

CORONERS AND JUSTICE ACT 2009

EXPLANATORY NOTES

THE ACT

Commentary on Sections

Part 3 - Criminal evidence, investigations and procedure

Chapter 2: Anonymity of witnesses

Section 86: Witness anonymity orders

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

Section 87: Applications

461. *Subsection (1)* provides that applications for a witness anonymity order may be made by defendants as well as prosecutors. This reflects the position in the case of *Davis*, where the Court of Appeal allowed a defence witness as well as prosecution witnesses to give evidence anonymously. The Government expects that defence applications are most likely to be made in multi-handed cases (that is, where there is more than one defendant) where one defendant does not wish a witness's identity to be known by the other defendant or defendants. But this subsection does not exclude the possibility of a defence application in a single-handed case.
462. *Subsection (2)* provides that, where an application for a witness anonymity order is made by the prosecutor, the identity of witnesses may be withheld from the defence before and during the making of the application. This ensures that the operation of the legislation is not impeded by procedural challenges to the power of the prosecution to withhold this information pending the court's determination of the application for the witness anonymity order.

463. Subsection (2) therefore provides that prosecutors are under no obligation to disclose the witness's identity to the defence at the application stage but must inform the court of the identity of the witness. Similar provision is made for the defence in *subsection (3)*, except that the defence must always disclose the identity of the witness to the prosecutor and the court but do not have to disclose it to any other defendant.
464. In addition, *subsection (4)* provides that where the prosecution or the defendant proposes to make an application for a witness anonymity order, information that might identify the witness can be taken out of any relevant material which is disclosed before the application has been determined. This does not, however, override the obligation to disclose the identity of the witness to the court (in the case of a prosecution application) or to the court and prosecutor (in the case of a defence application).
465. Subsection (2) also enables the court to direct that it should not be informed of the identity of the witness. This provides for the possibility that, whilst in the vast majority of cases the court will require to be informed of the witness's identity, there may be rare cases (particularly national security related cases) where even the court will neither need nor wish to know it.
466. *Subsections (6) and (7)* set out two basic principles. *Subsection (6)* states that on an application for a witness anonymity order every party to the proceedings must be given the opportunity to be heard. However, it may be necessary in the course of making the application to reveal some or all of the very information to which the application relates: for example, the name and address of the witness who is fearful of being identified. So *subsection (7)* provides that the court has the power to hear any party without a defendant or his or her legal representatives being present. This reflects the existing practice, by which prosecution applications are expected to be made in the absence of any other parties in the case, with the defence able to make representations later at a hearing with the prosecution (and possibly other defendants) present. It is expected that defence applications will be permitted without other defendants being present but will always be made in the presence of the prosecution.
467. *Subsection (8)* confirms that this section does not affect the power of the Criminal Procedure Rule Committee to set out further procedures relating to witness anonymity in the Criminal Procedure Rules.

Section 88: Conditions for making order

468. *Subsection (2)* requires three conditions to be met before a court can make a witness anonymity order. They are described as conditions A, B and C.
469. *Subsection (3)* sets out condition A, which is that the measures to be specified in the order are necessary for one of two reasons. The first is to protect the safety of the witness or another person or to prevent serious damage to property. There is no requirement for any actual threat to the witness or any other person. The second is to prevent real harm to the public interest. This will cover the public interest in national security and in the ability of police or other agencies to conduct undercover work.
470. *Subsection (4)* sets out condition B, which is that the effect of the order would be consistent with the defendant receiving a fair trial. Thus the grant of the order must be compliant with Article 6 of the ECHR.
471. *Subsection (5)* sets out condition C, which is that the witness's testimony is such that in the interests of justice the witness ought to testify and that either the witness would not testify if the order was not made or there would be real harm to the public interest if the witness were to testify without an order being made (such harm might, for example, arise as a result of the identity of a member of the security services being made public).
472. *Subsection (6)* specifies that in determining for the purposes of condition A whether the order is necessary to protect the safety of the witness, another person or to prevent damage to property, the court must have regard to the witness's reasonable fear of death

or injury either to himself or herself or to another person (“we’ll get your kids”) or reasonable fear that there would be serious damage to property (“we’ll fire-bomb your house”).

Section 89: Relevant considerations

473. *Subsection (1)* requires the court to have regard to the considerations set out in *subsection (2)* when deciding whether to make an order. The court must also have regard to any other factors it considers relevant.
474. The considerations in *subsection (2)* are the defendant’s general right to know the identity of a witness, the extent to which credibility of the witness is relevant in assessing the weight of the evidence he or she gives, whether the witness’s evidence might be the sole or decisive evidence, whether the witness’s evidence can be properly tested without knowing the witness’s identity, whether the witness has a tendency or any motive to be dishonest and whether alternative means could be used to protect the witness.

Section 90: Warning to jury

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

Section 91: Discharge or variation of order

476. The Act does not provide for a right of appeal against the making of, or refusal to make, a witness anonymity order. The Government considers that existing appeal procedures are sufficient. Thus in the case of the prosecutor, the appeal against a terminating ruling under Part 9 of the 2003 Act or Part IV of the Criminal Justice (Northern Ireland) Order 2004 is available. In the case of a defendant, the matter may be raised on appeal against conviction. Section 91 does however provide for the court that made an order to discharge or vary it in those proceedings, either on an application by a party to the proceedings or on its own initiative. This power may be used where, for example, a witness who previously gave evidence anonymously is content for the anonymity to be lifted.
477. Under *subsection (3)* the court must give every party to the proceedings an opportunity to be heard before determining an application for variation or discharge of an order or before varying or discharging an order on its own initiative.

Section 92: Discharge or variation after proceedings

478. This section provides the court that makes a witness anonymity order with the power to discharge or vary that order after the proceedings have finished. The court may vary or discharge the order either on an application by a party to the proceedings or on an application made by the witness. This may be appropriate for example, if a considerable period of time has elapsed since the trial and the circumstances of the witness have changed.
479. *Subsection (4)* requires that the court, prior to discharging or varying a witness anonymity order, provide all parties to the proceedings and the witness the opportunity to be heard unless it is not reasonably practicable to do so, for example, if it is not possible to trace the person concerned.

Section 93: Discharge or variation by appeal court

480. This section provides that an “appeal court” (defined in *subsection (6)* as the Court of Appeal, Court of Appeal in Northern Ireland or Court Martial Appeal Court) can discharge or vary a witness anonymity order made in the proceedings which gave rise to the appeal. Under this Chapter as under the CEWAA, an appeal court already has the power to make a witness anonymity order itself. However, this power does not of itself give it the power to discharge or vary an order made by the lower court.
481. This section gives an appeal court the flexibility it requires. There is no provision for an application procedure: it is intended that the power will be exercised by the appeal court of its own motion, how and when it thinks fit. The provision also applies to witness anonymity orders made under the CEWAA (see paragraph 16 of Schedule 22).
482. *Subsection (1)* sets out that the power applies where a court has made a witness anonymity order in a criminal trial and the defendant has been convicted, found not guilty by reason of insanity or been found to be under a disability and to have done the act charged. The new power will therefore apply in any appeal against conviction or other finding.
483. *Subsection (2)* gives an appeal court the discretion to take into account a wide range of factors before discharging or varying an anonymity order.
484. *Subsection (3)* requires the appeal court to hear any representations made by the parties to the trial proceedings, unless it would be impracticable to communicate with them. This mirrors the duty of the lower court to hear representations from the parties before making, discharging or varying an order during the course of the trial.
485. Under *subsection (4)* the duty to hear representations does not fetter the appeal court’s power to hear a party in the absence of one or more of the defendants and their legal representatives.

Section 94: Special provisions for service courts

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

Section 95: Public interest immunity

487. This section provides that this chapter of the Act does not affect the common law rules on public interest immunity.

Section 96: Power to make orders under the 2008 Act

488. This section repeals sections 1 to 9 and 14 of the CEWAA, which provide for making a witness anonymity order under that Act. Paragraphs 16 and 17 of Schedule 22 preserve the effect of a witness anonymity order made under the CEWAA before 1 January 2010 and set out how such orders are to operate.

Section 97: Interpretation of this Chapter

489. This section defines terms which are used in this Chapter of the Act. *Subsection (2)* ensures that where the court that makes a witness anonymity order is a magistrates’ court, it will be open to any magistrates’ court in the same local justice area (or the same petty sessions district in Northern Ireland) to discharge or vary the order, not only

*These notes refer to the Coroners and Justice Act 2009
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the court that originally made the order. There might otherwise be difficulties if, for example, a member of the court that made the order were to retire.