

CRIMINAL JUSTICE (WITNESS ANONYMITY) ACT 2011

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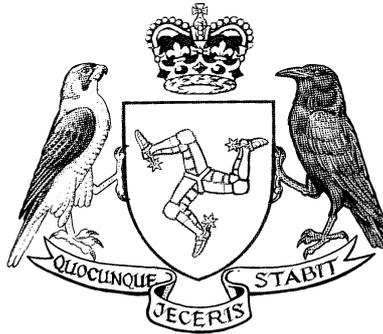
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Isle of Man } Signed in Tynwald: 18th January 2011
 to Wit } Received Royal Assent: 18th January 2011
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AN ACT

to provide for orders to secure the anonymity of witnesses in criminal proceedings; and for connected purposes.

BE IT ENACTED by the Queen’s Most Excellent Majesty, by and with the advice and consent of the Council and Keys in Tynwald assembled, and by the authority of the same, as follows:—

PART 1

OPENING PROVISIONS

1. The short title of this Act is the Criminal Justice (Witness Anonymity) Act 2011. Short title

2. (1) This Act provides for the making of court orders to secure the anonymity of witnesses in criminal proceedings. Operation of Act: new witness anonymity rules
 (2) The common law rules about a court’s power to make an order in a criminal proceeding about the withholding of a witness’s identity from the defendant (or, on a defence application, from other defendants) are abolished. P2008/15/1

3. This Act does not affect the operation of the Sexual Offences Act 1992. Sexual Offences Act 1992 not affected
[c.6]

4. In this Act — Interpretation
P2009/25/97
 “applicant”, for Part 3, means the party making the application;

“common law order” has the meaning given under section 24(b);

“criminal proceeding” means a criminal proceeding consisting of a trial or other hearing at which evidence falls to be given;

“defendant”, for a criminal proceeding, means a person charged with an offence to which the proceeding relates (whether or not convicted);

“judicial officer”, for a criminal proceeding, means the judge, High Bailiff or justice of the peace hearing the proceeding;

“legal representatives” does not include a court appointed advocate under section 8;

“order making provisions” means the provisions of sections 14 and 15;

“prosecutor”, for a provision about a criminal proceeding, means either of the following acting as prosecutor in the proceeding —

- (a) the Attorney General;
- (b) an advocate conducting proceedings assigned to him or her by the Attorney General under Schedule 8 of the Criminal Justice Act 2001, as prosecutor in the proceeding;

[c.4]

“vary”, for a witness anonymity order, includes a further variation of the of the order as already varied; and

“witness”, for a provision about —

- (a) a criminal proceeding, means a person called, or proposed to be called, to give evidence at the trial or hearing in question;
- (b) an application for a witness anonymity order, means the witness the subject of the application; or
- (c) a witness anonymity order, means the witness the subject of the order;

“witness anonymity order” means an order made under section 5(1).

PART 2

GENERAL PROVISIONS

Division 1 - Power to make witness anonymity orders

5. (1) A court hearing, or that is to hear, a criminal proceeding may order the taking of stated measures about a witness in the proceeding to ensure the witness's identity is not disclosed in, or in connection with, the proceeding. Order making power
P2009/25/86(1)

(2) However, the order —

(a) may be made only on an application under Part 3; and

(b) can not be made for a defendant to the criminal proceeding.

(3) In this section “hear”, a criminal proceeding, includes trying the proceeding.

6. Subject to section 7, a witness anonymity order may state any measures the court considers appropriate, including, for example, one or more of the following — Measures that may be ordered
P2009/25/86(1) and (2)

(a) that the witness's name and other identifying details be —

(i) withheld; or

(ii) removed from materials disclosed to a party to the proceeding;

(b) that the witness may use a pseudonym;

(c) that the witness must not be asked questions of a stated description that might lead to the witness being identified;

(d) that the witness be screened to a stated extent;

(e) that the witness's voice is subjected to modulation to a stated extent.

7. A witness anonymity order can not require —

(a) the witness to be screened to the extent that the witness can not be seen by any of the following persons — Restrictions on screening and modulation
P2009/25/86(4)

- (i) the judicial officer;
 - (ii) other members of the court;
 - (iii) if there is a jury, a member of the jury;
 - (iv) an interpreter or other person appointed by the court to assist the witness; or
- (b) the witness's voice to be modulated to an extent that the witness's natural voice can not be heard by a person mentioned in paragraph (a).

Division 2 - Safeguards

Court
appointed
advocate
required if
defendant
unrepresented

- 8.** (1) This section applies if —
- (a) an application has been made to a court for or about a witness anonymity order in a criminal proceeding that has not ended; and
 - (b) the defendant to the proceeding is not represented or becomes unrepresented at any time before the application is decided.
- (2) The court must appoint an advocate to advise it and, subject to subsection (4), to advise and represent the defendant about the application.
- (3) Subsection (2) applies even if the defendant does not want to be so represented.
- (4) If, under Part 3 or 4, the court hears the application in the defendant's absence, the advocate must not disclose to the defendant anything said or done at, or evidence adduced in, the hearing other than the contents of any order made.
- (5) Subsection (4) applies despite any other Act, law or rule.

Requirement
for jury
warning

P2009/25/90

- 9.** (1) This section applies if, on a trial on information with a jury, evidence has been given by a witness the subject of a witness anonymity order.
- (2) The judicial officer must give the jury a warning that the officer considers appropriate to ensure the fact of the making of the order does not prejudice the defendant.

PART 3

APPLYING FOR AND MAKING A
WITNESS ANONYMITY ORDER

10. Either the prosecutor or the defendant in a criminal proceeding may apply to the court for a witness anonymity order to be made about a witness in the proceeding.

Who may apply
P2009/25/87(1)

11. (1) If the prosecutor is the applicant, the prosecutor must, unless the court otherwise directs, inform the court of the witness's identity.

Requirements
for making
application

(2) If the defendant is the applicant, the defendant must inform the court and the prosecutor of the witness's identity.

P2009/25/87(2)
and (3)

(3) To avoid any doubt, it is declared that this section does not require, in connection with the application, disclosure of the witness's identity or information that might enable the witness to be identified —

(a) by the prosecutor to another party to the proceeding; or

(b) if there is more than one defendant, disclosure by the defendant making the application to any other defendant, or that other defendant's legal representatives.

12. (1) So long as the applicant complies with section 11, the applicant may disclose relevant material in any way that prevents disclosure of the witness's identity or information that might enable the witness to be identified.

Use of relevant
material by
applicant

P2009/25/87(4)
and (5)

(2) In this section "relevant material" means a document or other material that falls to be disclosed, or is sought to be relied on, by or for the applicant in connection with the proceeding or a proceeding preliminary to it.

13. (1) The court must give each party to the proceeding the opportunity to be heard on the application.

Hearing of
application

P2009/25/87(6)
and (7)

(2) However, the court may hear one or more of the parties in the absence of both the defendant and the defendant's legal representatives if, in the circumstances, the court considers it appropriate to do so.

14. (1) The court may make a witness anonymity order for the witness only if conditions A, B and C below have been complied with.

Conditions for
making order

P2009/25/88

(2) Condition A is that the proposed order is necessary to —

- (a) protect the safety of the witness or another person or to prevent any serious damage to property (“the protection purpose”); or
- (b) prevent real harm to the public interest, whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on those activities, or otherwise.

(3) Condition B is that, having regard to all the circumstances, the effect of the proposed order would be consistent with the defendant receiving a fair trial.

(4) Condition C is that the witness’s testimony is important enough that it is in the interests of justice that the witness testifies and —

- (a) the witness would not testify if the proposed order were not made; or
- (b) there would be real harm to the public interest if the witness were to testify without the proposed order being made.

(5) In deciding whether the proposed order is necessary for the protection purpose, the court must consider any reasonable fear of the witness that any of the following might happen if the witness is identified —

- (a) that the witness or another person will suffer death or injury;
- (b) that there will be serious damage to property.

Relevant
criteria for
conditions

P2009/25/89

15. (1) In deciding whether the conditions under section 14 have been complied with, the court must consider the following —

- (a) the general right of a defendant in a criminal proceeding to know the identity of witnesses to the proceeding;
- (b) the extent to which the witness’s credibility would be a relevant factor when the weight of the witness’s evidence comes to be assessed;
- (c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant;

- (d) whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without the witness's identity being disclosed;
 - (e) whether it would be reasonably practicable to protect the witness in a way other than by making a witness anonymity order stating the measures that are under consideration by the court;
 - (f) whether there is any reason to believe the witness has —
 - (i) a tendency to be dishonest; or
 - (ii) a motive to be dishonest in the circumstances of the case.
- (2) For subsection (1)(f), the court must consider —
- (a) any previous convictions of the witness; and
 - (b) any relationship between the witness and the defendant or any associates of the defendant.

PART 4

DISCHARGING OR VARYING ORDERS

16. (1) This section applies if a court has made a witness anonymity order for a witness in a criminal proceeding and the proceeding has not ended. During proceeding
P2009/25/91

(2) The court may, in the proceeding, discharge or vary the order if, after considering the order making provisions that applied to the making of the order, the court considers it appropriate to do so.

- (3) The court may do so —
- (a) on its own initiative; or
 - (b) on the application of a party to the proceeding (a “change application”).

(4) However, a change application may be made only if there has been a material change of circumstances since the later of the following —

- (a) if no previous change application has been made for the order, when the order was made;

- (b) if any change application has been made for the order, when the last change application was made.

(5) Before discharging or varying the order, the court must give each party to the proceeding the opportunity to be heard on the matter.

(6) However, the court may hear one or more of the parties in the absence of both defendant and the defendant's legal representatives if, in the circumstances, the court considers it appropriate to do so.

After
proceeding
has ended

P2009/25/92

17. (1) This section applies if a court has made a witness anonymity order in a criminal proceeding and that proceeding has ended ("the old proceeding").

(2) The court may discharge or vary the order if it appears to the court to be appropriate to do so in view of the order making provisions that applied to the making of the order.

(3) The court may do so on an application by a party to the old proceeding or the witness (a "change application").

(4) However, a change application may be made only if there has been a material change of circumstances since the later of the following —

- (a) when the old proceeding ended;
- (b) if any previous change application has been made for the order, when the last change application was made.

(5) The court can not decide a change application unless, for each of the parties to the old proceeding and the witness, it —

- (a) has given the party the opportunity to be heard; or
- (b) is satisfied it is not reasonably practicable to communicate with that party.

(6) However, the court may hear one or more of the parties mentioned in subsection (5) in the absence of both a person who was a defendant to the old proceeding and that person's legal representatives if it appears to the court to be appropriate to do so in the circumstances.

On appeal

P2009/25/93

18. (1) This section applies if —

- (a) a court has made a witness anonymity order about a witness in a criminal proceeding ("the trial proceeding"); and

(b) a defendant to the trial proceeding has in that proceeding been —

(i) convicted; or

(ii) found not guilty by reason of insanity; or

(iii) found to be under a disability and to have done the act charged that was an offence.

(2) The High Court may, in a proceeding on or in connection with an appeal by the defendant from the trial proceeding, discharge or vary the order if the High Court considers it appropriate to do so in view of the order making provisions that applied to the making of the order.

(3) The High Court can not discharge or vary the order unless, for each party to the trial proceeding, it —

(a) has given that party the opportunity to be heard; or

(b) is satisfied it is not reasonably practicable to communicate with that party.

(4) However, the High Court may hear one or more of the parties to the trial proceeding in the absence of a person who was a defendant to the trial proceeding and that person's legal representatives if, in the circumstances, the High Court considers it appropriate to do.

PART 5

MISCELLANEOUS PROVISIONS

19. (1) Any party to a criminal proceeding in which a court (the "original court") made a decision under this Act may appeal against the decision to the appeal division. Appeals with leave

(2) However, an appeal may be made only with the leave of the original court or the Appeal Division.

(3) In this section —

"Appeal Division" means the Staff of Government Division of the High Court of Justice; and

"decision" includes an order under this Act resulting from the decision and a refusal to make an order or grant an application.

Stated criteria not exhaustive **20.** (1) This section applies if a provision of this Act requires a court to consider particular criteria or a matter in making a decision.

(2) The provision does not prevent the court from considering anything else it considers relevant to the making of the decision.

Public interest immunity not affected **21.** Nothing in this Act affects the common law rules about the withholding of information on the ground of public interest immunity.

P2009/25/95

Rules of court **22.** Nothing in this Act affects any power to make rules of court consistent with this Act.

P2009/25/
87(8)

PART 6

TRANSITIONAL PROVISIONS

Division 1 - Existing criminal proceedings

Existing proceedings to which Act applies **23.** Subject to division 2, this Act applies to a criminal proceeding the trial or hearing of which had started, but had not ended, before this Act commences.

P2008/15/9

Division 2 - Existing common law orders

Application of division 2 **24.** This division applies to a criminal proceeding if, before this Act comes into operation —

P2008/15/
10(1)

(a) the trial or hearing of the proceeding had started but had not ended; and

(b) the court has made an order of a type mentioned in section 2(2) (a “common law order”) about a witness at the trial or hearing.

Validation of common law order **25.** Subject to sections 26 and 27, the common law order is taken to be, and to have always been, validly made.

Evidence not yet given under common law order **26.** (1) This section applies if the witness has not started to give evidence under the common law order’s terms.

(2) Despite section 2(2), the court may direct (a “continuation direction”) that the common law order is to remain in force.

P2008/15/
10(2) to (4)

(3) However, the court may make a continuation direction only if it considers the common law order was one that it could have made had this Act had been operative at the material time.

(4) If a continuation direction is made, Part 4 applies to the common law order as if it were a witness anonymity order.

(5) Otherwise, the court must —

(a) discharge the common law order; and

(b) consider whether instead it should, under the order making provisions, make a witness anonymity order for the witness, as if an application under Part 3 had been made for the order at the material time.

(6) If the court makes a witness anonymity order under subsection (5), the order must come into effect immediately after the discharge of the common law order.

27. (1) This section applies if the witness has started to give evidence under the common law order’s terms, whether or not the witness has finished doing so.

Evidence already given under common law order

(2) The court must decide whether the order’s effect is that the defendant has been, or will be, prevented from receiving a fair trial, considering —

P2008/15/10(5) to (7)

(a) whether the order was one that the court could have made had this Act been operative at the material time; and

(b) whether the court should exercise any power to give a direction to the jury (if there is one) about the evidence given under the order’s terms.

(3) If the court decides the defendant has been, or will be, prevented from receiving a fair trial, the court must give directions it considers appropriate for, and in connection with, bringing the trial or hearing to an end.

PART 7

AMENDMENT OF SUMMARY JURISDICTION ACT 1989

28. (1) The Summary Jurisdiction Act 1989 is amended as follows.

Amendment

(2) In section 6(5), after “Sexual Offences Act 1992” insert “and to any witness anonymity order under the Criminal Justice (Witness Anonymity) Act 2011 relating to the proceeding”.

[c.15]

