

CRIMINAL EVIDENCE (WITNESS ANONYMITY) ACT 2008

EXPLANATORY NOTES

THE ACT

Commentary on Sections

Section 3: Applications

28. *Subsection (1)* provides that applications for a witness anonymity order may be made by defendants as well as prosecutors. This reflects the position of the case of *Davis*, where the Court of Appeal allowed a defence witness as well as prosecution witnesses to give evidence anonymously. It is anticipated that defence applications will normally be made in multi-handed cases (that is, where there is more than one defendant) where one defendant does not wish a witness's identity to be known by the other defendant or defendants. But this subsection does not exclude the possibility of a defence application in a single-handed case.
29. *Subsection (2)* makes clear that the identity of witnesses can be withheld from the defence before and during the making of an application for a witness anonymity order. This ensures that the operation of the legislation is not impeded by procedural challenges to the power of the prosecution to withhold this information pending the court's determination of the application for the witness anonymity order.
30. *Subsection (2)* therefore provides that prosecutors are under no obligation to disclose the witness's identity at the application stage. (The same is also made clear for the defence in *subsection (3)*, except that the defence must always disclose the real identity of the witness to the prosecutor).
31. In addition, *subsection (4)* provides that where the prosecution or the defendant proposes to make a witness anonymity application, there is no duty to disclose the witness's real identity (or related identifying information) at any time before an application has been made (other than to the court or to the court and prosecutor in the context of a defence application).
32. *Subsection (2)* also requires the identity of a witness to be disclosed to the court unless the court directs otherwise. This provides for the possibility that, whilst in the vast majority of cases the court will require to be informed of the witness's identity, there may be rare cases (particularly national security related cases) where even the court will neither need nor wish to know it.
33. *Subsections (6) and (7)* set out two basic principles. *Subsection (6)* makes clear that every party to the proceedings has the opportunity to be heard. However, it may be necessary in the course of making the application to reveal some or all of the very information to which the application relates: for example, the name and address of the witness who is fearful of being identified. So *subsection (7)* provides that the court has the power to hear any party without a defendant or his or her legal representatives being present. This reflects the existing practice, in which prosecution applications

*These notes refer to the Criminal Evidence (Witness Anonymity)
Act 2008 (c.15) which received Royal Assent on 21 July 2008*

were expected to be made ex parte (in the absence of any other parties in the case), with the defence able to make representations later at an inter partes hearing (with the prosecution present and possibly other defendants). It is expected that defence applications will be permitted ex parte other defendants but will always be made in the presence of the prosecution.

34. *Subsection (8)* confirms that section 3 does not affect the power of the Criminal Procedure Rule Committee to set out further procedures relating to witness anonymity in the Criminal Procedure Rules.