

CRIMINAL EVIDENCE (WITNESS ANONYMITY) ACT 2008

EXPLANATORY NOTES

THE ACT

Commentary on Sections

Section 1: New rules relating to anonymity of witnesses

22. *Subsection (1)* introduces the concept of a witness anonymity order, which is defined in section 2(1). It makes it clear that such orders, as provided for by the Act, apply only in criminal proceedings.
23. *Subsection (2)* provides that the common law rules on witness anonymity are abolished. The common law rules thus abolished, and replaced by the Act, are those which allow the court to make an order to secure that the identity of a witness is withheld from the defendant or, in the case of defence applications, another defendant. Any common law rules which provide for other kinds of anonymity, for example any that might apply to the court's power to hold proceedings in camera, are not affected by the Act.
24. *Subsection (3)* provides that the Act does not affect the common law rules on public interest immunity (PII). PII applications will often be made by the prosecution in cases involving witness anonymity.

Section 2: Witness anonymity orders

25. *Subsection (1)* sets out the effect of a witness anonymity order. Breach of the order by the unauthorised disclosure of a witness's identity will fall to be dealt with as contempt of court (but see section 8(4) and (5) in respect of service courts). Subsection (1) defines the order in such a way as to grant the court a wide discretion as to how the court protects the anonymity of a witness in any particular case. For example, in some cases the court might consider that it is only necessary to screen the witness from the defendant and public; in others it might think it necessary to apply a whole range of measures.
26. *Subsection (2)* lists the kinds of measures the court may use to secure the witness's anonymity. The list is only illustrative; the court may employ other measures if it thinks fit. Technological developments and the practical arrangements in the courthouse may affect such decisions.
27. *Subsection (4)* makes it clear that the court may not make a witness anonymity order which prevents the judge, magistrates or jury either from seeing the witness or from hearing the witness's natural voice. The judge, magistrates and jury should always be able to see and hear the witness.

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 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.

Section 4: Conditions for making order

35. *Subsection (2)* introduces the conditions for making a witness anonymity order. There are three conditions, described as A, B and C, and they must all be satisfied. If they are not there can be no order.
36. *Subsection (3)* sets out the first condition for making a witness anonymity order, condition A. The measures to be specified in the order must be "necessary". That necessity may arise in one of two ways – see paragraphs (a) and (b). The first is the protection of the safety of the witness or another person or the prevention of serious damage to property. There is no requirement for any actual threat to the witness or any other person. The second is the prevention of real harm to the public interest. This will include, but will not be restricted to, the public interest in police or security service

under-cover officers being able to carry out future operations, whether or not they are fearful in any particular case.

37. Condition B, the requirement that the defendant receives a fair trial, is set out in *subsection (4)*. Thus the grant of the order must be compliant with Article 6 of the European Convention on Human Rights (ECHR). Condition C, set out in *subsection (5)*, is that the order is in the interests of justice, by reason of the fact that it is important that the witness should testify, and the witness would not testify if the order were not made.
38. *Subsection (6)* specifies that in determining whether the order is necessary to protect the safety of the witness, the court must have regard to the witness's reasonable fear of death or injury either to him or herself or to another person ("we'll get your kids") or fear that there would be serious damage to property ("we'll fire-bomb your house").

Section 5: Relevant considerations

39. *Subsection (1)* requires the court to have regard to the list of considerations in *subsection (2)* when deciding whether to make an order. Under *subsection (1)(b)*, the court must also have regard to any other factors it considers relevant, so it has a broad discretion to take a wide range of factors into account.
40. *Subsection (2)* sets out some considerations to which the court must turn its mind before reaching a decision to make an anonymity order. These cover the defendant's general right to know the identity of a witness, the extent to which credibility is relevant, whether the witness's evidence might be the sole or decisive evidence, whether the witness's evidence can be properly tested, whether the witness has a tendency or any motive to be dishonest. The court is also required to consider whether alternative means could be used to protect the witness's identity.

Section 6: Discharge or variation of order

41. The Act does not provide for a right of appeal against the making of, or refusal to make, a witness anonymity order. The Government considers that existing appeal procedures are sufficient. Thus in the case of the prosecutor, the appeal against a terminating ruling under Part 9 of the Criminal Justice Act 2003 is available. In the case of a defendant, the matter may be raised on appeal against conviction. Section 6 does however provide for an order to be discharged or varied. This will come into play where, for example, a witness who previously gave evidence anonymously is content for the anonymity to be lifted. The court may vary or discharge the order either on an application by a party to the proceedings or on its own initiative.

Section 7: Warning to jury

42. This section requires the judge to warn the jury in Crown Court trials, in whatever way the judge considers appropriate, to ensure that the fact that the order was made does not prejudice the defendant. The provision is based on section 32 of the Youth Justice and Criminal Evidence Act 1999 which makes similar provision for jury warnings where a special measures direction has been made to assist a vulnerable or intimidated witness.

Section 8: Special provisions for service courts

43. This section provides for the application of the witness anonymity provisions in relation to criminal proceedings before the service courts. Matters of law arising in the service courts, with the exception of the Courts-Martial Appeal Court and its successor under the Armed Forces Act 2006, are dealt with by the judge advocate. There are no juries in the service courts but such courts do have lay members. *Subsection (3)* requires the lay members to be warned as to the effect of the making of an order in the same way as juries are.

44. While the breach of an order within the civilian courts will be dealt with under common law powers relating to contempt of court this is not open to the existing service courts (again, with the exception of the Courts-Martial Appeal Court). Accordingly such breaches will be dealt with by a procedure under which the service court refers the matter to an appropriate court which does have powers to punish for contempt of court. *Subsections (4) and (5)* therefore adapt the procedures currently provided for contempt in the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957.

Section 9: Proceedings to which new rules apply

45. *Sections 9 to 11* deal with the circumstances in which the Act applies. This is an important feature of the Act because, in the absence of such provision, it might be necessary to abandon trials, or quash convictions, because of the House of Lords finding that the common law power to make an order preserving a witness's anonymity was more limited than many had previously thought. The aim underlying these sections is to prevent trials from being abandoned, or convictions quashed on appeal, solely on the ground that the trial court had no power at common law to make the anonymity order. The court is required to consider whether the anonymity order made could have been made under the new law.

Section 10: Pre-commencement anonymity orders: existing proceedings

46. As indicated in *subsection (1)*, section 10 deals with trials that are in progress at the time the Act comes into force. The section deals differently with the situations (1) where the witness has not yet started giving evidence, and (2) where evidence has been given in accordance with the order (whether or not the witness has finished giving their evidence).
47. In the former case, *subsection (3)* provides that the court may direct that the order remain in force, if the court is satisfied that the order is one that could have been made under the new law. If the old order could not have been made under the new law, the judge is required to discharge the order and consider whether to make one under the new law. It is not intended that the witness's identity should be disclosed to the defendant (or, in the case of an order obtained by a defendant, other defendants) while this process of consideration is going on.
48. Where evidence has already been given in accordance with the order, *subsection (6)* requires the judge to consider whether the trial has been made unfair as a result, taking into account whether a witness anonymity order could have been made under the new law and whether any potential unfairness could be corrected by giving an appropriate direction to the jury. The judge will then decide whether the trial or hearing is to continue in the usual way. If he or she considers that the defendant has been prevented from receiving a fair trial, *subsection (7)* requires the judge to consider how to bring the proceedings to a conclusion. It is open to the judge to consider ordering a re-trial.

Section 11: Pre-commencement anonymity orders: appeals

49. *Section 11* covers appeals where the conviction took place before the Act comes into force. These may be live appeals, that is to say, where the appellant has just been convicted before commencement and is appealing within the usual period allowed for appealing. Alternatively, it may be an out of time appeal, where leave to appeal has been granted exceptionally at the discretion of the appeal court. And it may be where the appeal court is considering a reference from the Criminal Cases Review Commission.
50. The purpose of section 11 is to prevent an appeal court from quashing a conviction solely on the grounds that a witness anonymity order was made under the common law (and so the court, as a result of the finding in *Davis*, had no power at the time to make the order in those circumstances). Instead, the court is required to consider whether the order could have been made under the new law. The appeal court is required to quash the conviction if it considers that the defendant did not receive a fair trial.

Section 12: Interpretation

51. Section 12 defines terms which are used in this Act.

Section 13: Commencement

52. This section provides for the Act to come into effect on Royal Assent.

Section 14: Expiry of power to make witness anonymity orders

53. The Justice Secretary gave an undertaking in his oral statement to the House of Commons on 26 June 2008 (Hansard: Vol. 478, Column 516), that the provisions of the Act would be subsumed within next session's Law Reform, Victims and Witnesses Bill, allowing for further and fuller debate on the Act's provisions. Section 14 provides that the power to make witness anonymity orders will cease to have effect on 31 December 2009, unless extended by order.
54. *Subsection (3)* contains an order-making power that would allow the Secretary of State to extend the life of the power to make witness anonymity orders by no more than a year at a time; this is a precaution in case for any reason the Law Reform, Victims and Witnesses Bill had not come into force by the expiry date. Any such order would be subject to the affirmative resolution procedure (see *subsection (5)*).
55. *Subsection (4)* ensures that where a witness anonymity order has been made before the relevant date, it will continue to have effect after that date.

Section 15: Short title and extent

56. This section sets out the short title of the Act. It also sets out the extent of provisions in the Act. This is detailed in paragraph 21 above.