



Criminal Evidence (Witness Anonymity) Bill

Briefing for House of Commons (All Stages)

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Summary

- Witness protection is central to the fair administration of justice. The effective investigation and prosecution of crime requires witnesses to be protected against threats and intimidation. Indeed, the right to life under Article 2 of the European Convention on Human Rights requires, amongst other things, witnesses to be protected against real and immediate risks to their safety.
- But the right of an accused person to confront his accuser goes further than the administration of justice. It is an essential principle of justice itself.
- After more than a decade of error by the lower courts, the House of Lords in *R v Davis* made clear that ‘the right to be confronted by one’s accusers is a right [that has been] recognised by the common law for centuries’ and that the use of anonymous witnesses is ‘irreconcilable with [this] long-standing principle’. The House of Lords judgment also made clear that the common law right to confront one’s accusers is additionally part of the right to a fair trial under Article 6(3)(d) of the European Convention on Human Rights.
- The Bill introduced by the government in response to that judgment is misconceived and poorly drafted. In particular, its provisions for witness anonymity orders (clauses 2-5) are:
 - unduly complex;
 - overly broad;
 - contrary to the common law right to confront one’s accuser;
 - likely to be incompatible with the right to a fair trial under Article 6(3)(d); and
 - lacking several of the safeguards found in the New Zealand legislation on which it was based.
- In addition, the Bill’s provision for appeals against pre-commencement anonymity orders (clauses 11) have the added benefit of being unnecessary and likely to be incompatible with both Articles 6 (the right to a fair trial) and 13 (the right to an effective remedy) of the European Convention on Human Rights.
- It is false to portray the issue of witness protection as a choice between protecting the lives of witnesses and protecting a person’s right to a fair trial. We note that the United States, a far larger jurisdiction than the UK with a much higher rate of gun crime, manages to protect its witnesses without compromising the right to a fair trial. Indeed, the US Marshall Service boasts that it has never lost a witness under its protection.

Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.
2. This Bill raises two issues with which JUSTICE has considerable engagement: witness protection and miscarriages of justice.
3. On the issue of witness protection, JUSTICE has long been concerned that the effective administration of justice should not be undermined by the intimidation of witnesses. In our 1998 report *Victims in Criminal Justice*, for instance, we identified a series of problems with the protection of victims and witnesses in criminal proceedings, from the courtroom to parole hearings to post-sentence arrangements.¹ Similarly in 2004, we welcomed the proposal for a nationally-resourced witness protection programme to provide effective protection for witnesses in serious organised crime cases.² In 2005, we intervened in the case of *Roberts v Parole Board* before the House of Lords,³ making submissions on the balance between witness protection and the right to a fair hearing. Most recently, in May 2008, we were one of a group of NGOs that intervened in the case of *Van Colle v Chief Constable of Hertfordshire Police* (also before the House of Lords), concerning the failure of Hertfordshire police to follow their own witness protection policy.⁴
4. On the issue of miscarriages of justice, JUSTICE has been at the forefront of work in this area since 1957, having been responsible for many of the leading cases on such issues as the right to silence, identification and confession evidence, and the need to safeguard against oppressive police questioning. Our successes led to many convictions being set aside and contributed to important changes in law and practice. This culminated in 1997, when the Criminal Cases Review Commission was established – something which JUSTICE first campaigned more than thirty years earlier. We are therefore mindful of the potential for emergency legislation intended to protect the public to itself lead to greater injustice in the long run.
5. In addition to the long-standing threats from terrorism and serious organised crime, it is evident that the UK currently faces a serious problem from gang-related crime, including gun and knife crime. We do not doubt the extent of the problem of witness intimidation in relation

¹ *Victims in Criminal Justice: Report of the JUSTICE Committee on the role of the victim in criminal justice* (JUSTICE, 1998).

² JUSTICE response to White Paper 'One Step Ahead – A 21st century crime strategy to defeat organised crime' (July 2004).

³ *Roberts v Parole Board* [2005] UKHL 45.

⁴ Judgment pending.

to the investigation of these crimes, nor the difficulties that police face in encouraging witnesses to give evidence.

6. But, over the past decade or so, the UK has also suffered from a serious problem with the growing use of anonymous witnesses. Rather than provide funding for effective witness protection programmes, the authorities have increasingly resorted to the expedient of providing anonymity to those who fear intimidation from suspects (as well as anonymity for police officers involved in covert operations). Although a large degree of responsibility must be borne by the Court of Appeal, whose erroneous rulings encouraged the growth in applications for anonymity, it was also irresponsible for police and government to rely on such decisions in the face of centuries of common law precedent against the use of anonymous witnesses and the clear rulings of the European Court of Human Rights on the right to a fair trial.
7. Accordingly, we take issue with the claim of the Justice Secretary on 26 June that the problem with anonymous witness was:⁵

a technical defect in the law, which until [the House of Lords judgment in *R v Davis*] had been **unidentified and unsuspected**.

8. On the contrary, we consider that the problems with anonymous evidence have long been identified⁶ and ought reasonably to have been anticipated by the police and government. The judgment of the Law Lords was in clear terms and unanimous. Lord Bingham noted that ‘the right to be confronted by one’s accusers is a right [that has been] recognised by the common law for centuries’,⁷ and that the use of anonymous witnesses was ‘irreconcilable with long-standing principle’.⁸ Lord Brown went even further, declaring that ‘the creeping emasculation of the common law principle must be not only halted but reversed’.⁹ Since the legal advice received by the government on such matters is not disclosed, we do not know the extent to which it was advised by either the Home Office, the Law Officers or Treasury Counsel that witness anonymity was compatible with the common law or the European Convention on Human Rights. We would, however, be very surprised if that legal advice did not disclose a significant risk that the witness anonymity issue was liable to be overturned, either by the House of Lords or by the European Court of Human Rights.

⁵ Hansard, HC Debates, 26 June 2008 : Column 516. Emphasis added.

⁶ See e.g. Ashworth, ‘Human rights: justification for allowing witness anonymity’, case note, *Criminal Law Review* (2002).

⁷ *R v Davis* [2008] UKHL 36, at para 34.

⁸ *Ibid*, para 29.

⁹ *Ibid*, para 66.

9. As Lord Mance's judgment in *R v Davis* makes clear, the right to confront one's accuser under Article 6(3)(b) allows some latitude to the courts to shield the identity of witnesses in marginal cases where the evidence they give is not decisive: for example a witness who sees the alleged getaway car parked outside the bank, but not the robbery itself, and whose evidence is corroborated by other non-anonymous evidence. To this extent, we consider that it may be possible to make provision for witness shielding orders short of complete anonymity in certain circumstances that are compatible with the right to a fair trial under Article 6(3) ECHR.
10. But we consider that Lord Mance's judgment to some extent underestimates the limited nature of this exception and the strength of the relevant international human rights standards on this point. The right to a fair trial under Article 14 of the International Covenant on Civil and Political Rights, for instance, goes further than Article 6 ECHR by declaring the right of an accused 'to be tried in his presence', in addition to the right to cross-examination of witnesses. In relation to this, the UN Human Rights Committee has held that:¹⁰

the accused shall be entitled to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. This provision is designed to **guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.**

11. We identify a number of concerns with the Bill below. Leaving aside the obvious point about the desirability of legislating on such an important issue on an emergency basis, we find the Bill to be poorly drafted and misconceived. Rather than model itself upon the guidance offered by the House of Lords in *R v Davis* and the case law of the European Convention on Human Rights, the Bill provides a muddled scheme for the making of witness protection orders, one which is overly complex and overly broad. It is particularly striking that it fails to include all of the safeguards contained in the New Zealand legislation upon which it was based.¹¹
12. If statutory provision is to be made for witness anonymity in the kind of marginal example noted above,¹² we consider the soundest model available is that provided by Article 6(3)(d) and the common law. As a matter of policy, however, we think it preferable for Parliament to focus upon witness protection by way of enhanced security for witnesses, granting witnesses new identities following their testimony in open court and relocation programmes. These will

¹⁰ UN Human Rights Committee, General Comment 13, Twenty-first session, 1984 (U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994)), para 12. Emphasis added.

¹¹ Evidence Act 2006 (NZ), sections 110-119.

¹² See para 9.

be necessary in any event as even the Bill envisages that witness anonymity orders will not be available where such measures would be inconsistent 'with the defendant receiving a fair trial'.¹³

13. We are well aware that providing security for witnesses is expensive and providing relocation and subsequent new identities for witnesses is even more costly. In such circumstances, it is easy enough to understand how the prospect of giving evidence anonymously is far more attractive to both witnesses fearful of their safety and public servants mindful of their own limited resources. But the protection of witnesses cannot be done at the expense of basic fairness and it cannot be done on the cheap. Experience of other common law jurisdictions shows that effective witness protection can be achieved without compromising the principles of open justice.

14. Lastly, we think it necessary to answer the pernicious logic that, since some witnesses will only agree to give evidence anonymously, anonymous evidence is somehow necessary to bring dangerous criminals to justice. Whatever the fears of such witnesses, it is false to portray the issue of witness protection as a choice between protecting the lives of witnesses and protecting a person's right to a fair trial. We note for example that the United States, a far larger jurisdiction than the UK with a much higher rate of gun crime, manages to protect its witnesses without compromising the right to a fair trial. Indeed, the US Marshall Service which operates the federal witness protection programme boasts that it has never lost a witness.¹⁴ It may well be true that 'without witnesses, justice cannot be done',¹⁵ but it is certainly impossible to do justice by means of injustice, nor should we fall into the trap of thinking otherwise.

Clause 1 – New rules relating to the anonymity of witnesses

15. Clause 1 seeks to provide new rules governing anonymous witnesses. In particular, clause 1(2) abolishes the common law rules:

relating to the power of a court to make an order for securing that the identity of a witness in criminal proceedings is withheld from the defendant (or, on a defence application, from other defendants)

¹³ Clause 4(4) aka 'Condition B'.

¹⁴ United States Marshall Service, Witness Security Program: 'No program participant who follows security guidelines has ever been harmed while under the active protection of the Marshals Service' (<http://www.usmarshals.gov/witsec/index.html>).

¹⁵ Lord Mackenzie of Framwellgate, Hansard HL Debates, 15 December 1998 : Column 1276.

16. In our view, though, this is an unnecessary step and this is made clear by the confused and contradictory claims concerning the common law found in the explanatory notes to the Bill.

17. First, the notes describe the judgment of the House of Lords in *R v Davis* in the following terms:¹⁶

That appeal concerned the use of anonymous witness evidence at trial, which is governed by the common law. The effect of the judgment is to **restrict the courts' ability at common law to allow evidence to be given anonymously during criminal trials.**

18. Secondly, the explanatory notes to clause 1(2) state:¹⁷

The common law rules replaced by the Bill are **those which allow the court to make an order to secure that the identity of a witness is withheld from the defendant** or, in the case of defence applications, a another defendant.

19. If, however, the effect of the ruling in *R v Davis* was to eliminate the common law rules allowing anonymous witnesses, then – by definition – there are no common law rules to abolish.

20. In fact, the House of Lords did *not* decide that a court could never make an order granting a witness anonymity in criminal proceedings. It only decided that the court could not make an order for protective measures where those measures hamper, in the words of Lord Bingham, 'the conduct of the defence in a manner and to an extent which was unlawful and rendered the trial unfair'.¹⁸

21. In the circumstances, we see no need for the abolition of the common law in this area. There are many areas of the criminal justice system in which the common law and statute happily coexist and we think the issue of witness protection is too important to deprive any statutory provision of the enrichment which the common law would provide. In particular, we expect the principles identified by the judgment in *R v Davis* will prove a valuable guide to the courts below in determining in any particular case whether an anonymity order is compatible with a defendant's right to a fair trial.

¹⁶ Explanatory notes, para 18. Emphasis added.

¹⁷ *Ibid*, para 22. Emphasis added.

¹⁸ *Davis*, n 7 above, at para 35 per Lord Bingham.

Clause 4 – Conditions for making an order

Clause 5 – Relevant considerations

22. Clause 4(2) directs that a witness anonymity order may only be made where 3 conditions are met:

- (a) the measures are necessary to protect the safety of a witness, another person, ‘to prevent serious damage to property’,¹⁹ or ‘real harm to the public interest’;²⁰
- (b) having regard to all the circumstances, the taking of those measures would be consistent with the defendant receiving a fair trial; and
- (c) it is necessary to make the order in the interests of justice, because it appears to the court that (i) it is important that the witness testify and (ii) the witness would not testify if the order were not made.

23. Clause 5 sets out a list of considerations the court must have regard to when deciding whether the conditions in clause 4 have been met. These are:

- the ‘general right’ of a defendant in criminal proceedings to know the identity of a witness in the proceedings;
- the extent to which the credibility of the witness would be a relevant factor when the weight of his or her evidence comes to be assessed;
- whether the witnesses’ evidence could be properly tested (whether on grounds of credibility or otherwise) without his evidence being disclosed;
- whether there is any reason to believe the witness has a tendency to be dishonest or any motive to be dishonest in the circumstances of the case; and
- whether it would be ‘reasonably practicable’ to protect the witness’s identity by any other means other than by making an anonymity order.

¹⁹ Clause 4(3)(a).

²⁰ Clause 4(3)(b).

24. The considerations set out in clause 5 are closely modelled upon the terms of the New Zealand Evidence Act 2006. However, the New Zealand Act also provides that the court must have regard to:

- the principle that witness anonymity orders are justified **only in exceptional circumstances**;²¹
- the gravity of the offence;²² and
- whether there is other evidence that corroborates the witness's evidence.²³

25. Nor is there any requirement to the court to consider what has been identified as the central factor in determining the compatibility of anonymous evidence with Article 6(3)(d), i.e. whether, if anonymity were to be granted, any conviction would be based 'solely or to a decisive extent' upon the anonymous evidence.²⁴

26. While some of the conditions contained in clause 4 and the considerations in clause 5 are sound, some plainly are not.

27. First, the idea that a risk of 'serious damage to property' (clauses 4(3)(a) and 4(6)(b)) alone could justify the anonymity of a witness in criminal proceedings trivialises the urgency of the issue of witness protection. As Lord Mance noted in *R v Davis*,²⁵ the recommendations of the Committee of Ministers of the Council of Europe provide that:²⁶

Anonymity should only be granted when the competent judicial authority, after hearing the parties, finds that ... **the life or freedom of the person involved is seriously**

²¹ Section 112(5)(b) of the Evidence Act 2006 (NZ) (witness anonymity order for the purpose of High Court trial). Emphasis added.

²² Section 112(5)(c).

²³ Section 112(5)(f).

²⁴ See e.g. *Doorson v The Netherlands* (1996) 22 EHRR 330, para 76. See also the judgment of Lord Mance in *R v Davis*, n 7 above, and Ashworth, n 6 above, at 496: 'where the evidence is decisive, no amount of safeguards can cure the inherent unfairness'.

²⁵ *R v Davis*, n 7 above, para 79.

²⁶ Council of Europe Committee of Ministers, Recommendation No. R (97) 13, concerning the intimidation of witnesses and the rights of the defence, para 11. Emphasis added.

threatened or, in the case of an undercover agent, his/her potential to work in the future is seriously threatened.

28. Secondly, the reference to the 'public interest' in clause 4(3)(b) is hopelessly vague. If, as it seems likely, it is intended to cover undercover police officers who do not fear intimidation but rather the risk to their safety if identified, then this should be more narrowly drafted along the lines of the Committee of Ministers recommendation above.
29. Thirdly, the reference in clause 5(2) to the 'general right' of a defendant in criminal proceedings to know the identity of a witness in criminal proceedings seems to us incompatible with the clear terms of the common law and Article 6(3)(d) of the European Convention. To describe the right as 'general' wrongly suggests that it is open to qualification on a number of grounds. Compatibility with Article 6(3)(d) requires that the threshold be set much higher.
30. Fourthly, in both clause 4(5) and clause 5(2)(c), the court is required to consider the 'importance' of the evidence and 'whether it could be properly tested without his or her identity being disclosed' respectively. In the first case, this involves the court having to assess the weight of the evidence (something which, in most serious criminal cases will be the function of the jury). In the second, the court is being invited to speculate how a defendant may answer or cross-examine a witness without knowing their identity.
31. Fifth and lastly, the requirement to consider whether it would be 'reasonably practicable' (clause 5(2)(e)) to protect the witness by other means once again sets the bar much too low. All other things being equal, the fundamental right of a defendant to know the identity of his accusers cannot be offset simply because a public authority has deemed it would be too expensive to protect the witness via other means.

Clause 11 – Pre-commencement anonymity orders: appeals

32. Clause 11 concerns cases in which an anonymity order was made and the defendant who was convicted prior to the new provisions coming into force appeals against his conviction.
33. Clause 11(2)(a) provides that a conviction shall not be unsafe solely on the ground that the trial court had no power at common law to make the anonymity order, but clause 11(2)(b) provides that a conviction will be unsafe if the order could not have been made under the new provisions and 'as a result of the order, the defendant did not receive a fair trial'.
34. In our view, this provision is likely to produce only further uncertainty and is likely to prove unnecessary. First, since it is open to the appeal court to remand a prisoner in custody

pending a retrial in any event, prisoners convicted on the basis of anonymous evidence are unlikely to walk free. Secondly, the undue complexity and overbreadth of the conditions and considerations in clauses 4 and 5 respectively are likely only to cause further confusion. Moreover, we consider it likely that the appeal provisions in clause 11 will be found to breach Article 6 (the right to a fair trial) and 13 (the right to an effective remedy) of the European Convention on Human Rights, by unduly restraining the ability of the appeal court to quash a conviction based on anonymous evidence.

Clause 12 – Interpretation

35. Clause 12 provides that witness anonymity orders may be made by a range of courts including a magistrate's court. In our view, the complexity of anonymity orders and the gravity of the exception they represent to the common law principles of effective cross-examination make them inappropriate to be determined by a court beneath the level of the Crown Court.
36. Such orders would be particularly inappropriate where the magistrates sit as the tribunal of fact, e.g. assessing the credibility of witnesses for the purposes of anonymity before proceeding to determine the facts at issue.

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