

Criminal Evidence (Witness Anonymity) Bill

EXPLANATORY NOTES

Explanatory notes to the Bill, prepared by the Ministry of Justice, are published separately as HL Bill 76 – EN.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Lord Hunt of Kings Heath has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Criminal Evidence (Witness Anonymity) Bill are compatible with the Convention rights.

Criminal Evidence (Witness Anonymity) Bill

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TO

Make provision for the making of orders for securing the anonymity of witnesses in criminal proceedings.

BE IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Introduction

1 New rules relating to anonymity of witnesses

- (1) This Act provides for the making of witness anonymity orders in relation to witnesses in criminal proceedings.
- (2) The common law rules relating to the power of a court to make an order for securing that the identity of a witness in criminal proceedings is withheld from the defendant (or, on a defence application, from other defendants) are abolished. 5
- (3) Nothing in this Act affects the common law rules as to the withholding of information on the grounds of public interest immunity. 10

Witness anonymity orders

2 Witness anonymity orders

- (1) In this Act a “witness anonymity order” is an order made by a court that requires 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. 15
- (2) The kinds of measures that may be required to be taken in relation to a witness include measures for securing one or more of the following—
 - (a) that the witness’s name and other identifying details may be—
 - (i) withheld; 20

- (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; 5
- (d) that the witness is screened to any specified extent;
- (e) that the witness’s voice is subjected to modulation to any specified extent.
- (3) Subsection (2) does not affect the generality of subsection (1).
- (4) Nothing in this section authorises the court to require – 10
- (a) the witness to be screened to such an extent that the witness cannot be seen by –
- (i) the judge or other members of the court (if any);
- (ii) the jury (if there is one); or
- (iii) any interpreter or other person appointed by the court to assist the witness; 15
- (b) the witness’s voice to be modulated to such an extent that the witness’s natural voice cannot be heard by any persons within paragraph (a)(i) to (iii).
- (5) In this section “specified” means specified in the witness anonymity order concerned. 20
- 3 Applications**
- (1) An application for a witness anonymity order to be made in relation to a witness in criminal proceedings may be made to the court by the prosecutor or the defendant. 25
- (2) Where an application under this section is made by the defendant, the defendant must inform the prosecutor of the identity of the witness.
- (3) The court must give every party to the proceedings the opportunity to be heard on an application under this section.
- (4) But subsection (3) does not prevent the court from hearing one or more parties in the absence of a defendant and his or her legal representatives, if it appears to the court to be appropriate to do so in the circumstances of the case. 30
- 4 Conditions for making order**
- (1) This section applies where an application is made for a witness anonymity order to be made in relation to a witness in criminal proceedings. 35
- (2) The court may make such an order only if it is satisfied that Conditions A to C below are met.
- (3) Condition A is that the measures to be specified in the order are necessary –
- (a) in order to protect the safety of the witness or another person or to prevent any serious damage to property, or 40
- (b) in order to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities, or otherwise).

- (4) Condition B is that, having regard to all the circumstances, the taking of those measures would be consistent with the defendant receiving a fair trial.
- (5) Condition C is that it is necessary to make the order in the interests of justice by reason of the fact that it appears to the court that—
 - (a) it is important that the witness should testify, and 5
 - (b) the witness would not testify if the order were not made.
- (6) In determining whether the measures to be specified in the order are necessary for the purpose mentioned in subsection (3)(a), the court must have regard (in particular) to any reasonable fear on the part of the witness—
 - (a) that the witness or another person would suffer death or injury, or 10
 - (b) that there would be serious damage to property, if the witness were to be identified.

5 Relevant considerations

- (1) When deciding whether Conditions A to C in section 4 are met in the case of an application for a witness anonymity order, the court must have regard to— 15
 - (a) the considerations mentioned in subsection (2) below, and
 - (b) such other matters as the court considers relevant.
- (2) The considerations are—
 - (a) the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings; 20
 - (b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his or her evidence comes to be assessed;
 - (c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant; 25
 - (d) whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without his or her identity being disclosed;
 - (e) whether there is any reason to believe that the witness—
 - (i) has a tendency to be dishonest, or 30
 - (ii) has any motive to be dishonest in the circumstances of the case, having regard (in particular) to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant;
 - (f) whether it would be reasonably practicable to protect the witness's identity by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court. 35

6 Discharge or variation of order

- (1) A court that has made a witness anonymity order in relation to any criminal proceedings may subsequently discharge or vary (or further vary) the order if it appears to the court to be appropriate to do so in view of the provisions of sections 4 and 5 that applied to the making of the order. 40
- (2) The court may do so—
 - (a) on an application made by a party to the proceedings if there has been a material change of circumstances since the relevant time, or 45

- (b) on its own initiative.
- (3) “The relevant time” means—
- (a) the time when the order was made, or
 - (b) if a previous application has been made under subsection (2), the time when the application (or the last application) was made. 5
- 7 Warning to jury**
- (1) Subsection (2) applies where, on a trial on indictment with a jury, any evidence has been given by a witness at a time when a witness anonymity order applied to the witness.
 - (2) The judge must give the jury such warning as the judge considers appropriate to ensure that the fact that the order was made in relation to the witness does not prejudice the defendant. 10
- 8 Special provisions for service courts**
- (1) Subsections (2) and (3) apply in relation to criminal proceedings before a service court consisting of a judge advocate and other members. 15
 - (2) Any decision falling to be made by the court in such proceedings under sections 2 to 6 is to be made by the judge advocate alone.
 - (3) If any evidence is given by a witness in such proceedings at a time when a witness anonymity order applies to the witness, the judge advocate must give the other members such warning as the judge advocate considers appropriate to ensure that the fact that the order was made in relation to the witness does not prejudice the defendant. 20
 - (4) Each of the provisions mentioned in subsection (5) has effect with the modification set out in that subsection in a case where—
 - (a) a witness anonymity order is made by a service court to which that provision applies, and 25
 - (b) a person does anything in relation to the order which would, if the court had been a court of law having power to commit for contempt, have been contempt of that court.
 - (5) In such a case— 30
 - (a) section 101(1) of the Army Act 1955 (3 & 4 Eliz. 2 c. 18) has effect with the omission of the words “not subject to military law;
 - (b) section 101(1) of the Air Force Act 1955 (3 & 4 Eliz. 2 c. 19) has effect with the omission of the words “not subject to air-force law”; and
 - (c) section 65(1) of the Naval Discipline Act 1957 (c. 53) has effect with the omission of the words “not subject to this Act”. 35

Application of provisions etc.

- 9 Proceedings to which new rules apply**
- (1) Sections 2 to 8 apply to criminal proceedings in cases where—
 - (a) the trial or hearing begins on or after the day on which this Act is passed, or 40
 - (b) the trial or hearing has begun, but has not ended, before that day.

- (2) Section 10 applies to certain proceedings falling within subsection (1)(b).

10 Pre-commencement anonymity orders: existing proceedings

- (1) This section has effect in relation to criminal proceedings in cases where—
- (a) the trial or hearing has begun, but has not ended, before commencement, and 5
 - (b) the court has made a pre-commencement anonymity order in relation to a witness at the trial or hearing.
- (2) Subsection (3) applies if the witness has not begun to give evidence under the terms of that order before commencement.
- (3) In such a case the court— 10
- (a) must consider whether that order was one that the court could have made if this Act had been in force at the material time,
 - (b) if it considers that that order was one that it could have made in those circumstances, may direct that the order is to remain in place, and
 - (c) otherwise, must discharge the order and consider whether instead it should make a witness anonymity order in relation to the witness in accordance with sections 2 to 5. 15
- (4) Any witness anonymity order made by virtue of subsection (3)(c) must be made so as to come into effect immediately on the discharge of the pre-commencement anonymity order. 20
- (5) Subsections (6) and (7) apply if the witness began before commencement to give evidence under the terms of the order mentioned in subsection (1)(b) (whether or not he or she has finished doing so).
- (6) In such a case the court must consider whether the effect of that order is that the defendant has been prevented from receiving a fair trial, having regard (in particular) to— 25
- (a) whether the order was one that the court could have made if this Act had been in force at the material time, and
 - (b) whether the court should exercise any power to give a direction to the jury (if there is one) regarding the evidence given under the terms of the order. 30
- (7) If the court determines that the defendant has been prevented from receiving a fair trial, it must give such directions as it considers appropriate for and in connection with bringing the trial or hearing to a conclusion.
- (8) In this section— 35
- “commencement” means the day on which this Act is passed;
 - “pre-commencement anonymity order” means an order made before commencement that falls within section 1(2).

11 Pre-commencement anonymity orders: appeals

- (1) This section applies where— 40
- (a) an appeal court is considering an appeal against a conviction in criminal proceedings in a case where the trial ended before commencement, and

- (b) the court from which the appeal lies (“the trial court”) made a pre-commencement anonymity order in relation to a witness at the trial.
- (2) The appeal court—
- (a) may not treat the conviction as unsafe solely on the ground that the trial court had no power at common law to make the order mentioned in subsection (1)(b), but 5
- (b) must treat the conviction as unsafe if it considers—
- (i) that the order was not one that the trial court could have made if this Act had been in force at the material time, and
- (ii) that, as a result of the order, the defendant did not receive a fair trial. 10
- (3) In this section—
- “the appeal court” means—
- (a) the Court of Appeal;
- (b) the Court of Appeal in Northern Ireland; or 15
- (c) the Courts-Martial Appeal Court or the Court Martial Appeal Court;
- “commencement” and “pre-commencement anonymity order” have the meanings given by section 10(8).

Supplementary 20

12 Interpretation

- (1) In this Act—
- “court” means—
- (a) in relation to England and Wales, a magistrates’ court, the Crown Court or the criminal division of the Court of Appeal; 25
- (b) in relation to Northern Ireland, a magistrates’ court, the Crown Court, a county court exercising its criminal jurisdiction or the Court of Appeal in Northern Ireland; or
- (c) a service court;
- “criminal proceedings” means— 30
- (a) in relation to a court within paragraph (a) or (b) above, criminal proceedings consisting of a trial or other hearing at which evidence falls to be given;
- (b) in relation to a service court, proceedings in respect of a service offence consisting of a trial or other hearing at which evidence falls to be given; 35
- “the defendant”, in relation to any criminal proceedings, means any person charged with an offence to which the proceedings relate (whether or not convicted);
- “prosecutor” means an individual or body charged with duties to conduct criminal prosecutions; 40
- “service court” has the meaning given by subsection (2);
- “service offence” has the meaning given by subsection (3);
- “witness”, in relation to any criminal proceedings, means any person called, or proposed to be called, to give evidence at the trial or hearing in question; 45

“witness anonymity order” has the meaning given by section 2.

- (2) In this Act “service court” means –
- (a) a court-martial constituted under the Army Act 1955 (3 & 4 Eliz. 2 c. 18), the Air Force Act 1955 (3 & 4 Eliz. 2 c. 19) or the Naval Discipline Act 1957 (c. 53) or the Court Martial established by the Armed Forces Act 2006 (c. 52); 5
 - (b) the Summary Appeal Court established by any of those Acts;
 - (c) a Standing Civilian Court established under the Armed Forces Act 1976 (c. 52) or the Service Civilian Court established by the Armed Forces Act 2006; or 10
 - (d) the Courts-Martial Appeal Court or the Court Martial Appeal Court.
- (3) In this Act “service offence” means –
- (a) any offence against any provision of Part 2 of the Army Act 1955, Part 2 of the Air Force Act 1955 or Part 1 of the Naval Discipline Act 1957; or
 - (b) any offence under Part 1 of the Armed Forces Act 2006. 15

13 Commencement

This Act comes into force on the day on which it is passed.

14 Expiry of power to make witness anonymity orders

- (1) No witness anonymity order may be made under this Act after the relevant date. 20
- (2) Subject to subsection (3), the relevant date is 31 December 2009.
- (3) The Secretary of State may by order provide for the relevant date to be a date specified in the order that falls not more than 12 months after –
- (a) 31 December 2009, or
 - (b) (if an order has already been made under this subsection) the date specified in the last order. 25
- (4) Nothing in this section affects –
- (a) the continuation in effect of a witness anonymity order made before the relevant date, or
 - (b) the power to discharge or vary such an order under section 6. 30
- (5) An order under subsection (3) –
- (a) is to be made by statutory instrument; and
 - (b) may not be made unless a draft of the instrument containing the order has been laid before and approved by a resolution of each House of Parliament. 35

15 Short title and extent

- (1) This Act may be cited as the Criminal Evidence (Witness Anonymity) Act 2008.
- (2) Subject to subsection (3), this Act extends to England and Wales and Northern Ireland.
- (3) The service courts provisions of this Act extend to England and Wales, Scotland and Northern Ireland; and in section 384 of the Armed Forces Act 40

2006 (extent to Channel Islands etc.) any reference to that Act includes a reference to the service courts provisions of this Act.

- (4) In subsection (3) “the service courts provisions of this Act” means the provisions of this Act so far as having effect in relation to service courts.

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