

Criminal Evidence (Witness Anonymity) Bill

Parliamentary Stages

8th and 9th July, 2008

Introduction

Whilst we acknowledge the perceived need for emergency legislation following the House of Lords decision in *R v Davis*¹, we are concerned that the urgent nature of this Bill does not override the requirement for proper consideration of the important issues involved in relation to witness anonymity. Whilst we appreciate that Parliament is to be asked to reconsider these provisions at a later date, we are concerned about what will be the position of cases that have been dealt with in the interim, if the legislation is subsequently amended.

We acknowledge that in a very limited number of cases witness anonymity may be necessary, subject to safeguards in the trial process to ensure that this does not disproportionately impact on the defendant's right to a fair trial. However, the Society believes that Witness Anonymity Orders (WAOs) should only be used in the most serious and exceptional cases. The Society observes that in the past convictions have been achieved without this legislation in notorious cases, for example *R v Kray* and others, and *R v Richardson* and others.

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¹ [2008] UKHL 36, [2008] WLR (D) 196

Right to a Fair Trial

It is a fundamental aspect of the right to a fair trial that the defendant in a criminal trial is able to challenge the evidence adduced against him or her. Knowledge of the witnesses' identity is usually essential to enable an effective challenge. If the defendant does not know the identity of a witness, they will be unable to provide their legal team with instructions to enable effective cross-examination. This may have the effect of emasculating the defence case to such an extent that the defendant's right to a fair trial is severely compromised.

The Law Society urges parliamentarians to ensure that the legislation is robust enough to prevent witness anonymity becoming a routine request that is made in ordinary cases without very good reason. We are very concerned to ensure that these orders will only be used in the most exceptional of cases.

Crown Court Trials Only

We cannot envisage any situation whereby anonymity would be appropriate in anything other than the most serious of cases, and by this we mean homicide, terrorism, and cases of extreme violence. It therefore follows that AWOs should only be able to be made in the Crown Court, in the most serious class of cases.

We understand that youth cases involving gangs may involve consideration of granting witnesses anonymity. Where issues of anonymity arise in serious Youth Court cases we suggest that, rather than Youth Courts having jurisdiction to make anonymity orders, the case is committed for trial in the Crown Court, or, alternatively, that any applications for anonymity are heard by a Crown Court judge in advance of a Youth Court trial. The facilities available in the average Crown Court for witness accommodation are, in any event, likely to be better than those in Youth/Magistrates' Court buildings.

Conflicts of Interest

A serious problem the Law Society envisages is that solicitors could be placed in invidious positions relating to potential or actual conflicts of interest. As a case develops, more information may come to light by which the solicitor comes to realise that an actual conflict exists because, for example, they have previously acted for the anonymous witness and could be in possession of confidential information. This could place solicitors in breach of their professional rules.

We would urge the Ministry of Justice, if this Bill becomes law, to work with the Law Society and other interested parties to develop a working protocol or Code of Practice to manage cases in which AWOs are made.

Comments on the drafting of the Bill

Witness Anonymity Orders - Clause 2

Clause 2(4) (a) requires clarification. Does the phrase 'the members of the court' refer to the justices sitting with a judge, or the members of an appellate court? Does it include the advocates acting for the CPS and for the defence?

Application - Clause 3

We are very concerned that clause 3(2) requires the defendant to inform the prosecutor of the identity of the witness in relation to whom they seek an order. How will this sit with the duty of disclosure the prosecutor will then owe to other defendants? What if the defence witness has reasonable grounds to fear reprisals and a threat to their safety from corrupt police officers? While it may be that in some cases it is appropriate for the prosecution to be notified, there is no provision to allow for circumstances where this would be inappropriate. The principle of 'equality of arms' is displaced to a disproportionate degree by this provision.

Conditions for making order - Clause 4

The conditions for making an order in the Bill are very broad. The test of necessity in clause 4 (3) is too low in that, by condition A in clause 4(3) (a), it must be necessary to 'protect the safety of the witness...', but there is no requirement that any actual threat has been made (Explanatory Note paragraph 31). The reasonableness of the fear, in particular, is however, merely one of the considerations the court must have regard to in assessing whether the measures in the order are necessary (cl 4(6)), with other considerations as are set out in clause 5. It is a further condition C that it is necessary to make the order in the interests of justice because 'it is important that the witness should testify', and 'the witness would not testify if the order were not made' (cl 4(5)).

Thus, it appears possible that an order could be made in relation to a witness in any criminal case, regardless of how serious it is alleged to be, who claims a general non-specific unease about testifying openly, and who therefore refuses to testify, without any actual threat or any suggestion of fault on the part of the defendant or his/her associates. It appears it will be possible for the conditions to be met (assuming the measures would be consistent with the fair trial in condition B) in any case where, for example, the police allege that in a certain locale witnesses have been dissuaded from giving evidence at some point in the past, but where there is no specific evidence to support such a fear in the particular case. In our view, given the radical departure from the usual right of the defendant created by witness anonymity, the conditions should be drawn more tightly. For example, in the New Zealand legislation the court must find that the safety of the witness is likely to be endangered.

The alternative condition A in clause 4(3) (b) – 'to prevent real harm to the public interest' – is particularly unclear and potentially very wide indeed.

Relevant Considerations - Clause 5

Other possible ways to protect witnesses, such as warning the defendant about the consequences of witness intimidation, or using bail conditions, are not specified as relevant factors for the court to consider. Clause 5(2)(e) refers only to other measures to protect the witness's identity, rather than to other measures not involving total anonymity, to protect the witness. Instead of allowing for the possible overly liberal use of WAOs, the Law Society would prefer to see those responsible for witness intimidation brought to justice and given deterrent sentences.

Omissions from the Bill

Different Types of Witness

We consider there could be merit in having separate sections to deal with the case of witnesses who are undercover police officers or members of the security services, and civilian witnesses, as is the case in the New Zealand Evidence Act 2006.

Pre-trial and Trial Anonymity

There may also be merit in distinguishing between a pre-trial witness anonymity order following charge, and an order for the purpose of giving evidence at trial, again as the NZ legislation provides. The Bill as currently drafted draws neither distinction. The Law Society is aware of a concern among prosecutors that police officers are too ready to make promises of anonymity pre-trial in circumstances where it is not, or will not be, appropriate.

Burden of Proof

We note that the Bill is not explicit as to the burden and standard of proof for the making of an order. It is also silent as to what the defence must be told on an application for an order by the prosecution, and how in practice such an application will be heard. If the defence are hampered in their ability to challenge assertions by the prosecution for an application on the basis of limited disclosure, then this would be reason for the legislation to explicitly place the burden on prosecution, and for the standard of proof required to be a high one, in view of the fundamental right of the defendant to know of the case against his or her.

Representations and Special Counsel

We are concerned that the Bill provides no right for the other party or parties to make representations; nor does it mention that the court may consider appointing a neutral special counsel to represent the interests of a defendant during the application, or subsequently at trial if the application is successful. While the Explanatory Notes suggest that explicit mention of these safeguards are unnecessary, they are in our view of sufficient importance to warrant specific mention on the face of the Bill.

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