act 2002 s 110(3) and 111(2)a) which states: s 110(3)(3) A young person referred to in subsection (1) may, after he or she attains the age of eighteen years, publish or cause to be published information that would identify him or her as having been dealt with under this Act or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, provided that he or she is not in custody pursuant to either Act at the time of the publication; s 111(2) Information that would serve to identify a child or young person referred to in subsection (1) as having been a victim or a witness may be published, or caused to be published, by (a) that child or young person after he or she attains the age of eighteen years or before that age with the consent of his or her parents; or (b) the parents of that child or young person if he or she is deceased.

[132] Criminal Code 1985 s 486.4(1),(2),(2.1),(2.2).

[133] ibid s 486.6.

[134] Quoting *R v Adams 1995* 4 SCR 70, *Re JF* [2018] ABPC 36 states on other sexual offences: [19] 'The court noted [in *R v Adams* 1995 4 SCR 70] that for a sexual assault offence, it was only once an application was made, that it was mandatory for a judge to issue the ban and therefore because the imposition of a ban was not automatic, under its inherent jurisdiction, the Court retained the authority to re-consider its previous order.
[20] …all is required is a material change in circumstances and the Court then has jurisdiction to consider rescinding or varying the ban – the material change here being that the victim JF wants the ban rescinded.'
[40] 'To interpret the Supreme Court of Canada in R v Adams for the proposition that a ban imposed as a result of a sexual assault could not be rescinded unless the Crown consented, would place an inordinate amount of authority in the Crown and would have the effect of ignoring the express wishes of victims.'
[47] The applicant here has had a considerable time to consider these tragic events, the impact they have had upon him and whether he wishes the ban to continue. When he first applied to have the ban removed, I rejected this application and gave him leave to apply at a later time. … Accordingly, I find that there has been a substantial change in circumstances since the granting of the ban with respect to the sexual assault offence and I am hereby rescinding that ban.'

rescind the publication bans granted. For child pornography cases, in *Re JF*, the Alberta Provisional Court pointed out that "although the wording of the subsection [section 163.1] does not contemplate the rescinding of the ban, case authority stands for the proposition that this type of ban can be varied if there is a change of circumstances". Thus it appears that the ban could be revoked, in some cases, even with respect to instances of child pornography, when an application is made by alleged victims who under the age of 18 at the time of offence.[135]

69. Witnesses who were under 18 years old when the adult defendant committed a sexual offence benefit from the same regime than as the alleged victims.[136] The regime is different for witnesses in non-sexual cases; they must apply for an order that will only be granted when it is in the interest of the proper administration of justice.[137] However, once there is a court order, it never expires and failure to comply with it is an offence.[138]

II. IN CANADA, ARE THE ANONYMITY PROTECTIONS AFFORDED TO CHILDREN COUPLED WITH ANY REQUIREMENT OR DISCRETION TO HOLD PROCEEDINGS BEHIND CLOSED DOORS (IN CAMERA)? IN OTHER WORDS, ARE ANONYMITY PROTECTIONS IN ADDITIONTO EXISTING IN CAMERA RULES OR ARE THESE PROTECTIONS SEEN AS AN ALTERNATIVE TO IN CAMERA RULES?

i. Youth Courts

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[135] Quoting [*R v Adams* 1995 4 SCR 70, this case states on Child pornography: [14] 'The language of that subsection includes the following: "[i]n proceedings in respect of an offence under section 163.1, a judge or justice shall make an order" [emphasis added]. This is mandatory. It applies to all offences under section 163.1 and there is no triggering event or discretion to refuse to grant the order. Furthermore, the section itself does not contemplate rescinding the ban.' [16] There is no choice or discretion to be exercised: when there is a proceeding in respect of an offence under section 163.1, the ban must be made and under no circumstances can it be rescinded. [17] The language [of s. 486.4(2)] requires that there be a triggering event; the triggering event is an application by the victim, the prosecutor or a witness under the age of 18 years, and once the application is made, the granting of the order then becomes mandatory. Although the wording of the subsection does not contemplate the rescinding of the ban, case authority stands for the proposition that this type of ban can be varied if there is a change of circumstances.'

[136] Criminal Code 1985 s 486.4(1) (2).
[137] ibid s 486.5.
[138] ibid s 486.6.

70. The "open court" principle is followed in Canada.[139] This principle also applies to proceedings in the youth court, in contrast to criminal proceedings in the UK youth justice system. However, the exclusion of the public (which may exceptionally include the media) can always be ordered as an additional measure of protection in youth courts. Such an order can be made either under section 132(1)(a) of the Youth Criminal Justice Act 2002 where 'the court or justice is of the opinion that any evidence or information presented to the court or justice would be seriously injurious or seriously prejudicial' to a defendant, witness or victim of the offense charged who is under 18 years-old, or section 132(1)(b) if 'it would be in the interest of public morals, the maintenance of order or the proper administration of justice to exclude any or all members of the public from the court room."[140]

71. The decision to exclude the public is an exercise of judicial discretion following the Dagenais/Mentuck framework discussed above. While Dagenais/Mentuck decisions dealt with the common law publication ban in criminal proceedings, the framework applies to all discretionary court orders by a trial judge to limit freedom of expression by the press during judicial proceedings, including closing the court room:

> "While the [Dagenais/Mentuck] test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in accordance with the [Canadian Charter of Rights and Freedoms], whether it arises under the common law, as is the case with a publication ban (Dagenais, supra; Mentuck, supra); is authorized by statute, for example under s. 486(1) of the Criminal Code which allows the exclusion of the public from judicial proceedings in certain circumstances [citations omitted]; or under rules of court, for example, a confidentiality order [citations omitted]. The burden of displacing the general rule of openness lies on the party making the application [citations omitted].[141]

72. When applying the Dagenais/Mentuck framework to a discretionary decision in the youth courts, the interests in conflict are, on one side, the society's interests in the open court and freedom of the press, and, on the other side, the society's interest in protecting the privacy of

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[139] *Endean v British Columbia*, 2016 SCC 42.
[140] ibid s 132(1)b).
[141] *Vancouver Sun (Re)* 2004 SCC 43 par 31; *Toronto Star Newspaper v Ontario* 2005 SCC 41 para 7; *Named Person v. Vancouver Sun*, 2007 SCC 43 par 35; *Toronto Star Newspapers Ltd v Canada* 2010 SCC 21 par 15-16; *Canadian Broadcasting Corp v The Queen* 2011 SCC 3 par 13.

young people. The framework must be adapted to consider the strong interest of society in protecting the privacy of young people, the latter being crystallised as a cornerstone of the Youth Criminal Justice Act 2002 because of its critical relationship to rehabilitation which promotes the long-term protection of society.[142]

73. An application of the Dagenais/Mentuck framework in the youth courts can be found in lower courts decisions such as *Toronto Star Newspaper Ltd v Ontario* 2012 ONCJ 27:

> "In the case at bar, the privacy rights of the young persons appear to be conflict with the expressive rights of the media. The *Dagenais/Mentuck*analysis must be applied "in a manner that reflects the fact that two fundamental rights are in jeopardy," and that both are "matters of exceptional importance". The court must bear in mind the value of protecting the privacy of young persons in the youth justice system when there may be reasonably alternative measures available. It must thus ascertain whether any reasonably alternative measures exist which protect the right of the young persons to privacy, while impairing free expression to the least extent necessary. Also, when considering the proportionality of the deleterious impact of the ban on free expression in relation to its salutary effects, it will be necessary to bear in mind the fundamental importance of the privacy right, both to the young people and to society. (*Dagenais*, par. 97)"
>
> In this judgment, the youth court was deciding an application from the media to lift the automatic prohibition on accessing some records of proceedings on the basis of section 119(1)(s) Youth Criminal Justice Act 2002. The same framework and balancing of interests applies when the youth court is deciding whether the public and the media should be excluded from the hearing or a specific part of it according to section 132(1)b).[143] They are all discretionary decisions limiting freedom of expression by the press during judicial proceedings.

ii. General Courts

74. Outside the youth courts, the relevant legislative provision allowing a court to exclude all or any members of the public from the hearing is section 486 of the Criminal Code of Canada.

[142] This balancing act has been performed in *Toronto Star Newspaper Ltd v Ontario* 2012 ONCJ 27.
[143] *R v TC* 2006 NSPC 61.

This section states that the starting principle is the 'open court', but that the prosecution or a witness can apply for an order excluding 'all or any members of the public from the court room for all or part of the proceedings, or order that the witness testify behind a screen or other device that would allow the witness not to be seen by members of the public' provided the court is of the opinion 'that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice' (or to protect national security).[144] The judge or justice may also make the order 'on his or her own motion.'[145] To determine whether the order is in the interest of the proper administration of justice, the factors to be considered are specified in section 486(2)[146].

75. For certain offences, if an application for a section 486(1) order is refused, 'the judge or justice shall…state, by reference to the circumstances of the case, the reason for not making an order.'[147] This includes all sexual offences. The interests of witnesses under 18 years old are expressly listed as a relevant factor to consider in the balancing process at section 486(2)(b) Criminal Code. In sexual offence cases, no matter the age of victims and witnesses, when the judge refuses an application for such order, he shall "state, by reference to the circumstances of the case, the reason for not making an order."[148]

76. Further, as mentioned above, the Dagenais/Mentuck test applies to all discretionary actions by a trial judge to limit freedom of expression by the press during all judicial proceedings in courts, including the youth courts. Discretion must be exercised in accordance with the Charter of Rights, whether it arises under the common law or it is authorized by statute as under section 486(1) of the Criminal Code. The decision must be made after a balancing of the interests at stake in the specific case at bar.

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[144] Criminal Code 1985 s 486(1)

[145] ibid. s. 486(1) of the Criminal Code 1985 makes no reference on this point to applications made by victims or the accused. However, s. 486(3), which covers orders refused for sexual offences, does refer to the accused having applied for a s. 486(1) order.

[146] '(a) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; (b) the safeguarding of the interests of witnesses under the age of 18 years in all proceedings; (c) the ability of the witness to give a full and candid account of the acts complained of if the order were not made;(d) whether the witness needs the order for their security or to protect them from intimidation or retaliation;(e) the protection of justice system participants who are involved in the proceedings;(f) whether effective alternatives to the making of the proposed order are available in the circumstances;(g) the salutary and deleterious effects of the proposed order; and(h) any other factor that the judge or justice considers relevant.'

[147] Criminal Code 1985 s 486(3) – on the application of the prosecution or the accused.

[148] Ibid.

77. Thus, *in camera* or private proceedings can be conducted both in youth courts and in general courts in Canada, as long as certain stringent conditions are satisfied. The power to conduct such proceedings however exists along with anonymity provisions within the statutory framework; thus, anonymity provisions are in addition to, rather than an alternative to in-camera proceedings.

III. IN CANADA, WHEN DO ANONYMITY PROTECTIONS FOR CHILD VICTIMS / COMPLAINANTS IN CRIMINAL PROCEEDINGS BEGIN TO OPERATE? (I.E. FROM THE MOMENT THE CRIME IS COMMITTED, FROM THE TIME THAT THE CRIME IS REPORTED, FROM THE BEGINNING OF THE CRIMINAL TRIAL, OR SOME OTHER TIME?)

i. Youth Courts

78. For charges involving a defendant under the age of 18, the anonymity protection of section 111 (subject to the exceptions) is automatic and applies to all defendants, witnesses and alleged victims who are under 18 years-old at the time of the alleged crime.[149] The Act does not state when the legislative protections in youth courts begin, but, as section 110(1) bans publication of information that would identify a 'young person as a young person dealt with under this Act', this presumably means that the anonymity protections begin once powers under the Act are first invoked. However, there is no case law on this point.

ii. General Courts

79. Publication bans for victims under 18 years old at the time of the crime are made by court order.[150] Even if the court has no discretion to refuse to make the order once asked for, the victim (or prosecutor) still must file an application for it. The application can be granted by

[149] Youth Criminal Justice Act 2002, s 2(1) and 14 (5).
[150] Criminal Code 1985, s 486(1) (2) (2.1) (2.2).

the court with jurisdiction to try the offence charged. The power to order publication bans derives both from statute and common law.[151]

80. Thus, outside the youth courts, the protections of the Criminal Code only apply once an application for an order has been made, unless the alleged offence i**s child pornography (as no application is necessary)**.[152] In *Re JF*, Honourable D.G. Redman Assistant Chief Judge cited the Canadian Supreme Court decision of *R v Adams*[153] where it was stated that 'for a sexual assault offence, **it was only once an application was made**, that it was mandatory for a judge to issue the ban'.[154] This means that identifying information 'published or transmitted'

[151] *Vancouver Sun (Re)* 2004 SCC 43 par 31; *Toronto Star Newspaper v Ontario* 2005 SCC 41 par 7; *Named Person v. Vancouver Sun*, 2007 SCC 43 par 35; *Toronto Star Newspapers Ltd v Canada* 2010 SCC 21 par 15-16; *Canadian Broadcasting Corp v The Queen* 2011 SCC 3 par 13.
[152] Criminal Code 1985 Sections 486.4(3), as above (n 10).
[153] *R v Adams* [1995] 4 SCR 70.
[154] *Re JF* [2018] ABPC 36.

prior to the granting of a section 486.4(1), (2), (2.1), (3) or section 486.5(1) ban does not fall within the scope of anonymity protection.[155]

NEW SOUTH WALES (AUSTRALIA)

I. HAVE THERE BEEN ANY SIGNIFICANT DEVELOPMENTS IN THE LAW IN THE UK, CANADA, AUSTRALIA AND NEW ZEALAND SINCE THE 2016 REPORT IN RESPECT OF:

(a) Anonymity protections afforded to children who are victims / complainants in criminal proceedings.

81. Section 15A(1) of the Children (Criminal Proceeding) Act 1987 (NSW) provides that:

[155] In *R v Canadian Broadcasting Corporation [2018] ABCA 391*, a decision of the Alberta Court of Appeal, the Honourable Justice Rowbotham stated that the terms 'published' and 'transmitted' in s. 486.4(1) Criminal Code 1985 were to be interpreted narrowly, as Parliament would have been clear if it had intended a broad meaning – at [44]. This meant that the defendants, who had posted identifying information of a 14-year-old victim of a homicide on their website **prior** to the imposition of the publication ban had not committed any offence
'[45] I am of the opinion that section 486.4 is capable of two interpretations. That is arguments for both the broad and narrow interpretation of "published" and "transmitted" are plausible… This leaves a reasonable doubt as to their meaning and scope, which requires us to apply the rule of strict construction.'
'[48] Accordingly, I conclude that the narrow definitions of published and transmitted apply. That is, "published" and "transmitted in any way" do not capture the CBC's refusal to remove or redact previous identifying information after the Ban issued. … If section 486.4(2.1) and (2.2) are intended to apply when identifying information is published and transmitted before a section 486.4 ban issues, statutory amendments are required.'

(1) The name of a person must not be published or broadcast in a way that connects the person with criminal proceedings if:

(a) the proceedings relate to the person and the person was a child when the offence to which the proceedings relate was committed, or

(b) the person appears as a witness in the proceedings and was a child when the offence to which the proceedings relate was committed (whether or not the person was a child when appearing as a witness), or

(c) the person is mentioned in the proceedings in relation to something that occurred when the person was a child, or

(d) the person is otherwise involved in the proceedings and was a child when so involved, or

(e) the person is a brother or sister of a victim of the offence to which the proceedings relate, and that person and the victim were both children when the offence was committed.

82. It is clear that subsection (1)(a) covers both child defendants (see, for example, *R v DH; R v AH* [2014] NSWCCA 326) and child complainants (and complainants of historical offences alleged whilst the witness was a child (see, for example, *Lindon v R* [2014] NSWCCA 112). Subsection (1)(b) covers witnesses.

83. The protection in section 15A is **automatic** and applies unless reporting is authorised under one of the exceptions provided for in the following sections. Section 15C provides that a court may, at time of sentencing, may authorise the publication of the name of a child offender convicted of a serious indictable offence. In determining whether to make such an order, a court is to have regard to the following matters:

(a) the level of seriousness of the offence concerned,

(b) the effect of the offence on any victim of the offence and (in the case of an offence that resulted in the death of the victim) the effect of the offence on the victim's family,

(c) the weight to be given to general deterrence,

(d) the subjective features of the offender,

(e) the offender's prospects of rehabilitation,

(f) such other matters as the court considers relevant having regard to the interests of justice.

84. Section 15D allows the publication of the name of a person otherwise protected with his or her consent if they are over 16 years old, or with the consent of the court if they are under 16 years of age. The court is not to give such consent unless it is satisfied that it is in the public interest that consent be given. Section 15E allows the reporting of the name of a deceased child with the consent of their senior available next of kin if certain further criteria are met. Section 15F makes an exception for traffic offences not heard by the children's court.

85. Small changes have been introduced in the central provision stipulating anonymity protections for children[156] in criminal proceedings, section 15A of the Children (Criminal Proceeding) Act, 1987 (NSW). However, these changes do not remove child victims/ complainants from the scope of protection of the provision.

86. The first amendment, introduced by the Parole Legislation Amendment Act 2017 No 57(NSW), schedule 4.1[157], added section 15A(6A) to the Children (Criminal Proceeding) Act 1987 that now makes it clear that 'restrictions on publication of criminal proceedings involving children also apply to parole-related hearings'[158].

87. The second change, implemented by the Victims Rights and Support Amendment (Statutory Review) Act 2018 No 34(NSW), schedule 3.1[159], concerns the initiation of proceedings for violation of the anonymity protections. According to the new section 15A (8) of the Children (Criminal Proceeding) Act 1987, proceedings for an offence contrary to section 15A Children (Criminal Proceeding) Act 1987 must commence within 2 years after the alleged offence. Previously, the time limit for commencing those proceedings was 6 months.[160]

88. In addition to the provisions under the Children (Criminal Proceeding) Act 1987, there are other statutory provisions which provide anonymity to child complainants/ victims, or

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156 Children (Criminal Proceedings Act) 1987 (NSW), s 3(1) defines children "as a person below the age of 18".
157 Parole Legislation Amendment Act 2017 No 57(NSW), <https://www.legislation.nsw.gov.au/acts/2017-57.pdf> The provisions displayed in this version of the legislation have all commenced, and the Act was repealed by sec 30C of the Interpretation Act 1987 No 15 with effect from 15.1.2019.
158 Explanatory Note to the Parole Legislation Amendment Act 2017 No 57(NSW) 9,
< https://legislation.nsw.gov.au/bills/5d28f9d2-d86e-4c85-aae8-5ed4f3a9e802 >
159 Victims Rights and Support Amendment (Statutory Review) Act 2018 No 34 (NSW),
https://www.legislation.nsw.gov.au/#/view/act/2018/34/sch3, The provisions displayed in this version of the legislation have all commenced, and the Act was repealed by sec 30C of the *Interpretation Act 1987No 15* with effect from 15.1.2019.
160 Explanatory Note to the Victims Rights and Support Amendment (Statutory Review) Bill 2018 No 34(NSW) 4,
< https://www.parliament.nsw.gov.au/bill/files/3529/XN%20Victims%20Rights%20and%20Support%20Amdt%20Stat%20Review.pdf >.

complainants/ victims in general, which would then also apply to children. Some of these pertain to specific situations, such as sexual offences, or domestic violence proceedings.

89. Child Protection (Offenders Prohibition Orders) Act, 2004(NSW) prevents the *name* of the victim of a registrable offense[161] committed by a registrable person[162]from being disclosed.[163]

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[161] Child Protection (Offenders Prohibition Orders) Act 2004(NSW), s. 3, says that "registrable offense" has the same meaning as in the Child Protection (Offenders Registration) Act, 2000. Under Child Protection (Offenders Registration) Act, 2000(NSW), s. 3, "registrable offense" has been defined as:
registrable offence means an offence that is:
(a) a Class 1 offence, or
(b) a Class 2 offence, or
(c) an offence that results in the making of a child protection registration order.
Class 1 offenses are (as per Child Protection (Offenders Registration) Act, 2000 (NSW), s. 3):*Class 1 offence* means:
(a) the offence of murder, where the person murdered is a child, or
(b) an offence that involves sexual intercourse with a child (other than an offence that is a Class 2 offence), or
(c) an offence against section 66EA of the *Crimes Act 1900*, or
(d) an offence against section 272.8, 272.10 (if it relates to an underlying offence against section 272.8) or 272.11 of the *Criminal Code* of the Commonwealth, or an offence against section 272.18, 272.19 or 272.20 of the *Criminal Code* of the Commonwealth if it relates to another Class 1 offence as elsewhere defined in this section, or
(d1) an offence against section 80A of the *Crimes Act 1900*, where the person against whom the offence is committed is a child, or
(e) any offence under a law of a foreign jurisdiction that, if it had been committed in New South Wales, would have constituted an offence of a kind listed in this definition, or
(f) an offence under a law of a foreign jurisdiction that the regulations state is a Class 1 offence, or
(g) an offence an element of which is an intention to commit an offence of a kind listed in this definition, or
(h) an offence of attempting, or of conspiracy or incitement, to commit an offence of a kind listed in this definition, or
(i) an offence that, at the time it was committed:
(i) was a Class 1 offence for the purposes of this Act, or
(ii) in the case of an offence occurring before the commencement of this definition, was an offence of a kind listed in this definition.
Class 2 offence means (as per Child Protection (Offenders Registration) Act, 2000 (NSW), s. 3):
(a) the offence of manslaughter (other than manslaughter as a result of a motor vehicle accident), where the victim of the manslaughter is a child, or
(a1) an offence that involves sexual touching or a sexual act against or in respect of a child, being an offence that is punishable by imprisonment for 12 months or more, or
(a2) an offence under section 33 (1) of the *Crimes Act 1900*, where the person against whom the offence is committed is a child under 10 years of age and the person committing the offence is not a child, or
(a3) an offence under section 66EB or 66EC of the *Crimes Act 1900*, or
(b) an offence under section 86 of the *Crimes Act 1900*, where the person against whom the offence is committed is a child, except where the person found guilty of the offence was, when the offence was committed or at some earlier time, a parent or carer of the child, or
(c) an offence under section 80D or 80E of the *Crimes Act 1900*, where the person against whom the offence is committed is a child, or
(c1) an offence under section 87 of the *Crimes Act 1900*, where the person committing the offence has never had parental responsibility (within the meaning of that section) for the child who is taken or detained, or
(d) an offence under section 91D, 91E, 91F, 91G or 91H of the *Crimes Act 1900* (other than an offence committed by a child prostitute), or
(e) (Repealed)
(f) an offence under section 91J, 91K or 91L of the *Crimes Act 1900* where the person who was being observed or filmed as referred to in those sections was then a child, or
(g) an offence against section 271.4, 271.7, 272.9, 272.10 (if it relates to an underlying offence against section 272.9), 272.11, 272.12, 272.13, 272.14, 272.15, 273.5, 273.6, 273.7, 471.16, 471.17, 471.19, 471.20, 471.22, 471.24, 471.25, 471.26, 474.19, 474.20, 474.22, 474.23, 474.24A, 474.25A, 474.25B, 474.26, 474.27 or 474.27A of the *Criminal Code* of the Commonwealth, or an offence against section 272.18, 272.19 or 272.20 of the *Criminal Code* of the Commonwealth if it relates to another Class 2 offence as elsewhere defined in this section, or
(h) an offence against section 270.6 or 270.7 of the *Criminal Code* of the Commonwealth where the person against whom the offence is committed is a child, or
(i) an offence against section 233BAB of the *Customs Act 1901* of the Commonwealth involving items of child pornography or of child abuse material, or
(j) any offence under a law of a foreign jurisdiction that, if it had been committed in New South Wales, would have constituted an offence of a kind listed in this definition, or

Disclosure of *any matter* reasonably likely to enable the victim to be identified is also prohibited.[164]

90. Crimes (Domestic and Personal Violence) Act 2007(NSW) prohibits the publication of names and identifying information[165] about children involved in proceedings for an apprehended violence order proceedings, if such proceedings have been brought for protection of a child[166], a child is appearing as a witness before the court in these proceedings, or a child is reasonably likely to be mentioned or otherwise involved in such proceedings.[167] Certain exceptions are permitted to this rule.[168] This provision thus extends to any child involved in a domestic violence case.

91. Crimes Act, 1900(NSW) prohibits the publication of matters identifying a complainant in proceedings in respect of a prescribed sexual offence.[169] This provision is not restricted to children. The provision prohibits *any person* from publishing *any matter*, which either identifies

(k) an offence under a law of a foreign jurisdiction that the regulations state is a Class 2 offence, or
(l) an offence an element of which is an intention to commit an offence of a kind listed in this definition, or
(m) an offence of attempting, or of conspiracy or incitement, to commit an offence of a kind listed in this definition, or
(n) an offence that, at the time it was committed:
(i) was a Class 2 offence for the purposes of this Act, or
(ii) in the case of an offence occurring before the commencement of this definition, was an offence of a kind listed in this definition.

[162] Child Protection (Offenders Prohibition Orders) Act 2004(NSW), s. 3, says that "registrable person" has the same meaning as in the Child Protection (Offenders Registration) Act (NSW), 2000. Child Protection (Offenders Registration) Act(NSW), s. 3A(1) defines "registrable person" as:
A *registrable person* is a person whom a court has at any time (whether before, on or after the commencement of this section) sentenced in respect of a registrable offence, and includes a corresponding registrable person.

[163] Child Protection (Offenders Prohibition Orders) Act, 2004, s. 18(1)(b).
[164] Child Protection (Offenders Prohibition Orders) Act, 2004, s. 18(1)(d).
[165] Crimes (Domestic and Personal Violence) Act 2007 (NSW), s. 45(5) which states: For the purposes of this section, a reference to the name of a person includes a reference to any information, picture or other material:(a) that identifies the person, or(b) that is likely to lead to the identification of the person.
[166] Crimes (Domestic and Personal Violence) Act 2007 (NSW), s 3(1) which states: *child* means a person under the age of 16 years.
[167] Crimes (Domestic and Personal Violence) Act 2007(NSW), s 45(1).
[168] Crimes (Domestic and Personal Violence) Act 2007(NSW), s 45(4), which states:
This section does not prohibit:
(a) the publication or broadcasting of an official report of the proceedings of a court that includes the name of any person the publication or broadcasting of which would otherwise be prohibited by this section, or
(b) the publication or broadcasting of the name of a person with the consent of the person or of the court.

[169] Crimes Act, 1900(NSW), s 578A.

the *complainant* in a prescribed sexual offence[170] proceeding, or is likely to lead to the identification of the *complainant.*[171] Certain exceptions are permitted to this rule.[172]

92. The Court Suppression and Non-publication Orders Act, 2010(NSW) provides courts the authority to make non-publication orders[173] or suppression orders[174], prohibiting or restricting the publication or other disclosure of information "tending to reveal the identity of or otherwise concerning any party to or witness in proceedings before the court or any person who is related to or otherwise associated with any party to or witness in proceedings before the court".[175] This provision is once again not restricted to children. Such orders can be made on several grounds, which are listed in the Act, including ensuring safety of the person, and avoiding distress to a party or witness in a prosecution involving sexual touching.[176] The court

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[170] Crimes Act, 1900(NSW), s 578A states that prescribed sexual offense has the same meaning as under the Criminal Procedure Act, 1986.
Criminal Procedure Act, 1986, s 3 defines prescribed sexual offence as:
(a) an offence under section 43B, 61B, 61C, 61D, 61E, 61I, 61J, 61JA, 61K, 61KC, 61KD, 61KE, 61KF, 61L, 61M, 61N, 61O, 63, 65, 65A, 66, 66A, 66B, 66C, 66D, 66DA, 66DB, 66DC, 66DD, 66DE, 66DF, 66EA, 66EB, 66EC, 66F, 67, 68, 71, 72, 72A, 73, 73A, 74, 76, 76A, 78A, 78B, 78H, 78I, 78K, 78L, 78M, 78N, 78O, 78Q, 79, 80, 80A, 80D, 80E, 81, 81A, 81B, 87, 89, 90, 90A, 91, 91A, 91B, 91D, 91E, 91F, 91G or 316A of the *Crimes Act 1900* , or
(b) an offence that, at the time it was committed, was a prescribed sexual offence for the purposes of this Act or the *Crimes Act 1900* , or
(c) an offence (including an offence under section 86 of the *Crimes Act 1900*) that includes the commission of, or an intention to commit, an offence referred to in paragraph (a) or (b), or
(d) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (a), (b) or (c).

[171] Crimes Act, 1900(NSW), s 578A(2).
[172] Crimes Act, 1900(NSW), s 578A(4), which states:
This section does not apply to:
(a) a publication authorised by the Judge or Justice presiding in the proceedings concerned,
(b)a publication made with the consent of the complainant (being a complainant who is of or over the age of 14 years at the time of publication),
(c)a publication authorised by the court concerned under section 15D of the *Children (Criminal Proceedings) Act 1987* in respect of a complainant who is under the age of 16 years at the time of publication,
(d) an official law report of the prescribed sexual offence proceedings or any official publication in the course of, and for the purposes of, those proceedings,
(e) the supply of transcripts of the prescribed sexual offence proceedings to persons with a genuine interest in those proceedings or for genuine research purposes, or
(f) a publication made after the complainant's death.

[173] Court Suppression and Non-publication Orders Act, 2010(NSW), s 3: an order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information).
[174] Court Suppression and Non-publication Orders Act, 2010(NSW), s 3 as: an order that prohibits or restricts the disclosure of information (by publication or otherwise).
[175] Court Suppression and Non-publication Orders Act, 2010(NSW), s 7(a).
[176] Court Suppression and Non-publication Orders Act, 2010(NSW), s 8:
(1) A court may make a suppression order or non-publication order on one or more of the following grounds:
(a) the order is necessary to prevent prejudice to the proper administration of justice,
(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,
(c) the order is necessary to protect the safety of any person,

can make such an order on its own motion, or on an application submitted by the party to the proceeding.[177] While making such orders, the court has to provide several entities, including media entities, an opportunity to be heard.[178] Once made, an order can be subject to a review[179] or an appeal[180]. The court is also given the power to make interim orders, in urgent situations.[181] Certain disclosures are not however prevented by the Act.[182] This Act does not limit inherent powers of courts in this respect, nor does it affect existing legislation which prohibits, restricts or grants a court powers to prohibit or restrict, the publication or disclosure of information in connection with proceedings, thus taking care not to dilute protections offered by other legislations, particularly to child complainants and witnesses in sexual assault proceedings.[183]

(b) Anonymity protections afforded to child victims, witnesses or offenders after they turn 18.

93. Children (Criminal Proceeding) Act 1987, section 15A (4)(b)[184] makes it clear that the provision applies 'even if the person is no longer a child, or is deceased, at the time of the publication or broadcast'.[185]

(d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including sexual touching or a sexual act within the meaning of Division 10 of Part 3 of the *Crimes Act 1900*),
(e) it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

[177] Court Suppression and Non-publication Orders Act, 2010(NSW), s 9(1) (a).
[178] Court Suppression and Non-publication Orders Act, 2010(NSW), s 9(2) (d).
[179] Court Suppression and Non-publication Orders Act, 2010(NSW), s 13.
[180] Court Suppression and Non-publication Orders Act, 2010(NSW), s 14.
[181] Court Suppression and Non-publication Orders Act, 2010(NSW), s 10.
[182] Court Suppression and Non-publication Orders Act, 2010(NSW), s 15:
(1) A suppression order does not prevent a person from disclosing information if the disclosure is not by publication and is in the course of performing functions or duties or exercising powers in a public official capacity:
(a) in connection with the conduct of proceedings or the recovery or enforcement of any penalty imposed in proceedings, or
(b) in compliance with any procedure adopted by a court for informing a news media organisation of the existence and content of a suppression order or non-publication order made by the court.
(2) A suppression order does not prevent the disclosure of information to the Bureau of Crime Statistics and Research if the disclosure is not by publication and the disclosure is made for the purposes of the compilation of statistical data about crime and criminal justice.

[183] Tasmania Law Reform Institute, Protecting the Anonymity of Victims of Sexual Crimes, Final Report no: 19, 9 (2013), <http://www.utas.edu.au/__data/assets/pdf_file/0005/461768/S194k_Final_05_A4.pdf>
[184] Children (Criminal Proceedings Act) 1987 (NSW), s 15A(4).
(4) This section applies to the publication or broadcast of the name of a person:
(a) whether the publication or broadcast occurs before or after the proceedings concerned are disposed of, and
(b) even if the person is no longer a child, or is deceased, at the time of the publication or broadcast.

[185] *Australian Broadcasting Corporation v Local Court (NSW)* 239 A Crim R 232.

94. In other than criminal proceedings, section 105 (1A) of the Children and Young Persons (Care and Protection) Act 1998 (NSW) provides that the prohibition on publication or broadcast of names and identifying information of a child or young person concerned is until: (a) the child or young person attains the age of 25 years, or (b) the child or young person dies, whichever occurs first.[186]

II. IN NEW SOUTH WALES, ARE THE ANONYMITY PROTECTIONS AFFORDED TO CHILDREN COUPLED WITH ANY REQUIREMENT OR DISCRETION TO HOLD PROCEEDINGS BEHIND CLOSED DOORS (*IN CAMERA*)? IN OTHER WORDS, ARE ANONYMITY PROTECTIONS IN ADDITION TO EXISTING *IN CAMERA* RULES OR ARE THESE PROTECTIONS SEEN AS AN ALTERNATIVE TO *IN CAMERA* RULES?

95. The anonymity protections of section 15A of the CCPA 1987 are generally afforded in addition to existing *in camera* rules. According to section 10 of the Children (Criminal Proceeding) Act 1987, the general public is excluded from criminal proceedings where a child is a party, unless the court otherwise directs.[187] However, any person who is engaged in preparing a report on the proceedings for dissemination through a public news medium is, unless the court directs otherwise, entitled to enter or remain in the proceedings.[188] The same-exclusion of the general public[189] but a right of 'any person who is engaged in preparing a report of the proceedings for dissemination through a public news medium […] to enter and remain in the place where the proceedings are being heard'[190]- is provided for in the Children and Young Persons (Care and Protection) Act 1998 (NSW) for proceedings before the Children's Court. However the default exception for the media to remain is subject to the complainant's testimony in sexual assault trials, explained below

[186] According to Section 105(6), this section does not apply in relation to criminal proceedings.
[187] Children (Criminal Proceeding) Act, 1987(NSW), s. 10(1)(a) states: "any person (other than a person referred to in paragraph (b) or (c)) who is not directly interested in the proceedings is to be, unless the court otherwise directs, excluded from the place where the proceedings are being heard".
[188] Children (Criminal Proceeding) Act, 1987(NSW), s 10(1)(b).
[189] Children and Young Persons (Care and Protection) Act 1998(NSW), s 104B.
[190] Children and Young Persons (Care and Protection) Act 1998(NSW), s 104C.

96. *In camera* rules are also stipulated in section 291 of the Criminal Procedure Act 1986 (NSW) for certain sexual offences: proceedings must be held *in camera* when the complainant gives evidence, whether in person or through an audio-visual medium.[191] The court is also vested with the discretion to declare that parts of the proceedings in respect of a prescribed sexual offence, other than the complainant's testimony, may be held in camera.[192] Such discretion can be exercised by the court on its own motion, or at the request of any party to the proceeding[193], on the basis of (a) the need of the complainant to have any person excluded from those proceedings, (b) the need of the complainant to have any person present in those proceedings, (c) the interests of justice, (d) any other matter that the court thinks relevant.[194] Further, incest offence proceedings are to be held in camera.[195] A media representative may enter the courtroom only if the complainant gives evidence for a prescribed sexual offence 'from a place other than the courtroom by means of closed-circuit television facilities or other technology that enables communication between that place and the courtroom'.[196] Where the proceedings or part of proceedings for a prescribed sexual offence are held in camera, the court may make reasonably practicable arrangements to allow media representatives to view or hear a record of the evidence, as long as they are not present in the courtroom or the other place where evidence is being given during in camera proceedings.[197] This ensures that the trial remains open to public scrutiny through the lens of the media.

97. Finally, the Criminal Procedure Act 1986(NSW) provides courts the power to issue ancillary orders, where the court may order that all or part of the evidence be heard, or document produced in camera.[198]

98. Thus, the statutory framework shows that the he anonymity provisions discussed above are in addition to these rules concerning in camera proceedings, and not alternatives to it.

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[191] Criminal Procedure Act, 1986 (NSW), s 291.
[192] Criminal Procedure Act, 1986 (NSW), s 291(A) (1).
[193] Criminal Procedure Act, 1986 (NSW), s 291(A) (2).
[194] Criminal Procedure Act, 1986 (NSW), s 291(A) (3).
[195] Criminal Procedure Act, 1986 (NSW), s 291(B).
[196] Criminal Procedure Act 1986 (NSW), s 291 C (1).
[197] Criminal Procedure Act 1986 (NSW), s 291C(2); Procedural details about how such media access would be conducted have been provided in District Court Criminal Practice Note 4, "Media access to sexual assault proceedings heard *in camera*", at [10-500], <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/practice_note_04.html#d5e29862> accessed 5 February 2019.
[198] Criminal Procedure Act, 1986 (NSW), s 302(1) (a).

III. IN NEW SOUTH WALES, PRECISELY WHEN DO ANONYMITY PROTECTIONS FOR CHILD VICTIMS / COMPLAINANTS IN CRIMINAL PROCEEDINGS BEGIN TO OPERATE? (I.E. FROM THE MOMENT THE CRIME IS COMMITTED, FROM THE TIME THAT THE CRIME IS REPORTED, FROM THE BEGINNING OF THE CRIMINAL TRIAL, OR SOME OTHER TIME?)

99. The prohibition on naming children in section 15A of the Children (Criminal Proceeding) Act 1987 relates to criminal proceedings and therefore comes into effect only at the commencement of criminal proceedings, which is defined as 'the point at which charges are laid or a court attendance notice is issued'[199]. It does not therefore cover the initial police investigation.

100. The Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, recommended 'that the NSW Government amend section 11 [now section 15A] of the [CCPA] to extend the prohibition on the naming of juveniles involved in criminal proceedings to cover the period prior to charges being laid and to include juveniles who are reasonably likely to become involved in criminal proceeding'.[200] However, the NSW Government did not support the recommendation as 'such an extended prohibition does not presently exist in any other Australian jurisdiction' and it 'is committed to seeking a nationally consistent prohibition', which is why it 'is not feasible to extend the prohibition beyond that which exists in any other state or territory and at the same time seek national uniformity'.[201]

101. Although it has been stated that 'the media did not exploit the lack of a prohibition prior to charges being laid and were in general "pretty responsible about that"'[202], this remains a protection gap for children who may become involved in criminal proceedings.

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[199] New South Wales Government, 'Response to the Inquiry into the Prohibition of Names of Children Involved in Criminal Proceedings' (2008) Report 35, 3 <https://www.parliament.nsw.gov.au/la/papers/DBAssets/tabledpaper/webAttachments/34905/081030%20Government%20response.pdf> accessed 5 February 2019.

[200] New South Wales and others, *The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings* (Standing Committee on Law and Justice, Legislative Council 2008) 79.

[201] New South Wales Government, 'Response to the Inquiry into the Prohibition of Names of Children Involved in Criminal Proceedings' (2008) Report 35, 3.

[202] New South Wales and others, The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings (Standing Committee on Law and Justice, Legislative Council 2008) 74, citing Mr. Andrew Haesler SC, Deputy Senior Public Defender with the NSW Public Defenders Office of New South Wales.

NEW ZEALAND

I. HAVE THERE BEEN ANY SIGNIFICANT DEVELOPMENTS IN THE LAW IN THE UK, CANADA, AUSTRALIA AND NEW ZEALAND SINCE THE 2016 REPORT IN RESPECT OF:

(a) Anonymity protections afforded to children who are victims / complainants in criminal proceedings.

102. In New Zealand, Courts ensure anonymity for child defendants/offenders, victims/complainants and witnesses in criminal proceedings either by exercise of their inherent powers or in pursuance of statutory authority. There are two statutory regimes for anonymity protection: the Children's and Young People's Well-Being Act 1989 (for Youth Courts)[203] and the Criminal Procedure Act 2011 (for general criminal courts). While the Children's and Young People's Well-Being Act 1989 is a substantive and procedural code in itself, the Criminal Procedure Act 2011 is required to be read in conjunction with the rules[204] under the Evidence Act 2006[205]. The latter is also often used to supplement the procedures in Youth Courts[206], particularly for aspects where its code is silent.

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[203] Children's and Young People's Well-Being Act 1989, s 2(1).

- child means a person under the age of 14 years
- young person,—

(a) In Parts 2 to 3A, means a person of or over the age of 14 years but under the age of 18 years:
(b) In Parts 4 and 5, means a person of or over the age of 14 years but under the age of 17 years:
(c) In every other provision in this Act, means a person to whom the provision applies because he or she is or was a young person within the meaning of either paragraph (a) or (b):
(d)In any provision in any other enactment that defines the term young person by reference to this section or the meaning in this Act,—
(i) Has the meaning given in paragraph (b) if the provision relates to—
(A) A criminal investigation, the commission of an offence, or criminal proceedings; or
(B) Any process associated with a criminal investigation, the commission of an offence, or criminal proceedings; or
(C) Parts 4 and 5 of this Act; or (ii) in any other case, has the meaning given in paragraph (a)

[204] Evidence Act 2006, s 5(3) read with definition of proceedings under Evidence Act 2006, s 4(1).

[205] Evidence Act 2006, s 4(1)(b)

- child means a person under the age of 18 years
- child complainant, in relation to any proceeding, means a complainant who is a child when the proceeding commences
- child witness, in relation to any proceeding, means a witness who is a child when the proceeding commences, and includes a child complainant but does not include a defendant who is a child

[206] Evidence Act 2006, s 5(1) , 5(3) read with definition of court under Section 4(1) of the Evidence Act 2006)

103. The Oranga Tamariki Legislation Bill was introduced by Tracey Martin in March 2019. The Bill seeks to, *inter alia,* amend the Children's and Young People's Well-Being Act 1989, the Criminal Procedure Act 2011 and the Victims' Rights Act 2002, to ensure that the benefits of the policy to include 17-year-olds in the youth justice jurisdiction are fully realised. Notably, Clause 2 states that the Bill will come into effect on 1 July 2019, along with the new definition of young persons under Section 7 of the 2017 Act. Pursuant to this, the definition of young person has been expanded to include all persons of or over the age of 14 years but under 18 years.[207] The Bill also proposes to amend the Criminal Procedure Act 2011[208] and the Victims' Rights Act 2002[209] to align all their provisions concerning young persons with the new definition of young persons as under the 2017 Act.

104. In addition to the statutory power to prevent publication, New Zealand courts also have an inherent power to suppress publication. Section 11 of the Evidence Act 2006 specifies that its provisions do not limit or affect the inherent powers of criminal courts, unless the Act provides otherwise.[210] In *Siemer v Solicitor General*, the NZ Supreme Court observed that even the New Zealand Bill of Rights Act 1990 does not exclude the courts' inherent power to make "suppression orders", forbidding the publication of a person's name, address or occupation.[211] Further, it was held that a suppression order (including an interim ban, pending trial, on the publication of material which gives rise to a real risk of prejudice to a fair trial) can be issued if the Court gives serious consideration to the right to fair trial and the freedom of expression[212] and so long as it can be demonstrably justified in a free and democratic society.[213]

i. Youth Courts

105. While proceedings in the Youth Court are not open to the public, accredited media reporters nonetheless are entitled to be present at such hearings[214] to preserve the principle of open justice. This is subject to a statutory prohibition against publication in Section 438 of the Children's and Young People's Well-Being Act 1989, which provides that proceedings under

[207] Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, s. 7(4).
[208] Oranga Tamariki Legislation Bill 2019, subpart 5.
[209] Oranga Tamariki Legislation Bill 2019, subpart 10.
[210] Evidence Act 2006, s 11.
[211] *Siemer v Solicitor-General* [2013] NZSC 68.
[212] New Zealand Bill of Rights Act 1990, s 14.
[213] New Zealand Bill of Rights Act 1990, s 5.
[214] Children's and Young People's Well-Being Act 1989, s 329(1) (l).

Part 4 (Youth Justice) can only be published with the leave of the Youth Court that heard the proceedings. However, subsection 3 lists information which cannot be published in any circumstance, as follows:

Section 438: Publication of reports of proceedings under Part 4

(3) In no case shall it be lawful to publish, in any report of proceedings under Part 4,—

(a) The name of any child or young person or the parents or guardians or any person having the care of the child or young person; or

(b) The name of any school that the child or young person is or was attending; or

(c) Any other name or particulars likely to lead to the identification of the child or young person or of any school that the child or young person is or was attending:

(d) The name of any complainant.

106. According to the Media and Reporting Protocol of 2017, a Judge does not need to order suppression of these details (mentioned under 438(3)) as **they are automatically suppressed**.[215] While considering the application and administration of section 438, the well-being and best interests of child or young person is to be considered.[216]

107. However, this protection does not apply when a young person is tried in, or transferred to the District or High court for sentencing.[217] Section 275 of the Children's and Young People's Well-Being Act 1989 specifies the circumstances in which young persons are to be tried in

[215] 'Media and Reporting Protocol in the Youth Court' <https://www.youthcourt.govt.nz/assets/Documents/Publications/2017-Youth-Court-Media-Protocol.pdf> accessed 10 February 2019.

[216] Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, s 4A.

4A - Well-being and best interests of child or young person
(1)In all matters relating to the administration or application of this Act (other than Parts 4 and 5 and sections 351 to 360), the well-being and best interests of the child or young person are the first and paramount consideration, having regard to the principles set out in sections 5 and 13.
(2)In all matters relating to the administration or application of Parts 4 and 5 and sections 351 to 360, the 4 primary considerations, having regard to the principles set out in sections 5 and 208, are—
(a) the well-being and best interests of the child or young person; and
(b) the public interest (which includes public safety); and
(c) the interests of any victim; and
(d) the accountability of the child or young person for their behaviour.

[217] Natalie Jordan, 'Name Suppression, the Media and Juvenile Offenders' (2007) 1 NZLSJ 251, which cites *Police v Young Person* (1991) 8 FRNZ 609.

or transferred to the 'general' courts, after the applicable pre-trial processes have taken place in the Youth Court. [218]

108. Once transferred to the general courts, suppression of the name is at the discretion of the judge. For instance, Chambers J in *R v Fenton* held that the protection accorded by section 438 which restricts publication of a young person's name, applies only to reports under that Act.[219] Further, Justice Fisher, in *R v Raviri* stated that section 438 ceased to apply once the accused were committed to the High Court for trial.[220] This indicates that courts have interpreted section 438 as ceasing to apply after the young person has been transferred to the general courts for trial or sentencing, as separate statutory protection then applies.

ii. General Criminal Courts

109. Under Section 204 of the Criminal Procedure Act 2011, no person is allowed to publish the name, address or occupation of a **child complainant or witness** to the proceedings who is under the age of 18.[221] The Act separately provides for the automatic suppression of the name and details of complainants under the age of 18 in sexual cases.[222]

110. It is important to note that the Criminal Procedure Act does not treat 'complainant' and 'victim' as synonymous.[223] Therefore, unless a child victim who is not a witness is treated as subsumed within 'complainant' in Section 204, it is for the Court to exercise discretion and to issue a suppression order for that child provided it thinks that one of the grounds under Section 202(2) is met.[224] This is unlike the Evidence Act 2006 which defines a child witness

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[218] Children's and Young People's Well-Being Act 1989, s 275
S. 275: "Manner of dealing with offence of murder or manslaughter, or where jury trial to be held (1) This section applies if a young person— (a) is charged with murder or manslaughter; or (b) is charged with a category 3 or 4 offence, other than murder or manslaughter, and elects to be tried by a jury; or (c) is to have a jury trial and be tried with a person with whom the young person is jointly charged, in accordance with section 277."

[219] *R v Fenton*, 1/2/00 HC, Auckland T992412.
[220] R v *Whatarangi Raviri, Casie Raviri, PK, AP, RR, DH, JK and BK* (3 July 2002), HC, Auckland T014047
[221] Criminal Procedure Act 2011, s 204.
[222] Criminal Procedure Act 2011, s 203(3).
(3)No person may publish the name, address, or occupation of the complainant, unless—(a)the complainant is aged 18 years or older; and (b) the court, by order, permits such publication.

[223] Criminal Procedure Act 2011, s 202, 203.
[224] Criminal Procedure Act 2011, s 202:
Court may suppress identity of witnesses, victims and connected persons:
(1) A court that is hearing a proceeding in respect of an offence may make an order forbidding publication of the name, address, or occupation of any person who—
(a) is called as a witness; or
(b) is a victim of the offence; or

to include a complainant who is a child when the proceeding commences.[225] In contrast to the Children's and Young People's Well-Being Act 1989, the suppression provisions in the Criminal Procedure Act acknowledge the authority of the Court to permit publication.[226]

111. Since the Act expressly recognises the standing of members of the media in respect of challenges to suppression orders, it is understood to also apply to members of the media.[227] The applicability of suppression orders to non-parties such as the media was raised and expressly upheld by the Supreme Court in the case of *Siemer v Solicitor General*.[228] Furthermore, the Criminal Procedure Act vests in the Court the power to prohibit publication of the whole or any part of the evidence adduced or the submissions made in any proceeding in respect of an offence, if such publication will, inter alia, prejudice the fairness of the trial or cause undue hardship to the victim.[229]

(c) is connected with the proceedings, or is connected with the person who is accused of, or convicted of, or acquitted of the offence.
(2) The court may make an order under subsection (1) only if the court is satisfied that publication would be likely to—
(a) cause undue hardship to the witness, victim, or connected person; or
(b) create a real risk of prejudice to a fair trial; or
(c) endanger the safety of any person; or
(d) lead to the identification of another person whose name is suppressed by order or by law; or
(e) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
(f) prejudice the security or defence of New Zealand.
(3) Subsection (1) applies whether or not the court has made an order under section 200 suppressing the identity of the defendant.

[225] Evidence Act 2006, s 4(1)
child witness, in relation to any proceeding, means a witness who is a child when the proceeding commences, and includes a child complainant but does not include a defendant who is a child.

[226] Criminal Procedure Act 2011, s 204(1).
[227] Criminal Procedure Act 2011, s 210.
S. 210. Standing of members of media (1)This section applies to— (a) a person who is reporting on the proceedings and who is either subject to or employed by an organisation that is subject to—
(i)a code of ethics; and
(ii)the complaints procedures of the Broadcasting Standards Authority or the Press Council; and
(b)any other person reporting on the proceedings with the permission of the court.
(2)A person to whom this section applies has standing to initiate, and be heard in relation to, any application for a suppression order, and any application to renew, vary, or revoke a suppression order.

[228] *Siemer v Solicitor-General* [2013] NZSC 68.
[229] Criminal Procedure Act 2011, s 205.
S. 205. Court may suppress evidence and submissions (1)A court may make an order forbidding publication of any report or account of the whole or any part of the evidence adduced or the submissions made in any proceeding in respect of an offence.
(2)The court may make an order under subsection (1) only if the court is satisfied that publication would be likely to—

112. Under section 200 of the Criminal Procedure Act of 2011, a court may make an order forbidding the publication of the name, address, or occupation of a **person who is charged with, or convicted or acquitted of, an offence**.[230] Whether a 'defendant' is entitled to name suppression, either temporarily or permanently, is to be determined by a court according to the criteria set out in sub-section 200(2). This includes publication that may cause extreme hardship to the person charged with, or convicted of, or acquitted of the offence, or any person connected with that person, or cast suspicion on another person that may cause undue hardship to that person, or cause undue hardship to any victim of the offence, or create a real risk of prejudice to a fair trial, or endanger the safety of any person, or lead to the identification of another person whose name is suppressed by order or by law, or prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, or prejudice the security or defense of New Zealand.[231]

113. In addition, the 2011 Act also provides for the automatic suppression of the defendant's identity in specified sexual cases. If a person is accused or convicted of an offence under section 130 (incest)[232] or 131 (intrafamilial abuse)[233] of the Crimes Act 1961, no one can publish his/her name, address, or occupation, unless the same is permitted by the court, by means of an order. The purpose of this provision is to protect the complainant.

(a) cause undue hardship to any victim of the offence; or
(b) create a real risk of prejudice to a fair trial; or
(c) endanger the safety of any person; or
(d) lead to the identification of a person whose name is suppressed by order or by law; or (e) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
(f) prejudice the security or defence of New Zealand.

[230] Criminal Procedure Act 2011, s. 200.
[231] Criminal Procedure Act 2011, s. 200 (2).
[232] Incest – "Sexual connection is incest if— (a) it is between 2 people whose relationship is that of parent and child, siblings, half-siblings, or grandparent and grandchild; and (b) the person charged knows of the relationship. (2) Every one of or over the age of 16 years who commits incest is liable to imprisonment for a term not exceeding 10 years."

[233] Sexual conduct with dependent family member – "(1) Every one is liable to imprisonment for a term not exceeding 7 years who has sexual connection with a dependent family member under the age of 18 years. (2) Everyone is liable to imprisonment for a term not exceeding 7 years who attempts to have sexual connection with a dependent family member under the age of 18 years. (3) Everyone is liable to imprisonment for a term not exceeding 3 years who does an indecent act on a dependent family member under the age of 18 years. (4) The dependent family member cannot be charged as a party to the offence. (5) It is not a defence to a charge under this section that the dependent family member consented."

114. When a person who is charged with an offence first appears before the court, the court may make an interim order under section 200 (1) of the Criminal Procedure Act, 2011, if that person advances an arguable case that one of the grounds in subsection (2) applies.[234] Such an order expires at the person's next court appearance, and may only be renewed if the court is satisfied that one of the grounds in subsection (2) applies.[235]

(b) Anonymity protections afforded to child victims, witnesses or offenders after they turn 18.

i. Youth Courts

115. For proceedings before the Youth Court, the ban on the publication of proceedings could continue, in certain cases, even after those involved reach the age of majority. For instance, in the Napier Youth Court in *R v MC*,[236] the child offender was granted a permanent name suppression on grounds of his personal history and the proximate relationship shared with the victim. From 2016 onwards, the Youth Court has also begun publishing anonymised summaries of its decisions to give effect to the automatic suppression whilst preserving public scrutiny of the youth justice system.[237]

ii. General Courts

116. Section 208(2) of the Criminal Procedure Act states that if the term of suppression order is not specified, it has permanent effect.[238] The suppression order can also be lifted upon a request by the complainant/witness after he or she turns 18, subject to the Court's satisfaction regarding the complainant/witness's understanding of the implications of such lifting.[239] Ordinarily, revocation of the suppression order requires proof of an exceptional circumstance

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[234] Criminal Procedure Act 2011, s 200 (4).
[235] Criminal Procedure Act 2011, s 200 (5).
[236] *R v MC* [2015] NZYC 48.
[237] Online Summaries of Youth Court Judgments, https://www.youthcourt.govt.nz/decisions, accessed on 10 February 2019
[238] Criminal Procedure Act 2011, s 208
S. 208: Duration of suppression order and right of review- (1)A suppression order— (a) may be made permanently, or for a limited period ending on a date specified in the order; and (b) if it is made for a limited period, may be renewed for a further period or periods by the court; and (c) if it is made permanently, may be revoked by the court at any time.
(2) If the term of a suppression order is not specified, it has permanent effect.
(3)A suppression order may be reviewed and varied by the court at any time.

[239] Criminal Procedure Act 2011, s 204(4).

or a triggering change of circumstances. This was discussed in the recent case of *NZME Publishing Ltd v R*,[240]where the Court of Appeal noted that:

> Good reason must be shown for the revocation of a permanent name suppression order. The passage of time in itself will not be good reason. Nor will the type of changed circumstance which is an ordinary concomitant of the passing of time. A court necessarily has those matters in contemplation when granting permanent name suppression. It also follows we think, that something out of the ordinary, in other words exceptional, will need to be shown to justify revocation of the order.

117. Interestingly, in certain cases Courts have declined to revoke suppression orders even for repeat offenders whose names had remained suppressed as a consequence of the statutory suppression of the name(s) of their victim(s).[241] In *Forsyth v District Court at Lower Hutt*,[242] the High Court of New Zealand (Christchurch Registry) enumerated some principles to aid in the interpretation of public/private interest that outweighs the need for suppression:

- whether the person whose name is suppressed is acquitted or convicted;
- the seriousness of the offending;
- adverse impact upon the prospects for rehabilitation of a person convicted;
- the public interest in knowing the character of the person seeking name suppression, an interest which has been acknowledged in cases involving sexual offending, dishonesty, and drug use; and
- circumstances personal to the person appearing before the Court, his family, or those who work with him and impact upon financial and professional interests.

118. Section 208 of the 2011 Act indicates that a suppression order may be made permanently, or for a limited period ending on a date specified in the order. If the term of a suppression order is not specified, it has permanent effect.[243]

II. IN NEW ZEALAND, ARE THE ANONYMITY PROTECTIONS AFFORDED TO CHILDREN COUPLED WITH ANY REQUIREMENT OR DISCRETION TO HOLD PROCEEDINGS BEHIND CLOSED DOORS (*IN CAMERA*)? IN OTHER WORDS, ARE ANONYMITY

[240] *NZME Publishing Limited v R* [2018] NZCA 363.
[241] *Forsyth v District Court at Lower Hutt* [2015] NZHC 2567.
[242] ibid.
[243] Criminal Procedure Act 2011, s 208.

PROTECTIONS IN ADDITION TO EXISTING *IN CAMERA* RULES OR ARE THESE PROTECTIONS SEEN AS AN ALTERNATIVE TO *IN CAMERA* RULES?

i. Youth Courts

119. In 2017, the Children's Well-being Act 1989 was amended to recognise the right of the child or young person to give evidence in private under Section 167.[244] Further, the court, under Sections 166(4)[245] and 168[246] of the Act, retains its other powers to hear proceedings in private or to exclude certain individuals from being present during the hearing.

ii. General Courts

120. Ordinarily under the Evidence Act 2006,[247] evidence is to be presented by a witness orally in a courtroom in the presence of the judge or, if there is a jury, the judge and jury and the parties to the proceedings. The Act, however, allows any witness (particularly child witnesses) to depart from the ordinary manner of giving evidence and instead give evidence in an alternative manner provided certain requirements are met. Under Section 107 of the Evidence Act (pursuant to the changes introduced by the Evidence (Amendment) Act of 2016[248]), child witnesses are now entitled to give evidence through alternate means:

(a) (i) by a video record made before the hearing of the proceeding:

(ii) while in the courtroom but unable to see the defendant or some other specified person:

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[244] Children's and Young People's Well-Being Act 1989, s 167.
[245] Children's and Young People's Well-Being Act 1989, s 166(4).
S. 166(4): "Persons entitled to be present at hearing of proceedings in Family Court: Nothing in this section limits any other power of the court—
(a) to hear proceedings in private; or
(b) to permit a McKenzie friend to be present; or
(c) to exclude any person from the court."

[246]Children's and Young People's Well-Being Act 1989, s 168 states that
S.168 "Other powers of court to hear proceedings in private or exclude persons not affected: Nothing in section 166(2) or section 167 limits any other power of the court to hear proceedings in private or to exclude any person from the court."
[247] Evidence Act 2006, s 83.
[248] Evidence (Amendment) Act 2016.

(iii)from an appropriate place outside the courtroom, either in New Zealand or elsewhere:

(b) by use of any appropriate practical and technical means the Judge, the jury (if any), and any lawyers can see and hear the witness giving evidence, in accordance with any regulations made under section 201:

(c) the defendant can see and hear the witness, unless the Judge directs otherwise.

However, the use of such alternate means (like video-recording) by a child witness does not mean that the public is excluded from the courtroom. Therefore, these are not in-camera proceedings but an alternative way by which child witnesses can give evidence. The Evidence Act has separate provisions for *in camera* proceedings for witnesses who have obtained pre-trial and/or trial anonymity orders.[249]

Under Section 197 of the Criminal Procedure Act 2011[250], the Court is empowered to exclude some people from the whole or any part of any proceeding in respect of an offence when it is of the opinion such a measure is necessary to avoid:

- undue disruption of the proceedings
- risking the security or defence of New Zealand
- a real risk of prejudice to a fair trial
- endangering the safety of any person
- prejudicing the maintenance of the law.

Members of the media can only be prevented from remaining in the courtroom on grounds of national security.[251]

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[249] Evidence Act 2006, s. 116(1) which states: Judge may make orders and give directions to preserve anonymity of witness
(1)A Judge who makes an order under section 110 or 112 may, for the purposes of the giving of oral evidence in accordance with an oral evidence order or the trial (as the case may be), also make any orders and give any directions that the Judge considers necessary to preserve the anonymity of the witness, including (without limitation) 1 or more of the following directions:
(a)that the court be cleared of members of the public:
(b)that the witness be screened from the defendant:
(c)that the witness give evidence by closed-circuit television or by video link.
(2)In considering whether to give directions concerning the mode in which the witness is to give his or her evidence in accordance with an oral evidence order or at the trial, the Judge must have regard to the need to protect the witness while at the same time ensuring a fair hearing for the defendant.
(3)This section does not limit—
(a)section 365 of the Criminal Procedure Act 2011 (which confers power to deal with contempt of court); or
(b)section 197 of the Criminal Procedure Act 2011 (which confers power to clear the court); or
(c)any power of the court to direct that evidence be given, or to permit evidence to be given, by a particular mode.
[250] Criminal Procedure Act 2011, s 197.
[251] Criminal Procedure Act 2011, s 198(1).

Thus, as the statutory framework indicates, with respect to both youth courts and general courts, the provisions for in- camera or private proceedings exist in consonance with those governing anonymity provisions, indicating that the latter are in addition to, and not alternatives to in-camera rules.

III. IN NEW ZEALAND, PRECISELY WHEN DO ANONYMITY PROTECTIONS FOR CHILD VICTIMS / COMPLAINANTS IN CRIMINAL PROCEEDINGS BEGIN TO OPERATE? (I.E. FROM THE MOMENT THE CRIME IS COMMITTED, FROM THE TIME THAT THE CRIME IS REPORTED, FROM THE BEGINNING OF THE CRIMINAL TRIAL, OR SOME OTHER TIME?)

(a) From the time that the charges are framed

121. Since the Children's and Young People's Well-Being Act 1989 makes no mention of anonymity protections before the trial begins, the provisions of the Evidence Act 2006 can be relied upon to fill the gap. In particular, Section 110 of the Evidence Act empowers the prosecution or the defendant to apply to the judge for pre-trial witness anonymity order at any time after the charges are framed. The Judge may make the order if he or she believes that the safety of the witness or if any person is likely to be endangered or there is likely to be serious damage to the property, if the witness's identity is disclosed before the trial or that withholding the witness's identity until the trial would not be contrary to the interests of justice.[252] This order has the effect of excusing the applicant from either disclosing to the other party, or disclosing during oral evidence, any details that may lead to a witness's identification. The grant of a pre-trial anonymity order also has the effect of prohibiting the publication of any details that may result in the witness's identification.[253] However, the Judge is not bound to grant the request and can only do so on the basis of an examination of, *inter alia*, the defendant's right to fair trial and the witness's safety.[254] Section 110 confers this power upon District/High Court judges and Youth Court judges.[255]

(c) During the trial

[252] Evidence Act 2006, s 110(4).
[253] Evidence Act 2006, s 111(d).
[254] Evidence Act 2006, s 110(5).
[255] Evidence Act 2006, s 110(6).

122. As discussed above, once trial commences, child complainants, witnesses and defendants are entitled to suppression of identity under the Children's and Young People's Well-Being Act 1989 and the Criminal Procedure Act 2011. Therefore, unlike the pre-trial provisions, there is no requirement to make an application to the court, seeking such protection.