**RESEARCH PAPER 08/60**
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# *Criminal Evidence (Witness Anonymity) Bill*

## Bill 134 of 2007-08

The *Criminal Evidence (Witness Anonymity) Bill* was introduced by the Government on Thursday 3 July 2008 and is expected to go through all its Commons stages on Tuesday 8 July.

The Bill would abolish the common law rules relating to witness anonymity orders and replace them with statutory powers. This is in response to the judgment of the House of Lords, on 18 June 2008, in *R v Davis*, in which it was held that the measures ordered by the court to ensure the anonymity of some witnesses had been beyond its common law jurisdiction.

The Bill has been introduced as an emergency measure because the ruling is likely to affect a number of ongoing prosecutions in which similar measures have been ordered, as well as convictions following trials in which witnesses have given evidence anonymously.

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# Summary

The *Criminal Evidence (Witness Anonymity) Bill* would abolish the common law rules relating to witness anonymity orders and replace them with statutory powers.

The Bill makes provision for any party to criminal proceedings to apply for a witness anonymity order, so that order may be made on the application of either the prosecution or a defendant.

It sets out the conditions which must be satisfied before a court can make a witness anonymity order, the considerations the court must have regard to when deciding whether to make an order and sets out a non-exhaustive list of the kinds of special measures that the courts may apply in order to protect the identity of anonymous witnesses.

The Bill includes transitional provisions to deal the effect of witness anonymity orders which have been made in trials already begun before the new law comes into force and for appeals against convictions which have already been secured on the basis of anonymous evidence.

It extends to England and Wales and Northern Ireland.

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# I Background to the Bill

## A. Witness anonymity

A practice which has grown during the last two decades in criminal trials has been to allow prosecution witnesses to give evidence anonymously. Typically this will involve concealing the identity of the witness from the defendant and the public, by measures such as the use of pseudonyms, screens erected in the courtroom, electronic distortion of witnesses' voices, and preventing questioning (of *any* witnesses) which might lead to the identification of the anonymous witness. These witnesses might be innocent bystanders at the scene of the crime, undercover police officers or agents, or people who were themselves involved in crime. What they have in common would be a reluctance to give evidence (unless they are permitted do so anonymously) usually through fear, for themselves, their families and friends, of the risk of reprisals from the criminal fraternity. The practice of allowing anonymity has been developed by the courts and has no statutory basis.

While there are no statistics available to show how often witness anonymity has been permitted, it has been suggested that the practice had become "commonplace",[1] even "routine" in some categories of case,[2] and that it was being used in more than half of all murder trials.[3] In 2006 there were 699 trials for murder in England and Wales, 372 of which resulted in convictions. It has been described as "a powerful weapon" to bring dangerous criminals to justice, "a vital tool in bringing those responsible for the most brutal crimes to justice",[4] which is "fundamental to the successful prosecution of a significant number of cases, some of which involve murder, blackmail, violent disorder and terrorism".[5]

Those involved in different parts of the criminal justice system appear to have had quite different impressions about the prevalence of the practice. Ken Jones, president of the Association of Chief Police Officers, was reported to have said:

> Anonymity has been used in a tiny, tiny minority of cases … These powers are used only in rare and exceptional circumstances

while counsel in a current murder prosecution has commented:

> My understanding is that there are as many as 550-600 applications for witness anonymity across England and Wales, which is staggering. I always believed that these applications were only made in the most serious of cases. But it seems that the police have gone totally overboard in using these provisions and it's

1 Lord Neill of Bladen, HL Deb 26 June 2008 c1607
2 Lord Kingsland, HL Deb 26 June 2008 c1601
3 "How anonymous witnesses saw justice done", 25 June 2008, *The Independent, "*The erosion of a basic right", 25 June 2008*, The Times*
4 "If witness anonymity is withdrawn, many killers will walk free", 23 June 2008, *The Times*
5 Jack Straw, HC Deb 26 June 2008 c516

> something that will now have to be looked at very carefully. It is for Parliament, and not the courts, to obfuscate the common law.[6]

Lord Hunt of King's Heath told the House of Lords that he suspected that only a very small proportion of the 1.5 million cases that go through the courts every year were affected.[7]

## B. How witnesses can be protected against intimidation

There are various ways in which witnesses who have been, or may be, intimidated, can be given the confidence to testify. "Witness protection programmes" may guarantee the personal safety of the witness and his family, and sometimes even provide them with new identities after the trial. The United Nations Office on Drugs and Crime has outlined the features of some such programmes used in a number of countries, and summarised the other measures which can be made available to protect witnesses, including:

> (a) Police protection;
> (b) Temporary relocation in safe areas;
> (c) Evidentiary rules of protection measures when testifying in court (anonymity, shielding, videoconferencing); and
> (d) Moderate financial assistance.[8]

The *Serious Organised Crime and Police Act 2005* places the arrangements for providing protection for witnesses and others on a statutory footing in England and Wales. It places a duty on public authorities to assist protection providers and introduces offences in connection with the unauthorised disclosure of information about protected persons or protection arrangements. However, witness protection programmes have limitations, apart from the major expenditure which they are likely to involve.

> … in reality, and certainly for the individual of good character, with established roots, this kind of programme is unacceptable. It requires a complete change of identity, and home, and work, not only for the witness himself or herself, but for his family, and a likely permanent separation between them, and other members of their extended family, and a subsequent life which is dominated by the need for continued security, and constant supervision of that security by police officers. This process is grossly invasive of the right of the witness and his family to private and family life. It is likely to be appropriate when the identity of the witness is already known to the defendant, and may be suitable for the professional criminal who has decided, for reasons of his own, to give evidence against his former colleagues and who is treated as a "supergrass". [9]

## C. Other provisions restricting identification of witnesses

Many statutory provisions restrict reporting of parties' or witnesses' identities, either on a permanent or on a temporary basis. It is well known that, by statute, the victims of sexual

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6 "Dozens of murder cases at risk after collapse of hitman trial; Criminal justice", 25 June 2008, *The Times*

7 HL Deb 26 June 2008 c1603

8 "Good practices for the protection of witnesses in criminal proceedings involving organised crime", January 2008

9 *R v Davis, R v Ellis and others* [2006] 1 W.L.R. 3130

offences must not be identified by the press,[10] and there are similar restrictions applicable in some cases where evidence is given by children, and on the disclosure of information about family proceedings. These restrictions do not, however, have the effect of concealing witnesses' identities from parties to the proceedings.

There is also a range of measures to assist vulnerable or intimidated witnesses to give evidence in court. Special measures under *Youth Justice and Criminal Evidence Act 1999* can include

- screens – to ensure that the witness does not see the defendant
- video recorded evidence in chief – allowing an interview with the witness, which has been video recorded before the trial, to be shown as the witness's evidence in chief
- live TV link – allowing a witness to give evidence from outside the court
- clearing the public gallery of the court – so that evidence can be given in private
- removal of wigs and gowns in court
- video recorded pre-trial cross-examination – allowing a witness to be cross-examined before the trial about their evidence and a video recording of that cross-examination to be shown at trial instead of the witness being cross examined live at trial
- intermediaries – allowing an approved intermediary to help a witness communicate with legal representatives and the court
- allowing a witness to use communication aids (e.g. alphabet boards)

The categories of persons eligible to apply for these special measures are: children under the age of 17, people who suffer from a mental or physical disorder, or who have a disability or impairment that is likely to affect their evidence a well as those whose evidence is likely to be affected by their fear or distress at giving evidence in the proceedings. Among other things, courts must determine whether making particular measures available to an eligible witness will be likely to improve the quality of the evidence given by the witness and whether it might inhibit the testing of his/her evidence.

While some of these special measures are similar to those which have been used to enable witnesses to give evidence anonymously, the essential distinction is that the identity of the witness is not concealed from the parties to the proceedings as it is when full anonymity is ordered.

## D. Testing the lawfulness of witness anonymity

The lawfulness of the practice of allowing witness anonymity was challenged in two appeals which were heard by the Court of Appeal in March 2006.[11] That court held that:

> there was clear jurisdiction at common law to admit incriminating evidence against a defendant by anonymous witnesses; that a trial was not unfair and the conviction unsafe simply because the evidence of anonymous witnesses in justifiable and genuine fear, whose testimony could be tested in the adversarial process, might be decisive of the outcome; … in the circumstances, the decisions in both cases to order anonymity were justified and had not affected the fairness of the trials; and that, accordingly, the convictions were safe.

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[10] Unless the victim chooses to be named

[11] *R v Davis, R v Ellis and others* [2006] 1 W.L.R. 3130

The court considered the question of safeguards, saying that these were -

> issues for judicial decision in case-specific situations, after allowing for the disclosure process, any public interest immunity decisions, and the ability to cross-examine together with the deployment of material helpful to the defendant in the course of cross-examination, or even when cross-examination may not be possible. For example, the judge may be satisfied that a wholly independent, understandably terrified witness, a stranger to the defendant, and with no possible motive to implicate him, may have made a note of a crucial car number plate at the scene of the crime. If satisfied that this witness is indeed independent, but unfit to give live evidence, the judge may admit his or her evidence, anonymously, and in statement form.[12]

The court certified that a point of law of general public importance was involved in its decision, namely

> Is it permissible for a defendant to be convicted where a conviction is based solely or to a decisive extent upon the testimony of one or more anonymous witnesses?

and on 10 October 2006 the House of Lords granted the defendant Davis leave to appeal.

His appeal was heard in April, and judgment was delivered on 18 June 2008. The Lords' unanimous allowing of the appeal seems to have been unexpected. One member of the court even said in his speech -

> When originally I was party to the grant of leave to appeal in this case I was not, I confess, expecting the appeal to succeed. Clearly, however, it raised an issue of high principle and deserved to be heard. Now having heard the argument and had the advantage of reading in draft the opinions of my noble and learned friends Lord Bingham of Cornhill, Lord Rodger of Earlsferry and Lord Mance, I entertain no doubt whatever that the appeal must indeed be allowed. I find my Lords' logic utterly compelling.[13]

Lord Woolf, the former Lord Chief Justice, echoed that sentiment.[14]

In the Davis case the defendant was charged with murdering two men at a New Year's Eve party. The only three witnesses who identified him as the gunman were among those who had claimed to be in fear of their lives if it became known that they had given evidence against him. Accordingly the judge had made an order imposing various protective measures preventing their identification. The defendant could not have been convicted without their evidence. His defence was that he had left the party before the killing, and that the anonymous witnesses who identified him as the gunman had given false evidence at the instigation of an ex-girlfriend with whom he had fallen out. It was

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12 p3151

13 *R v Davis* [2008] UKHL 36 per Lord Brown of Eaton-Under-Heywood at para 63

14 HL Deb 26 June 2008 c1609

said that the protective measures had hampered the conduct of his defence because it had not been possible to explore who the witnesses were and the nature of their contact with him.

The full House of Lords judgment is available online,[15] and the following summary is taken from *The Times* Law Report:

> … The trial judge, accepting that the witnesses' fear for their lives was genuine, directed: (i) they would give evidence under pseudonyms, (ii) their personal identifying details would be withheld from the defendant and his advisers, (iii) his counsel would not be permitted to ask any question from which they might be identified, (iv) they would give evidence screened from the defendant and (v) their voices would be distorted to prevent him recognising them…
>
> Lord Bingham said that it was a long-established principle of the English common law that, subject to certain exceptions and statutory qualifications, the defendant in a criminal trial should be confronted by his accusers in order that he might cross-examine them and challenge their evidence.
>
> There were long-recognised exceptions to that principle, and further exceptions enacted by statute, but until recently there had been no precedent for protective measures of the present kind, even when the problem of witness intimidation had been extreme.
>
> His Lordship referred to the adoption of that principle in the United States as a constitutional right and its importance in other countries influenced by the common-law tradition. His Lordship also analysed a number of recent United Kingdom cases involving witness anonymity in criminal, coronial and extradition proceedings.
>
> With regard to the European Convention on Human Rights, the right of confrontation was well recognised and established in England long before adoption of the Convention. The introduction of article 6.3(d), guaranteeing the defendant's right to examine witnesses against him, did not add anything of significance to any requirements of English law for witnesses to give their evidence in the presence of the accused ...
>
> Adopting Lord Mance's analysis of case law of the European Court of Human Rights at Strasbourg, he said that the rule as it now stood, vouched by a series of authorities, was that no conviction should be based solely or to a decisive extent on the statements or testimony of anonymous witnesses. The reason was that such a conviction resulted from a trial which could not be regarded as fair. That was the view traditionally taken by the common law.
>
> The Crown relied on five propositions:
>
> 1 The problem of witness intimidation was real and prevalent: witnesses would not give evidence unless their identity was withheld from the defence; if they did

[15] *R v Davis* [2008] UKHL 36, http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080618/davis-1.htm

not give evidence dangerous criminals would walk free and both society and the administration of justice would suffer.

His Lordship did not doubt the reality of that proposition; it was not a new problem but it was a serious one and might well call for urgent attention by Parliament.

2 The paramount object must always be to do justice: see Scott v Scott((1913) AC 417); if, to do justice, some adaptation of ordinary procedure was called for, it should be made, provided the overall fairness of the trial was not compromised.

While Scott recognised that there might in some circumstances be a departure from the rule that justice should be administered in public, the rights of a litigating party were the same whether a trial was conducted in camera or open court. Nothing in Scott was authority for the power of a court to abrogate a long-standing common law right directly bearing on the ability of a criminal defendant to defend himself.

3 Recent case law, particularly R v Taylor (Gary) (The Times August 17, 1994), supported the adoption of protective measures.

Some of the recent case law, in particular Taylor, was binding on the Court of Appeal. But the reasons given to support those decisions were, as his Lordship's analysis suggested, unsound. By a series of small steps, largely unobjectionable on their facts, the courts had arrived at a position irreconcilable with long-standing principle.

4 The Strasbourg jurisprudence, properly understood, did not condemn the use of protective measures.

His Lordship could not, for the reasons given by Lord Mance, accept that their use was compatible with the Strasbourg court's jurisprudence.

5 The defendant was protected from the risk of unfairness by the prosecutor's duty to disclose material known to him as damaging to an unidentified witness or of a previous inconsistent statement made by such a witness.

Undoubtedly, the prosecutor here performed that duty diligently and conscientiously but the fairness of a trial should not largely depend on such diligent performance of duty. The disclosure made to the defence, consistently with the protective measures, contained nothing which would enable the defendant to identify the witnesses giving evidence.

His Lordship turned to whether the protective measures operated unfairly; their impact on the defence had to be considered.

Having referred to the defendant's denial of guilt and his belief that the witnesses' false evidence was procured by a former girlfriend with whom he had fallen out, his Lordship said that defence counsel was gravely impeded from pursuing that suggestion in cross-examination by ignorance of, and inability to explore who the witnesses were, where they lived and the nature of their contact with the defendant.

When a witness, whom the defendant believed to be the girlfriend, was called, it was doubtful whether she was. But that could not be explored. If the jury concluded she was probably not, they would also conclude the defence was

> based on a false premise. A trial so conducted could not be regarded as meeting the ordinary standards of fairness.
>
> His Lordship could not accept the Court of Appeal's analysis of the domestic and Strasbourg authorities. In the English cases stress was consistently laid on the need to ensure that the procedure did not unfairly prejudice the defendant. But there were great dangers in that approach.
>
> The Court of Appeal did not adequately address the problem that the defendant was denied the opportunity fully to investigate the truth of the witnesses' evidence. At no point did the Court of Appeal acknowledge that the right to be confronted by one's accusers was recognised by the common law for centuries; and it was not enough if counsel saw them if they were unknown to and unseen by the defendant.
>
> The protective measures imposed here hampered the conduct of the defence in a manner and to an extent which was unlawful and rendered the trial unfair.[16]

## E. Reaction to the House of Lords judgment in *R v Davis*

There was immediate concern about the effect which the ruling would have, both on pending trials in which anonymity might have been granted, and on the soundness of past convictions in which witnesses had given evidence anonymously. The Secretary of State for Justice and Lord Chancellor (Jack Straw) said:

> "In addition to those cases in the prosecution pipeline, there is great concern among the CPS and the wider public that a number of serious criminals convicted by a jury, whose trials satisfied Article 6 and common law requirements, and whose appeals have failed, would seek to make use of the technicality of their Lordships' judgment to have their convictions quashed.[17]

He said that accurate estimates of the number of cases involved would be provided as soon as they were available.

The media referred to a "catastrophic" and "potentially disastrous" ruling, to police fears that –

> dozens of Britain's most dangerous criminals, including murderers and terrorists, could be freed from jail

and to police estimates that 40 to 50 cases either going through the courts, or about to start, could be affected by the ruling.[18] Jacqui Smith, the Home Secretary, speaking at a meeting of senior police officers in Liverpool, had said she shared their frustration.[19]

It was reported that the Crown Prosecution Service had sought an adjournment in all cases using anonymous witnesses so that the implications of the judgment could be

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16 "Accused has the right to confront his accusers", 19 June 2008, *The Times*
17 HC Deb 26 June 2008 c516
18 "Police chief fears killers will go free", 21 June 2008, *The Telegraph*
19 "Threat to murder convictions forces ministers to rewrite law", 25 June 2008, *The Independent*

assessed.[20] Some of the media criticised the Law Lords for their ruling, for sabotaging a vital prosecution tool, describing them as "loony",[21] "crazy" and "barmy".[22] Other writers explained the Law Lords' reasoning and commented on the difficulty – or impossibility – of accommodating both the need to ensure that witnesses who might be subject to intimidation did come forward and were willing to give evidence, and the right of accused persons to have a fair trial.[23] Frances Gibb, writing in *The Times*, referred to what was thought to be the first case in which witnesses had given evidence behind screens and without being identified, and added:

> The practice has grown in parallel with a gangland culture in which potential witnesses fear speaking out. It was developed for the best of intentions - to secure justice - but it cuts across a fundamental common law: the right of an accused to know who his or her accuser is.[24]

Within days, the impact of the ruling on ongoing prosecutions became apparent. On 24 June, HH Judge Paget discharged the jury in a murder trial at the Old Bailey, in which four witnesses had given evidence under false names and from behind screens, with their voices distorted. He told the jury:

> I am afraid the trial has been derailed and I am afraid I will have to discharge you and order a retrial in the New Year… You have heard evidence from a number of witnesses that you should not have heard

The trial had been running for two months and was nearing the end of the prosecution case. It was said to have cost £6 million. The press have drawn attention to a number of other high profile cases where there might be successful appeals in the light of the ruling in *R v Davis*. On 4 July, the Guardian reported:

> The CPS revealed that nearly 600 cases might be jeopardised by [the ruling]. Their breakdown makes interesting reading, for most pending trials involved undercover police officers, while nearly half involved trials that had already taken place but were still within the time limit for appeal against conviction. That suggests anonymity is being granted in a remarkable number of cases. Only 50 involved ordinary members of the public as witnesses, as did the case that formed the subject of last month's appeal.[25]

On 30 June 2008, at a pre-inquest hearing into the death of Jean Charles de Menezes, it was ordered that 44 police officers could give evidence anonymously at the inquest.[26]

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20 "Police chief fears killers will go free", 21 June 2008, *The Telegraph*

21 "Cons could walk", 25 June 2008, *Daily Star*

22 "Anarchy is unleashed: Outrage as crazy Law Lords ban anonymous trial witnesses", 25 June 2008, *The Sun*

23 E.g. "How can you tell if witnesses are lying if they are allowed to remain anonymous?", 25 June 2008, *The Independent*, "The erosion of a basic right: dozens of murder cases at risk after collapse of hitman trial", 25 June 2008, *The Times*

24 ibid

25 "Secrecy and laws", 4 July 2008, *The Guardian*

26 "De Menezes officers get anonymity", 1 July 2008, *The Metro*

# F. Government response

## 1. Statement by the Secretary of State for Justice

On 26 June, the Secretary of State for Justice and Lord Chancellor made a statement announcing the Government's intention to introduce emergency legislation to "rectify the situation". He expressed gratitude to the opposition parties for their cooperation, and said:

> To deal with this situation, our courts had developed careful and proportionate measures by which the trial judge, where he or she believed it necessary, could order that evidence be given in such a way that the identification of certain key prosecution witnesses was disguised … In the Davis appeal, the Court of Appeal reviewed all of the circumstances, the common law authorities and the Strasbourg jurisdiction, and held that measures of this kind were both necessary and just to defendants in this case. Their appeals were therefore dismissed. In the House of Lords, their lordships took the opposite view.[27]

He referred to comments made by several of the Law Lords about the possible need for urgent parliamentary attention, or a careful statutory modification of basic common law principles, and said that since the judgment had been handed down the Government had been looking urgently at how a statutory framework could operate, taking account of overseas experiences, not least that of New Zealand. He said -

> The essence of the scheme that will be published in the Bill is that the trial judge will have to be satisfied that the need for anonymity is established, that a fair trial will be possible and that it is in the interests of justice to make such an order for anonymity. There will also be other factors that the judge will have to consider in reaching this decision…
>
> The Bill will … contain measures to ensure that the Appeal Court should not quash convictions solely on the basis that the trial court lacked jurisdiction under the common law to provide for anonymity measures. The aim will be to ensure that defendants cannot take unfair advantage of the technical defect in the law which has until now been unidentified and unsuspected.[28]

He added that the Government had, for months, planned to include witness anonymity provisions in the forthcoming *Law Reform, Victims and Witnesses Bill*,[29] which would provide a full opportunity for both Houses to give further consideration to the provision. He undertook that the Bill would contain:

> what amounts to a sunset clause for this urgent measure.

His undertaking was that the provisions of this Bill, if passed, would be included in next Session's Bill.

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27 HC Deb 26 June 2008 c515
28 C516
29 Announced in the draft legislative programme on 14 May, HC Deb 14 May 2008 c1385

## 2. Points raised in debate

### *a. A "technical" defect*

When the statement was repeated in the House of Lords, several peers expressed concern at the implication that the House of Lords ruling had identified a mere "technical defect" in the law, of which it would be unfair for defendants to take advantage, and they sought assurance that the Court of Appeal would still have power to quash convictions where the imposition of anonymity measures had, on the facts of the case, violated the defendant's right to a fair trial.[30]

### *b. Media criticism of the Law Lords*

There was consensus that media attacks on the judiciary, some of which had been scurrilous, completely misunderstanding the constitutional function of the judges, had been wholly unjustified: the judges had done their job well forcing Parliament

> to think clearly about something that has not been thought about clearly up until now.[31]

### *c. Retrospectivity and transitional arrangements*

There was some concern about restrospective operation of the new provisions. Mr Straw said that the way forward was that there would be measures to ensure that the appeal court would not quash convictions solely on the basis that the trial court lacked the jurisdiction under the common law (as was now known but had not been known before 18 June) to provide for anonymity measures. He added:

> We should not get ourselves into a huge lather about transitional arrangements. There is a world of difference between legislation that is retrospective to create substantive criminal offences, which has been regarded as totally out of order in all circumstances, and legislation that changes criminal procedure, which can operate only from the day when it comes into force but then makes a difference as to how cases are judged prospectively, including cases that are in the pipeline, whether that pipeline is trial or appeal within the normal time limits, and cases that come into a new pipeline, which are cases in our system referred well out of time by the Criminal Cases Review Commission or that gain direct access to the Court of Appeal.

### *d. The need for emergency legislation*

When asked to explain the urgency to a layman, Mr Straw said that the need arose

> … because some cases are currently in court, and others in the pipeline. Given the clear intention on both sides of the House to rectify the gap created by the Law Lords' judgment, we do not want to see applications made by the defence in those cases either for acquittals or for very expensive retrials. Although this is

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30 Lord Lloyd of Berwick 26 Jun 2008 : Column 1605 Lord Mayhew of Twysden Lord Goodhart 1606

31 HC Deb 26 June 2008 cc518, 520

> entirely a matter for the judiciary and not for me, I hope—in the light of what I have said today and of the Bill, if it is passed as I hope it will be—that at worst, cases will be adjourned until the Bill comes into force.

He told the House that he had not been aware of any complaints about the courts' witness anonymity practice: it had not been the subject of parliamentary questions or ministerial correspondence.

Lord Woolf, the former Lord Chief Justice, mentioned that he experience of reviewing cases in which anonymity had been used, and he added:

> I am bound to say that, based on my experience, I believe that it is necessary that legislation should be brought forward because otherwise trial judges dealing with these matters will be in an impossible situation. They cannot afford to wait and see what the Court of Appeal or the House of Lords will say about a case—they have to act on the material which is before them.[32]

### *e. Sunset clause*

Although Mr Straw made "an absolute promise" that there would be what amounted to a sunset clause, it was made clear that such a clause might not appear on the face of the Bill.[33] Nick Herbert said that the House should be wary of emergency legislation with an open-ended time scale.[34] Lord Kingsland was concerned that, if the *Law Reform, Victims and Witnesses Bill* were delayed, this emergency legislation might have a longer life than was desirable.[35]

### *f. Categories of cases to which the new provisions will apply*

David Howarth and Lord Thomas of Gresford questioned whether anonymity was required in the magistrates' court for less serious crimes. Mr Straw said that he did not propose to restrict the cases to Crown court cases, and Lord Hunt said that, as some of the most troubling cases had arisen in youth courts and there could be real fear among witnesses, the Government thought that they, too, ought to be covered.

### *g. Application to defence witnesses*

Geoffrey Cox pointed out that defence witnesses could experience the same types of intimidatory pressure as prosecution witnesses, especially if the defence run was one which was in conflict with that of a co-defendant.[36] Mr Straw confirmed that anonymity would be available to defence witnesses.

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32 HL Deb 26 June 2008 c1609
33 HC Deb 26 June 2008 c519
34 HC Deb 26 June 2008 c517
35 HL Deb 26 June 2008 c1600
36 HC Deb 26 June 2008 c524

### *h. Witness protection programmes as an alternative*

The Government was asked whether it was considering alternative methods of resolving the problem, such as special protection programmes providing for the relocation of witnesses and their families to places of safety, which had been the approach in the United States of America. [37] The response was that while witness protection schemes should continue to be used, they were not the only answer to the specific problem of people who were genuinely fearful of giving their testimony without some protection. Lord Hunt said that, given the degree of disruption a relocation or change of identity could have to the life of a witness and his or her family, it was not surprising that such programmes were offered only in the most extreme cases where there was a threat to life, hence the importance of witness anonymity.

### *i. Whether anonymity should be expressed to be exceptional*

Lord Thomas of Gresford said that, although anonymity was needed in some cases, it had been granted far too often. It was essential thing that anonymity should be the exception and not the presumption, as it had tended to become in these past few years.[38]

### *j. Use of special counsel*

Nick Herbert said that pre-trial applications should be made to a judge, who should determine them on evidence, with both parties having the right to be heard and that, if necessary, a special counsel should be appointed to test a witness's fear of the consequences of giving evidence.[39]

### *k. Threshold for threat level*

Lord Harris of Haringey hoped that when the threshold was set for reasons why a witness should be afforded anonymity, it would not be set at the level where the witness had actually to have been threatened. The witness might not be someone who the defendant expected to testify against them, so if it was a requirement that they actually be threatened, that threshold may be too high.[40]

Lord Hunt responded that the Government would consider the question of threshold very carefully in preparing legislation and consider what guidance would need to be issued. He referred to *R v Taylor* in which the Court of Appeal had set out the detailed principles for the exercise of the power to order anonymity.[41]

> There must be real grounds for a fear of the consequences if the identity of the witness were revealed. The evidence must be sufficiently important to make it unfair to make the Crown proceed without it. The Crown must satisfy the court that the creditworthiness of the witness had been fully investigated and disclosed. The court must be satisfied that there would be no undue prejudice to the

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37 HL Deb 26 June 2008 c1602
38 HL Deb 26 June 2008 c1603
39 HC Deb 26 June 2008 c518
40 HL Deb 26 June 2008 c1608
41 at a time when a common law power was believed to exist

accused. Finally, the court could balance the need for protecting the witness, including the extent of that protection, against unfairness or the appearance of unfairness.

## G. Scrutiny of the Bill

The *Criminal Evidence (Witness Anonymity) Bill* is due to go through all its Commons stages on Tuesday 8 July 2008, the fifth day after its introduction. As yet, there has been no scrutiny by parliamentary select committees. The Joint Committee on Human Rights plans to hold an evidence session on the Bill on Tuesday 8 July, taking evidence from Sir Ken Macdonald QC, Director of Public Prosecutions, and Paddy O'Connor of Doughty Street Chambers.

An open meeting on the Bill, for Members of both Houses, is to be held in advance of the Bill's Commons stages. It is to be held in Committee Room 10 at 5 p.m. on Monday 7 July.

## H. The right to a fair trial

The central issue, both in the *Davis* case, and in the emergency legislation designed to fill the lacuna which it is seen to have created, is the extent to which the use of anonymous witnesses may make it impossible for defendants to be fairly tried.

Article 6 of the European Convention on Human Rights provides:

> **Article 6 – Right to a fair trial**
>
> 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3 Everyone charged with a criminal offence has the following minimum rights:
>
> a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> b to have adequate time and facilities for the preparation of his defence;
>
> c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Prior to the House of Lords judgment in *R v Davis*, *Archbold's Criminal Pleading, Evidence and Practice* (2008) gave the following information on witness anonymity (obviously much of this has been superseded by the House of Lords judgment):

> Identification of witnesses
> …8-70 Ordinarily, a private witness at the beginning of his (or her) examination in chief, is asked to state his (or her) full name. The trial judge, in the exercise of his inherent jurisdiction to control the proceedings being conducted before him, may, however, permit a departure from the practice in appropriate cases, e.g certain types of blackmail: see R v Socialist Worker, ex p Attorney General [1975] Q.B. 637, DC (per Lord Widgery C.J., at p.644)
>
> Blackmail apart, departures from the usual practice have been and will be rare, and in considering whether or not to permit such a departure the judge should bear in mind, inter alia , that publication of a witness's name and/or address may result in further witnesses coming forward, the existence of whom may not otherwise have been known. In R v Socialist Worker, ex p Att Gen ante, reference was made by Lord Widgery, without disapproval, to the departure permitted by the trial judge in R v Jones, Dee and Gilbert, unreported, December 1973, CCC. In that case, it was alleged inter alia, that certain of the defendants were parties to a contravention of s 31 of the Sexual Offences Act 1956 (woman exercising control over prostitution). The judge permitted each of the girls called for the Crown to be referred to throughout the trial by a letter of the alphabet. The rationale was that, unless the anonymity of these former prostitutes was preserved, grave difficulties may be suffered in obtaining the necessary evidence in any further case of that nature. A similar device has been adopted in similar circumstances in Shaw v DPP [1962] A.C. 220; it drew no adverse comment from the Court of Appeal or the House of Lords. See also generally, Att Gen v Leveller Magazine Ltd [1979] A.C. 440, HL (post §25-321).
>
> 8-71 In exceptional circumstances, the judge may permit a witness to conceal his identity entirely from the accused; whether the circumstances exist is for the discretion of the judge: R v Taylor (G), The Times, August 17, 1994, CA. The following factors are relevant (but they are not rules of law: see R (Al Fawwaz) v Governor of Brixton Prison [2002] 1 A.C 556 HL).
>
> (a) The must be real grounds for fear of the consequences if the identity of the witness were revealed. It might not be necessary for the witness himself to be fearful, or to be fearful for himself alone.
> (b) The evidence must be sufficiently important to make it unfair to make the Crown proceed without it. A distinction could be drawn between cases where the creditworthiness of the witness was in question, rather than his accuracy.
> (c) The Crown must satisfy the court that the creditworthiness of the witness had been fully investigated and disclosed.
> (d) The court must be satisfied that there would be no undue prejudice to the accused. There might be factors pointing the other way, for example, the use of a video screen to enable the accused to see the witness, as in the instant case, where a screen protected the witness being seen directly from the dock.
> (e) The court could balance the need for the protection of the witness, including the extent of that protection, against unfairness, or the appearance of unfairness.

8-71a In R v Davies (Iain); R v Ellis [2006] 2 Cr.App.R 32, the Court of Appeal considered the legitimacy of measures taken to disguise the identity of a witness by way of non-disclosure of his true identity, voice modulation and the use of screens. It was held: (i) the court possesses an inherent jurisdiction at common law to control its own proceedings, if necessary by adapting and developing its existing processes; whilst some of the steps identified by developing common law principles have been codified (see ante, §8-69), they add to and do not detract from common law principles; (ii) the disadvantages of witness anonymity measures are immediately ameliorated provided the defendant retains the ability of his counsel to pursue a substantial degree of cross-examination of the witness before the jury, and by the proper discharge of the prosecution's disclosure obligations; (iii) in broad terms, the same considerations apply to witnesses called by or on behalf of the defendant; (iv) as to the jurisprudence of the European Court of Human Rights, the seminal decisions are Doorson v Netherlands 22 EHRR 330, and Van Mechelen v Netherland, 25 EHRR 647, and subsequent cases are no more than an application of established principles, viz, that the concealment of the identity of witnesses is not inconsistent with Article 6 of the European Convention [Right to a fair trial] (post, §16-57), provided, (a) that the need for anonymity is established, (b) that cross examination of the witness by an advocate is permitted (but there may be cases where it is not objectionable for an anonymous statement to be read to a jury), and (c) that the trial overall was fair; a trial will not inevitably be unfair simply because the evidence of an anonymous witness may be decisive of the outcome; (v) as to the domestic jurisprudence, the discretion in a trial judge to permit a witness to give evidence anonymously is beyond question; the principles set out in R (Al Fawwaz) v Governor of Brixton Prison (ante) and (R (D) v Camberwell Green Youth Court; R (DPP) v Same (ante, § 8-55c) are not to be treated as obiter dicta and they do not conflict with the decisions of the European Court; (vi) as to the exercise of the discretion, the court must examine the application for the witness to give evidence anonymously scrupulously (in effect by applying the three-stage test in the Strasbourg jurisprudence, ante); among the safeguards which may ensure a trial is fair are: (a) that the decision whether to exercise the discretion is case specific, (b) that the case may subsequently be withdrawn from the jury if it would be unsafe for the evidence of an anonymous witness to be considered further, and (c) that the jury should be directed as to the particular disadvantages to the defence; such directions should probably suggest that the jury should consider whether there is any independent, supporting evidence, tending to confirm the credibility of the anonymous witness, and the incriminating evidence given by the witness (but this is not a pre-requisite to conviction); (vii) as to the role of the Court of Appeal, the decision of the trial judge is discretionary, but it involves an exercise of judgment; if the court concludes that the order for witness anonymity made the trial unfair, the conviction will be unsafe, even if the original decision of the judge could not be criticised; (viii) as to the conflict between the duties of the defence counsel to the court not to reveal the identity of the witness, and his duties to his client, the choice is stark and should be made by the client on advice; counsel could either observe the witness, so that he may be better able to cross-examine him (in which case he could not provide his client with a description of the witness), or if counsel believed his professional relation with the client would be damaged if he were unable to communicate information which his client wanted from him, the anonymous witness should be screened from counsel; (ix) whether or not counsel decides to observe the witness personally, each member of the jury and the judge must be able to see and observe the witness for himself, and they must be able to hear the unmodulated voice of the witness; (x) if the defendant decides that counsel shall not observe the witness, he cannot advance a ground of appeal based on his, or his counsel's rejection of the opportunity to do so.

> 8-71b As to the giving of directions prohibiting publications exempted from disclosure in court, see the Contempt of Court Act 1981, s.11.

*Archbold* provides further information about witness anonymity, the European Convention on Human Rights and the right to a fair trial at paragraph 16-68. It notes, *inter alia*, that:

> Ignorance as to the identity of a witness may deprive the defence of the particulars which would enable it to demonstrate that he is prejudiced, hostile or unreliable: *Kostovski v Netherlands* 12 EHRR 434 at para 42 […] In *Doorson v Netherlands* 22 EHRR 330, however, the Court emphasised the need to balance the interests of the accused against any risk to the life, liberty or security of a witness. Where there is an identifiable threat to the safety of a witness, arrangements to preserve anonymity can in principle be justified, providing adequate safeguards are in place to counter-balance the resulting unfairness to the defence. In particular, the judge should be made aware of the witness's identity; the defence should have an opportunity to question the witness; the evidence should be treated with "extreme care"; and a conviction should not be based "solely or to a decisive extent" on evidence given anonymously. In addition, the Court should always consider alternative methods of protecting a witness and should adopt the least intrusive method available: *Van Mechelen v Netherlands* 25 EHRR 647.

# II What the Bill does

The Bill was introduced on 3 July 2008. *Explanatory Notes* to the Bill were published on the same day and are available electronically.[42] The Notes contain a full summary of the background and ECHR considerations.

The Bill would abolish the common law rules relating to witness anonymity, and replace them with statutory powers. The new regime would empower courts to make orders requiring specified measures to ensure that a witness's identity is not disclosed (except to judges, juries and interpreters) provided that the court is satisfied that three conditions are met. The conditions relate to

- the necessity of the specified measures, in order to protect the safety of the witness or another person, or to prevent serious damage to property or real harm to the public interest; (*clause 4(3))*
- the measures being consistent with the defendant receiving a fair trial; *(clause 4(4*)) and
- the importance, in the interests of justice, that an otherwise unwilling witness should testify.*(clause 4(5))*

It should be noted that all three conditions would have to be satisfied, so the defendant's right to a fair trial would not fall to be balanced against any other factors. In deciding whether those conditions are satisfied, the court would be required to have regard to five

[42] http://services.parliament.uk/bills/2007-08/criminalevidencewitnessanonymity.html

specified considerations, as well as any other matters which the court considered relevant.*(clause 5)*

An additional safeguard is that the judge would be required to give the jury such warning (if any) as the judge considers necessary to ensure that the fact that the order was made in relation to the witness does not prejudice the defendant. *(clause 7)*

Paragraph 2 in the *Explanatory Notes* states that breach of a witness anonymity order will fall to be dealt with as contempt of court. The Bill does not create any new offences.

### *a. Future, current and past proceedings*

The Bill deals with -

- future trials *(clause 9(1)(a))*
- trials which were ongoing when the Bill came into force and in which an anonymity order has already been made *(clause 9(1)(a) and 10)* and
- appeals against conviction in past cases where an anonymity order was made *(clause 11)*.

For trials which are already in progress, the test would be whether (if the witness has not already given evidence) an order could have been made under the new law, or (if the witness has already given evidence) the trial has been made unfair as a result. The Bill sets out the options available to the court in cases where the test is not satisfied. For appeals against past convictions, the appeal court must not treat a conviction as unsafe *solely* on the ground that the trial court had no power to make an anonymity order, but must do so if the order could *not* have been made if the new law had applied *and* that as a result of that order, the defendant did not receive a fair trial.

### *b. Special counsel*

Paragraph 28 of the *Explanatory Notes* states that, in all cases, parties in the case other than the applicant will have the right to make representations to the court, but the Government does not think it necessary to state this on the face of the Bill. It also states that the court has a general power to use special counsel to assist it in determining these applications, and that the role of a special counsel will be to represent the interests of the defendant (or, in defence applications, the interests of other defendants).

The Treasury Solicitor's Guide to the Role of Special Advocates and the Special Advocates Support Office (SASO) sets out the statutory and other bases for the use of special advocates.

> The House of Lords in R -v- H and C [2004] UKHL 3, [2004] 2 AC 134 held that 'special counsel' (in effect a Special Advocate) might exceptionally be appointed in a criminal case. The House held however that such an appointment will always be exceptional, never automatic; a course of last and never first resort; and should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant. (See particularly paragraphs 22 and 36-37 of the Judgment for the House's view of the use of special counsel). Special counsel are appointed by the Attorney General on request from the trial Judge. SASO has responsibility for

> providing formal instructions to special counsel in criminal cases on behalf of the Attorney General.[43]

In the case referred to, the special counsel had been appointed to assist on a public interest immunity ("PII") matter. In *Roberts v Parole Board*,[44] the House of Lords held (by a majority decision) that the Parole Board was entitled to use the Special Advocate procedure. Lord Woolf's conclusion was that:

> Where there should be, for public interest reasons that satisfy the board, non disclosure not only to the prisoner but also his representatives, and the board concludes that the nature of the proceedings and the extent of the non disclosure does not mean that the prisoner's right to a fair hearing will necessarily be abrogated, the board has either an implicit or express power to give directions as to withholding of information and, if it would assist the prisoner, to the use of [a specially appointed advocate].

Lord Bingham, dissenting, said that the proposed procedure would infringe general principles of procedural fairness and the ordinary principle governing the conduct of judicial inquiries that a party was entitled to disclosure of all materials which might be taken into account when reaching a decision adverse to him. Lord Steyn, also dissenting, referred to the absence of statutory authority for the Parole Board's "particular evisceration of the right to a fair hearing" and quoted Frankfurter J's observation that:

> "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."

adding the comment that:

> Even the most wicked of men are entitled to justice at the hands of the state.[45]

His view was that:

> The special advocate procedure strikes at the root of the prisoner's fundamental right to a basically fair procedure. If such departures are to be introduced it must be done by Parliament. It would be quite wrong to make an assumption that, if Parliament had been faced with the question whether it should authorise, in this particular field, the special advocate procedure, it would have sanctioned it.

Special Advocates who had been involved in terrorism cases expressed concern about "mission creep" in Special Advocates' responsibility when giving oral evidence to the Joint Committee on Human Rights last year. Nick Blake QC said:

> I am very concerned about the extension of this role into other areas which it is manifestly unsuitable for. Let me make plain that a Special Advocate does not ensure a fair trial. That is absolutely impossible. Proceedings with a Special Advocate are not a fair trial so suggestions at one stage in 2002 that we might

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43 see http://www.attorneygeneral.gov.uk/attachments/Special_Advocates.pdf
44 [2005] 2 AC 738
45 P783

> have criminal trials conducted in secret with Special Advocates is completely impossible, contrary, in my view, to the fundamental norm of fair trial values. There are then cases where people might want to use the system to deprive people of assets or property, or possibly the hope of liberty in the Parole Board context. That is particularly controversial, a judicial decision about future liberty, and I think those are extensions outside the area in which it was originally evolved. I view those extensions with very considerable concern.

Andy Nicol QC endorsed what had been said about the danger of Special Advocates becoming used in areas where in the past the opposing the appellant, defendant or litigant has been told everything that is put before the court.[46]

The Constitutional Affairs Select Committee said, in its 2005 report on the Special Immigration Appeals Commission, that there were defects with the Special Advocate system, stating at para 55 of the report:

> 55. Although the use of Special Advocates is being extended in the UK, we believe that it is one which should only be operated under the most exceptional circumstances which call for material to be kept closed.[47]

### *c. The New Zealand "template"*

The Bill has features in common with New Zealand's *Evidence Act 2006*, which had been referred to in the House of Lords judgments in Davis, and seen as a possible template for new legislation in this country.[48] One notable similarity is that the conditions for granting a witness anonymity order may be satisfied where special measures would be needed "to prevent any serious damage to property", in the absence of any threat to personal safety *(clause 4(3)(a)).* The New Zealand Attorney General's view was that –

> Having regard to the approach of the European Court to these matters generally, if faced with an anonymity order made on the basis of risk of damage to property only, it is highly likely that the Court would find that the accused's Convention rights were breached…
>
> it would be an exceptional case [in New Zealand] where the risk of property damage, without any accompanying risk to persons, could be the basis for a witness anonymity order. In most cases there will need to be some kind of risk to persons for the damage to property to be 'serious'.

The list of considerations to which the court must have regard is significantly different from the New Zealand list. Both lists include the general right of a defendant in criminal proceedings to know the identity of witnesses, and whether there are any other practical means of protecting the witness's identity. The New Zealand list also includes –

- the principle that witness anonymity orders are justified only in exceptional circumstances

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46 Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning, JCHR 19th Report of 2006-07, HL Paper 157/HC 394, Minutes of Evidence Q40

47

48 See part III and Annex

- the gravity of the offence
- the importance of the witness's evidence to the party's case
- whether there is other evidence that corroborates the witness's evidence.[49]

The New Zealand Evidence Act 2006 also gives the judge express power to appoint "independent counsel" to assist him or her, and to direct the independent counsel to inquire into any matters the judge thinks relevant.[50] For ease of reference, the relevant part of the Act is set out in the second part of the Annex.

### *d. Other issues*

As foreshadowed in the debates following the Government Statement:

- the Bill does not contain a sunset clause
- the new regime would apply in magistrates' courts and would not be limited to trials for more serious offences
- the Bill would have some retrospective effect insofar as it could affect the final outcome of criminal proceedings which had begun, or led to convictions, before the new regime came into force
- the Bill contains no special provision for appointing special counsel
- there is no requirement for an actual threat to have been made to any person
- the regime would apply to witnesses for the defence as well as those for the prosecution

# III Press comment on the Bill

*The Guardian* editorial on 4 July was critical of the Bill, saying:

> Experts report that the bill shows signs of hasty drafting and doubt that the courts will allow the government's plan for it to operate retrospectively so that defendants already convicted cannot appeal. The New Zealand system has more safeguards to protect defendants from malicious witnesses. The government promises that it is just an interim measure to save what is sometimes years of work in bringing cases to trial. The opposition, rightly, wants this undertaking made explicit in the bill.
>
> As to the fundamental question, it is hard to argue against anonymity if it really is the only way to bring to justice to the killer of Ben Kinsella, murdered in London last weekend, or of any of the many other victims of teenage killings, or the drug dealers who have been the target of undercover police operations. It is, however, a sad admission of failure, an acknowledgment that there are people in society who do not feel the law can protect them. It will also require a respect for the judges' determination to ensure a fair trial - something that this government has not always shown.[51]

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49 s111
50 s115
51 "Secrecy and laws", 4 July 2008, *The Guardian*

# IV Other jurisdictions

In January 2008, the UN Office Good Practices Guide published a compendium of good practices for the protection of witnesses in criminal proceedings involving organised crime. This was the result of examining 43 systems round the world. Relevant extracts are set out in the first part of the Annex.

Several references were made in the House of Lords judgments in *Davis* to statutory schemes allowing witness anonymity in New Zealand and the Netherlands.

## 1. The Netherlands

The Dutch Ministry of Justice has issued guidance for potential witnesses in Dutch courts, explaining when witness anonymity may be available:

> Threatening witnesses There is a special procedure for witnesses against whom threats have been made. This may only be applied in cases where the suspect does not know your identity and where it concerns serious criminal offences. There is a serious threat if your life, health, safety, family life or social-economic existence is reasonably expected to be at risk. The special procedure means that your identity is concealed from the suspect and his counsel. Furthermore, you do not have to appear at the public hearing, you only have to meet with the investigating judge. The investigating judge assesses whether he will comply with your request to make an anonymous statement. During the application of such a procedure and making the statement, a lawyer may assist you. The investigating judge must ensure that your statement is made in such a way that it will conceal your identity.If you have already told the police during the first interrogation that you would prefer not to make a statement due to threats, the police will consult the public prosecutor about applying for a special procedure as describe above.[52]

In a critical analysis of the legal practice in the Netherlands, published in 1997, A. Beijer and A.L. van Hoorn concluded that amendment of the Netherlands Witness Protection Act was needed as a result of recent findings of the European Court of Human Rights.[53] They said that -

> The idea that a personal confrontation between the accused and the witness is an essential requirement to a fair trial traditionally plays a secondary role in the Dutch criminal justice system.

They described how the Dutch Supreme Court had, in 1981, accepted anonymity as a means of protection for intimidated witnesses, leading to an intense debate over the acceptability of anonymity. The Dutch legislature had then been compelled to introduce a Witness Protection Act, following the decision of the European Court of Human Rights in Kostovski, where the court had held that there had been a violation of the defendant's right to a fair trial by basing his conviction to a decisive extent on anonymous statements. The Act, which came into force in 1994, placed restrictions on the use of

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52 http://english.justitie.nl/images/witness_tcm75-28554_tcm35-14160.pdf
53 http://www.library.uu.nl/publarchief/jb/congres/01809180/15/b25.pdf

anonymous testimony and did contain more procedural safeguards for the defendant than had previously been the case. The authors say that it is rare for an application to be refused, mainly because prosecutors were very reluctant to make applications for witness anonymity. It is used only "a few dozen times" a year. They also comment that it may often be difficult for the examining magistrate to give full supporting reasons for his decision, since the inclusion of details with respect to the intimidation may well lead to disclosure of the witness's identity. Similarly, great care has to be taken during appeals lest the identity of the witness is inadvertently revealed. The authors refer to literature showing that

> … anonymous testimony is considered to be an important potential source of miscarriages of justice. If the witness has been examined anonymously, then any information that could reveal his identity is suppressed. In other words, information that is of essential importance in assessing the reliability of the statement (could) be missing. Questions that the defence could have asked if the identity of the witness was known cannot be raised. Often, the questions which the defence is able to ask are left unanswered, so that continued questioning is difficult. The lack of response on the part of the defence also makes it easier for the witness to distort the facts or present the information as more certain than it actually is. In short, the acceptance of anonymous evidence can considerably limit the defendant's possibilities to defend himself. In the worst scenario, this could result in the defendant being convicted unjustly or punished too severely.
> Another point that has attracted much criticism is the difficult position in which the decision-making authority – the trial judge – is placed.

Their view is that the problems regarding anonymous witnesses are practically unsolvable, the (few) advantages of the use of anonymous witness statements do not outweigh their disadvantages, moreover complete anonymity is not a very effective means of protection, except when the defendant and the intimidate witness do not know each other.

## 2. New Zealand

The relevant provisions of the New Zealand *Evidence Act 2006* are set out in the second part of the Annex. The Act re-enacts the provisions relating to witness anonymity that were formerly contained in the *Evidence Act 1908* (as amended by the *Evidence (Witness Anonymity) Amendment Act 1997*). Before the Act became law, New Zealand's Attorney-General advised the Government on whether the provisions of the Bill were consistent with the New Zealand Bill of Rights Act 1990. The relevant part of his advice is set out in the third part of the Annex.

## 3. United States

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.(emphasis added)

The rule has been strictly applied: in *Alford v United States* 282 US 687 (1931) a conviction was quashed where a government witness had been excused from answering a question about where he lived. Both the United States and Canada have legislated for formal witness protection programmes.[54]

[54] http://news.bbc.co.uk/1/hi/uk/959518.stm

# V Annex

## A. Extracts from the UN Office Good Practices Guide

**2. Procedural protection**

In a number of countries, the court may decide to apply specific measures during the hearing of testimony to ensure that witnesses testify free of intimidation and fear for their lives. These measures can also be applied in sensitive cases (trafficking in persons, sex crimes, child witnesses and family crimes, among others) to prevent the revictimization of victim-witnesses by limiting their exposure to the public and the media during the trial.

They include:
(a) Use of a witness's pretrial statement instead of in-court testimony;
(b) Presence of an accompanying person for psychological support;
(c) Testimony via closed-circuit television or videoconferencing;
(d) Voice and face distortion;
(e) Removal of the defendant or the public from the courtroom;
(f) Anonymous testimony.

There are usually no statutory restrictions as to the types of crime or witness for which such measures can be allowed. Their application may be requested by the prosecutor and decided by the court after it has heard the opinion of the defence. The court's decision is usually open to appeal.

The elements typically taken into account by courts when ordering the application of procedural measures are:
(a) Nature of the crime (organized crime, sexual crime, family crime etc.);
(b) Type of victim (child, victim of sexual assault, co-defendant etc.);
(c) Relationship with the defendant (relative, defendant's subordinate in a criminal organization etc.);
(d) Degree of fear and stress of the witness;
(e) Importance of the testimony.

Procedural measures can be grouped into three general categories depending on their purpose:
(a) Measures to reduce fear through avoidance of face-to-face confrontation with the defendant, including the following measures:
(i) Use of pretrial statements (either written or recorded audio or audio-visual statements) as an alternative to in-court testimony;
(ii) Removal of the defendant from the courtroom;
(iii) Testimony via closed-circuit television or audio-visual links, such as videoconferencing;
(b) Measures to make it difficult or impossible for the defendant or organized criminal group to trace the identity of the witness, including the following measures:
(i) Shielded testimony through the use of a screen, curtain or two-way mirror;
(ii) Anonymous testimony;
(c) Measures to limit the witness's exposure to the public and psychological stress:
(i) Change of the trial venue or hearing date;

(ii) Removal of the public from the courtroom (in camera session);
(iii) Presence of an accompanying person as support for the witness.

Those measures may be used alone or in combination to produce a greater effect (for example, videoconferencing with shielding or anonymity with face distortion). In the application of procedural measures, due consideration should be given to balancing the witness's legitimate expectation of physical safety against the defendant's basic right to a fair trial. In jury trials, any restriction of a defendant's right to confront his or her accuser potentially introduces a bias in the trial. Any implying of the defendant's dangerousness may unfairly prejudice the jury, thereby undermining the presumption of innocence and giving disproportionate value to the protected witness's testimony. Trial courts must instruct jurors that the use of protective measures should not bias their decision on guilt or innocence. In addition, trial court judges should give general instructions as to the weighing of witness testimony to prevent the jury from overvaluing evidence given by a protected witness. Despite such cautionary instructions, when procedural measures are applied to reduce the witness's fear of a face-to-face confrontation with the defendant, they impose an additional burden on the accused to prove his or her innocence, or at least the absence of threat.

**(a) Pretrial statements**
In some countries, written or recorded audio or audio-visual statements given by a witness before an investigator, prosecutor, investigative judge or judge during the pretrial phase may be admissible as evidence in court in exceptional cases, for example, if the witness dies before the trial date.

Allowing pretrial statements as evidence in court when the witness is available to testify could be used as a protective measure insofar as it does not expose the witness to potentialintimidation by the defendant. Conversely, doing so could affect the defendant's right to a fair trial, preventing him or her from directly challenging the witness's testimony and raising additional points other than those recorded during the taking of the statement. As a result, pretrial statements could be allowed on the condition that the defence (counsel/ defendant) has the chance to examine and challenge the credibility of the statement and the granting of its admissibility. Those standards are easier to maintain when the statement is taken with the exclusive purpose of being used in court in the place of live witness testimony. In such cases, at the request of the prosecutor, the pretrial hearing of a witness can be conducted as an alternative to in-court witness testimony.

**(c) Shielding of the witness**
The use of screens, curtains or two-way mirrors may be ordered by the court to shield witnesses and their identity from the defendant and from the public and the media as a means to reduce potential intimidation. Screens should not prevent the judge, magistrates, jury and at least one legal representative of each party to the case (prosecution and defence) from seeing the witness and the witness from seeing them. Their use affects the right to face-to-face confrontation, with no opportunity for the defendant to see the expression or attitude of the witness and to challenge the latter's credibility on the basis of such appearance (see figure II). The right to cross-examination is not affected.

**(d) Removal of the defendant from the courtroom and in camera sessions**

In exceptional cases, the court may order the removal of the defendant from the courtroom as a precautionary measure to prevent intimidation of the witness during the taking of testimony or as a punitive measure in response to intimidation attempts by the defendant, such as verbal threats or threatening gestures made towards the witness. That measure has serious implications for the defendant's right to confrontation. To compensate, after the completion of testimony, the defendant may be allowed back in the courtroom to read the transcript of the testimony and dictate questions to the witness. The defendant would then be removed again from the courtroom to allow the witness to respond.

When the threat against the witness does not come from the defendant but from people who are not parties to the criminal proceedings but are related to the case, the court may exclude the public from the courtroom. That measure does not apply to the parties to the case.

**(e) Use of modern communications technology**

In article 18, paragraph 18, of the Organized Crime Convention, States parties are called upon to introduce domestic legislation allowing testimony by videoconference or through other technological means, such as devices and software for image and voice distortion, to prevent the revealing of a witness's identity to the defendant and the public. (a) Image and voice distortion techniques can be used to keep the witness's identity secret in situations where the defendant and the witness know each other. When the witness is present in the courtroom, the techniques may involve the use of simple means, such as a theatrical disguise to hide or alter the witness's facial characteristics (wigs, make-up, large sunglasses). Image distortion can also be combined with evidence via closed-circuit television, altering or blurring by electronic means the witness's face to prevent recognition. If the witness could be recognized merely by the sound of his or her voice, special electronic equipment can be used to distort the witness's voice while testifying behind a screen or via videoconference. Where the audio recording of court proceedings is mandatory, the voice-distorted testimony should be maintained in the official records. However, if the defendant knows the witness, the validity of such measures is limited as the defendant would be able to identify the witness from the substance of the testimony and describe to others the person against whom to retaliate;

(b) Videoconferencing refers to the use of interactive telecommunications technologies for witness testimony via simultaneous two-way video and audio transmissions. It allows the options of the witness testifying from a room adjoining the courtroom via closed-circuit television or from a distant or undisclosed location through an audio-visual link. Videoconferencing offers the benefit of enabling the witness to be absent from the place where the proceedings are being held but at the same time to see and hear – and be seen and heard by – the judge, magistrates or jury and the other parties. The testimony is broadcast to the courtroom where the prosecutor, defendant and public are present. As a protective measure, it reduces the threat to the witness's security and the danger of intimidation by the defendant in the courtroom. Where total anonymity is required, videoconferencing may be used in conjunction with screens or image distortion. Questions by the prosecutor or the defence counsel are relayed by microphone to the witness, who usually answers through voice distortion.

A number of countries have designated special courtrooms in the regular court system for the holding of trials of cases involving organized crime and have equipped them with

the latest communications technology. In the Republic of Korea, a special, new courthouse is being built specifically to accommodate the taking of remotely given evidence via video link. Although the use of modern communications technology, especially videoconferencing, depends upon the financial resources available, it is not prohibitively expensive.

There are countries where the use of electronic means to hide the witness's facial or other characteristics is not allowed because they are considered to limit the right of face-to-face confrontation and to prevent the jury or magistrates from gaining an impression of the witness's relevant physical attributes, for example in cases where it is claimed that the defendant used force to restrain the witness.

**(f) Anonymous witnesses**

Keeping some or all of a witness's identity details hidden from the defence and the public can be an effective means of protection in the rare cases where the substance of the testimony itself does not identify the witness to the defence and the testimony is corroborated by other evidence. The measure is usually granted by the court at the request of the witness, and the ruling can usually be appealed and is revocable.

Countries where anonymous testimony is allowed:

(a) Keep records of the witness's identity separately from the transcript of the trial and in a secure location;

(b) Sanction or prosecute in accordance with the law any attempt to reveal an anonymous witness's identity.

(i) Partial or limited anonymity

Where partial or limited anonymity is granted, the witness may be cross-examined in court by the defence but is not obliged to state his or her true name or other personal details, such as address, occupation or place of work. That measure is particularly useful when hearing the testimony of undercover agents and members of surveillance teams who would be in danger if their real identities became known to the public. Such a witness usually testifies in court under the assumed name that he or she was known by during the operation but states his or her true function (police officer, investigator etc.).

(ii) Total or complete anonymity

When total or complete anonymity is granted by the court, all information relating to the identity of the witness remains secret. The witness appears in court but testifies behind a shield, disguised or through voice distortion. In practice, that measure is useful only in cases where witnesses were innocent bystanders of the crime, and therefore such cases rarely involve prosecutions of gang leaders, who typically order others to carry out their violent schemes. If the defendant knows the witness, then maintaining complete anonymity would be unrealistic, as the defendant can readily identify the witness through his or her testimony or the context of the information provided. Total anonymity is an exceptional measure and may have serious implications for the defendant's right to a fair and open trial, face-to-face confrontation and right to crossexamine a witness. It places limitations on the right to challenge the genuineness, accuracy and sincerity of the testimony. The defence in such cases may not be able to verify:

(a) Any relationship with the defendant that may be the cause of a prejudiced attitude;

(b) The origin of the knowledge;

(c) Any personal history that may affect the witness's credibility (mental condition, criminal record, habitual lying etc.).

In view of the impact that the use of anonymous testimony has on the rights of the defendant, its application should be established statutorily with strictly defined conditions that balance the need for protection with the defendant's right to a fair trial.15 In countries where total anonymity is used
(a) A conviction needs to be corroborated by other material evidence and cannot be based solely or to a decisive extent on the anonymous testimony;
(b) The defendant should be allowed to put questions directly to the witness during testimony or through the defence counsel, in written form or otherwise;
(c) The reasons for maintaining the secrecy of the witness's identity should be revisited at different stages of the criminal proceedings and after their completion;
(d) The decision-making authority (investigative judge, court, other) should verify that there is a witness and should clarify circumstances that may affect the witness's reliability (mental illness, bias against the witness etc.).

The handling by court staff of anonymous witnesses' data is of particular importance. Court proceedings, evidence and information related to the case are typically handled by a number of people. Court staff responsible for the safekeeping of such information and for entering such information into the record must be carefully selected.

The jurisprudence of the European Court of Human Rights on implementation of article 6 (right to a fair trial) of the Convention for the Protection of Human Rights and Fundamental Freedoms (United Nations, Treaty Series, vol. 213, No. 2889) has created a set of conditions for the use of anonymous witnesses that are incorporated in the respective legislation and court practices of the 46 States parties to the Convention and that limit the weight or probative value that may be placed on such evidence (see European Court of Human Rights, Kostovski v. The Netherlands, Judgement of 20 November 1989, Application No. 11451/85, Series A, No. 166; Windisch v. Austria, Judgement of 27 September 1990, Application No. 12489/86, Series A, No. 186; Lüdi v. Switzerland, Judgement of 15 June 1992, Application No. 12433/86, Series A, No. 238; and Doorson v. The Netherlands, Judgement of 26 March 1996, Application No. 20524/92, Reports 1996-II).

In Germany, when total anonymity is granted, a law enforcement officer gives the evidence in court in place of the witness, stating what the witness saw. With the exception of information relating to the identification details of the witness, there are no limitations to the right of the defence to challenge the testimony as relayed by the law enforcement officer. Additionally, the defence has the right to submit in writing questions to be put to the anonymous witness by the reporting officer, who will subsequently report the answers to the court. The Federal Court of Justice has ruled that, because of its largely hearsay character, such testimony has limited value unless otherwise corroborated by other material evidence (Council of Europe. Terrorism: Protection of Witnesses and Collaborators of Justice (Strasbourg, Council of Europe Publishing, 2006)).

An example of the serious legal issues raised by the use of anonymous witnesses is the criticism that the International Tribunal for the Former Yugoslavia received for allowing for the first time a totally anonymous witness to testify in the Tadic case (Prosecutor v. Dusko Tadic, Case No. IT-94-1-T). Tadic was arrested in Germany on 12 February 1994,

and charged in connection with crimes committed in 1992 in the Omarska prison camp in Bosnia and Herzegovina. Pursuant to a request by the International Tribunal for the Former Yugoslavia, Germany transferred custody of Tadic to the Tribunal in April 1995. The Tribunal indicted Tadic on 132 counts of crimes against humanity and war crimes. During the trial, the prosecutor filed a motion requesting protective measures for seven witnesses, including total anonymity for some of them (testimony via oneway closed-circuit television, voice and image distortion, non-disclosure of identifying data, sealing and removal from court records of such data, testimony during in camera sessions of the chambers). The trial chamber's decision by majority vote (2 to 1) to grant the prosecution's motion was severely criticized as limiting the right of the defendant to a fair trial (see http://www.un.org/icty/cases-e/index-e.htm, which also contains the separate opinion of Judge Stephen on the prosecutor's motion requesting protective measures for victims and witnesses). No trial chamber of the International Tribunal for the Former Yugoslavia or the International Criminal Tribunal for Rwanda has allowed an anonymous witness since then. On 26 January 2000, Dusko Tadic was convicted and sentenced to 20 years of imprisonment.

# B. New Zealand Legislation

**Evidence Act 2006 No 69 (as at 03 September 2007), Public Act**
**Part 3 Trial process › Subpart 5—Alternative ways of giving evidence**

*Giving of evidence by anonymous witnesses*

**110 Pre-trial witness anonymity order**

(1) This section and section 111 apply if a person is charged with an offence and is to be proceeded against by indictment.

(2) At any time after the person is charged, the prosecution or the defendant may apply to a Judge for an order—

> (a) excusing the applicant from disclosing to the other party prior to the preliminary hearing the name, address, and occupation of any witness, and (except with leave of the Judge) any other particulars likely to lead to the witness's identification; and
>
> (b) excusing the witness from stating at the preliminary hearing his or her name, address, and occupation, and (except with leave of the Judge) any other particulars likely to lead to the witness's identification.

(3) The Judge must hear and determine the application in chambers, and—

> (a) the Judge must give each party an opportunity to be heard on the application; and
>
> (b) neither the party supporting the application nor the witness need disclose any information that might disclose the witness's identity to any person (other than the Judge) before the application is dealt with.

(4) The Judge may make the order if he or she believes on reasonable grounds that—

> (a) the safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed before the trial; and
>
> (b) withholding the witness's identity until the trial would not be contrary to the interests of justice.

(5) Without limiting subsection (4), in considering the application, the Judge must have regard to—

> (a) the general right of a defendant to know the identity of witnesses; and
>
> (b) the principle that witness anonymity orders are justified only in exceptional circumstances; and
>
> (c) the gravity of the offence; and

(d) the importance of the witness's evidence to the case of the party who wishes to call the witness; and

(e) whether it is practical for the witness to be protected prior to the trial by any other means; and

(f) whether there is other evidence that corroborates the witness's evidence.

(6) A pre-trial witness anonymity order may be made by—

(a) a District Court Judge who holds a warrant under the District Courts Act 1947 to conduct trials on indictment:

(b) if the preliminary hearing is held in a Youth Court, a Judge referred to in section 274(2)(a) of the Children, Young Persons, and Their Families Act 1989:

(c) a High Court Judge.

**111 Effect of pre-trial witness anonymity order**

If a pre-trial witness anonymity order is made under section 110,—

(a) the party who applied for the order must give the Judge the name, address, and occupation of the witness; and

(b) during the course of the preliminary hearing, no lawyer, officer of the court, or other person involved in the preliminary hearing may disclose the name, address, or occupation of the witness, or any other particulars likely to lead to the witness's identification; and

(c) during the course of the preliminary hearing,—

(i) no oral evidence may be given, and no question may be put to any witness, if the evidence or question relates to the name, address, or occupation of the witness who is subject to the order; and

(ii) except with leave of the Judge, no oral evidence may be given, and no question may be put to any witness, if the evidence or question relates to any other particulars likely to lead to the identification of the witness who is subject to the order; and

(d) no person may publish, in any report or account relating to the proceeding, the name, address, or occupation of the witness, or any other particulars likely to lead to the witness's identification.

**112 Witness anonymity order for purpose of High Court trial**

(1) This section and section 113 apply if a person is charged with an indictable offence and is committed to—

(a) the High Court for trial; or

(b) a District Court for trial and is the subject of an application under section 28J of the District Courts Act 1947 to transfer the proceeding to the High Court.

(2) At any time after the person is committed for trial, the prosecution or the accused may apply to a High Court Judge for a witness anonymity order under this section.

(3) The Judge must hear and determine the application in chambers, and—

(a) the Judge must give each party an opportunity to be heard on the application; and

(b) neither the party supporting the application nor the witness need disclose any information that might disclose the witness's identity to any person (other than the Judge) before the application is dealt with.

(4) The Judge may make a witness anonymity order if satisfied that—

(a) the safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed; and

(b) either—

(i) there is no reason to believe that the witness has a motive or tendency to be dishonest, having regard (where applicable) to the witness's previous convictions or the witness's relationship with the accused or any associates of the accused; or

(ii) the witness's credibility can be tested properly without disclosure of the witness's identity; and

(c) the making of the order would not deprive the accused of a fair trial.

(5) Without limiting subsection (4), in considering the application, the Judge must have regard to—

(a) the general right of a defendant to know the identity of witnesses; and

(b) the principle that witness anonymity orders are justified only in exceptional circumstances; and

(c) the gravity of the offence; and

(d) the importance of the witness's evidence to the case of the party who wishes to call the witness; and

(e) whether it is practical for the witness to be protected by any means other than an anonymity order; and

(f) whether there is other evidence that corroborates the witness's evidence.

**113 Effect of witness anonymity under section 112**

If a witness anonymity order is made under section 112,—

(a) the party who applied for the order must give the Judge the name, address, and occupation of the witness; and

(b) the witness may not be required to state in court his or her name, address, or occupation; and

(c) during the course of the trial no lawyer, officer of the court, or other person involved in the proceeding may disclose—

(i) the name, address, or occupation of the witness; or

(ii) except with leave of the Judge, any other particulars likely to lead to the witness's identification; and

(d) during the course of the trial—

(i) no oral evidence may be given, and no question may be put to any witness, if the evidence or question relates to the name, address, or occupation of the witness who is subject to the order; and

(ii) except with leave of the Judge, no oral evidence may be given, and no question may be put to any witness, if the evidence or question relates to any other particulars likely to lead to the identification of the witness who is subject to the order; and

(e) no person may publish, in any report or account relating to the proceedings, the name, address, or occupation of the witness, or any other particulars likely to lead to the witness's identification.

**114 Trial to be held in High Court if witness anonymity order made**

(1) If an application to transfer a proceeding to the High Court is made under section 28J of the District Courts Act 1947 and a witness anonymity order is made under section 112 in that case before the application is dealt with, the Judge considering the application must transfer the proceeding to the High Court.

(2) In any other case where a witness who may be called to give evidence in a criminal trial is the subject of a witness anonymity order made under section 112, the trial must be held in the High Court.

(3) This section has effect despite anything in sections 28A and 28J of the District Courts Act 1947.

**115 Judge may appoint independent counsel to assist**

(1) For the purposes of considering an application for a witness anonymity order under section 112, the Judge may appoint an independent counsel to assist the Judge and,

without limiting the directions the Judge may give, the Judge may direct the independent counsel to—

(a) inquire into the matters referred to in section 112(4)(a) and (b) and any other matters the Judge thinks relevant; and

(b) report the counsel's findings to the Judge.

(2) The party who applied for the witness anonymity order must make available to the independent counsel all information relating to the proceeding that is in the party's possession.

(3) Fees for professional services provided by counsel appointed under this section, and reasonable expenses incurred,—

(a) may be determined in accordance with regulations made under section 201; and

(b) are payable from money appropriated by Parliament for the purpose.

(4) The bill of costs submitted by a counsel appointed under this section must be given to the Registrar of the High Court in which the proceeding was heard, and the Registrar may tax the bill of costs.

(5) If the counsel is dissatisfied with the decision of the Registrar as to the amount of the bill, the counsel may, within 14 days after the date of the decision, apply to a Judge of the court to review the decision, and the Judge may make any order varying or confirming the decision that the Judge considers fair and reasonable.

**116 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 preliminary hearing or 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 at the preliminary hearing or 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 206 of the Summary Proceedings Act 1957 (which confers power to deal with contempt of court); or

(b) section 138 of the Criminal Justice Act 1985 (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.

**117 Variation or discharge of witness anonymity order during trial**
At any time before a witness gives evidence during a trial, a High Court Judge may, on his or her own motion or on the application of either party, vary or discharge a witness anonymity order made for the purposes of the proceeding under section 112.

**118 Witness in police witness protection programme**
If, at any time after the events that are the subject of a charge, a witness under a police witness protection programme assumes a new identity, the witness may not be required in any proceeding concerning the charge to disclose his or her assumed name or any particulars likely to disclose his or her new identity.

**119 Offences**
(1) A person commits an offence and is liable on conviction on indictment to a term of imprisonment not exceeding 7 years who, with knowledge of a pre-trial witness anonymity order made under section 110, intentionally contravenes section 111(b) or (d).

(2) A person commits an offence and is liable on conviction on indictment to a term of imprisonment not exceeding 7 years who, with knowledge of a witness anonymity order made under section 112, intentionally contravenes section 113(c) or (e).

(3) If a person contravenes section 111(b) or (d) or 113(c) or (e), and that contravention does not constitute an offence against subsection (1) or (2) of this section, the person commits an offence and is liable on summary conviction,—

(a) in the case of an individual, to a fine not exceeding $2,000:

(b) in the case of a body corporate, to a fine not exceeding $10,000.

(4) Nothing in this section limits the power of any court to punish any contempt of court.

*Signature of statements by assumed name*

**120 Persons who may sign statements by assumed name**
(1) A deposition or other written statement of evidence given by an undercover police officer may be given and signed in the name by which the officer was known during the relevant investigation.

(2) A deposition or other written statement given by a witness who is the subject of an application for an anonymity order made under section 112, or who is the subject of an anonymity order made under section 110 or 112, may be given and signed by the witness using the term witness followed by an initial or mark.

(3) This section overrides any contrary provision in this Act or any other enactment.

## C. Advice on the New Zealand Evidence Bill

5 April 2005

Attorney-General

LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
EVIDENCE BILL Our Ref: ATT114/1298(13)

Witness anonymity orders

The Bill re-enacts the provisions relating to witness anonymity that are presently contained in the Evidence Act (as amended by the Evidence (Witness Anonymity) Amendment Act 1997).
The applicable rights

The right to a fair trial is obviously relevant (s 25(a)). In addition, the right of an accused to know the identity of witnesses for the prosecution is part of the protections provided for in the Bill of Rights. Although not expressly stated, it can be seen to be part of the rights in s 25 in particular ss 25(a) (right to a fair and public hearing); s 25(e) (right to present a defence); and s 25(f) (right to examine the witnesses for the prosecution). It is also possibly part of the rights in s 24(d) (to have adequate time and facilities to prepare a defence).
It is not necessary to deal with each of these rights separately because, in this context, they raise similar considerations.
Fair trial and the right to know the identity of witnesses

There would clearly be Bill of Rights difficulties with any legislative provision which took away an individual's right to a fair trial. As Thomas J (dissenting) said in R v Hines,[42] "the right to a fair trial is sacrosanct".[43] The bill is satisfactory in this respect as the making of the various orders requires consideration of the effect on fair trial.
As Thomas J also noted, a fair trial is not itself an absolute concept.[44] Hence, the various safeguards which are designed to ensure a fair trial are not absolute. As stated by Richardson P:[45]
Assessment of the values underlying the right to a fair trial by everyone charged with an offence must also recognise the public interest in the effective prosecution of criminal charges and the protection of the criminal process and witnesses and their families from intimidation or other matters affecting the adducing of their evidence.

In their judgments in Hines, their Honours indicated that witness anonymity provisions then being considered by the Law Commission could be consistent with the BORA.
Blanchard J was not prepared to change the law but said that if he was, he would depart from Hughes and declare,[46]
"that the identity of a prosecution witness may be withheld (subject to its being made known to the presiding Judge) if the Court determines, after independent investigation concluded on its behalf and a voir dire, (a) that the trial will remain fair to the accused and (b) that the revelation of the witness's identity will place the witness or any other person at serious risk of physical harm."

Both of the two dissenting judges (Gault and Thomas JJ) would allow limits on the right of confrontation. Gault J placed importance on the need for balance between the relevant rights. Thomas J similarly referred to the other rights involved including those of witnesses to life, not to be subjected to disproportionately severe treatment, and to freedom of movement and residence in New Zealand. Gault J would apply the following criteria:[47]

88.1 The decision should be one for the courts to determine in particular cases with only general guidance from the legislature.

88.2 There must be an overriding constraint upon the power, that it must not in the particular case deprive an accused of a fair trial.

88.3 Permission to withhold identity should be given only where it is necessary. Other means of protecting witnesses must be shown as likely inadequate.

88.4 Anonymity should not be given in cases of witnesses whose credibility reasonably is in issue.

88.5 The Court should be satisfied (and he favours independent inquiry) that there are no aspects of the background of the witness potentially undermining of general credibility.

Thomas J similarly referred inter alia to the need for the court to be satisfied that the witness or other persons will be exposed to the risk of serious physical harm; for consideration to have been given to other means of protection; and that the Judge would have to be satisfied that the anonymity order was in the interests of justice.

The Law Commission in its discussion paper on "Witness Anonymity" (Preliminary Paper 29) similarly reached the provisional view that a High Court judge should be able to make a witness anonymity order in relation to indictable criminal proceedings.

The current provisions of the Evidence Act were considered by the Court of Appeal in R v Atkins [2000] 2 NZLR 46. In that case the Court of Appeal was considering the granting of witness anonymity orders on the basis of the safety of the witnesses and other persons. The Court emphasised that the cases in which a witness anonymity should be made 'will be rare cases, based on their own particular circumstances…. The power is to be used sparingly.' Nevertheless the Court did not make any adverse comment as to the consistency of the current witness anonymity provisions with the BORA.

The current provisions are essentially being re-enacted. The discretionary nature of the order is such that the courts must exercise the discretion consistently with the BORA. As indicated by the Court of Appeal as being appropriate, the provisions provide for general guidance but ultimately it is up to the court to decide whether an order is appropriate in a particular case. Accordingly, the provisions are not inconsistent with the BORA.

'Serious damage to property'

The provisions enable a court to make an order where:

93.1 The safety of the witness or of any other person is likely to be endangered; or

93.2 There is likely to be serious damage to property.

'Serious damage to property' is not defined. Accordingly, it will have to be interpreted consistently with the BORA. In most cases involving large-scale damage to property,

there will be some accompanying risk of physical harm whether it is to the occupants or users of the property or to rescuers.
Having regard to the comments of the Court of Appeal and the international jurisprudence, it would have to be an exceptional case for the discretion to be exercised consistently with BORA where there is no risk of physical harm to a person. In circumstances where there is no risk of physical harm it would be very difficult to satisfy the criteria enunciated by Blanchard, Thomas or Gault JJ.
In terms of international jurisprudence, Dutch law includes a power to make witness anonymity orders on the basis of threatened 'socio-economic' existence.[48] The European Court of Human Rights has considered anonymity orders made under the Dutch provisions on three occasions. Each case considered by the European Court has concerned orders made for the protection of the personal safety of witnesses. Even then, in two out of the three cases, the European Court found that the applicant's Convention rights had been breached.[49]
Whilst accepting that witness anonymity orders may be appropriate in some circumstances, the European Court has repeatedly stated:
All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs 1 and 3(d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage.

Having regard to the approach of the European Court to these matters generally, if faced with an anonymity order made on the basis of risk of damage to property only, it is highly likely that the Court would find that the accused's Convention rights were breached.
Furthermore, as the Court of Appeal has done in Hines, the European Court has made it clear that the protection of witnesses through witness anonymity orders can justify restricting the right to a fair trial by reason of other rights in the Convention.[50] However, whilst the European Convention includes the right to respect for private and family life (Article 8) and the right to protection of property (Article 1 to the First Protocol), the BORA does not provide for comparable rights.
Accordingly, even if the European Court were to consider that protection of property rights outweighed an accused's rights to a fair trial and equality of arms (which is highly doubtful), such a decision would have no direct application in New Zealand. There are no comparable property rights in the BORA. Rather, in New Zealand, it will be the victim's right to a fair trial that will need to be balanced against that of the accused.
In conclusion, it would be an exceptional case where the risk of property damage, without any accompanying risk to persons, could be the basis for a witness anonymity order. In most cases there will need to be some kind of risk to persons for the damage to property to be 'serious'. However, given the interpretative requirement in s6 of the BORA and the highly discretionary nature of the power to make witness anonymity orders, I do not think the provisions are inconsistent with the BORA.