



ANALYSIS

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SCHEDULE

Enactments Amended

1997, No. 103

An Act to amend the Evidence Act 1908 and related enactments
 [11 December 1997]

BE IT ENACTED by the Parliament of New Zealand as follows:

1. Short Title—This Act may be cited as the Evidence (Witness Anonymity) Amendment Act 1997, and is part of the Evidence Act 1908 (“the principal Act”).

2. Interpretation—Section 2 of the principal Act is amended by adding the following definition:

“‘Witness’, in sections 13B to 13J, means a person (other than an undercover Police officer) who may be called to give evidence.”

3. New sections inserted—The principal Act is amended by inserting, after section 13A, the following sections:

“13B. **Pre-trial witness anonymity order**—(1) This section applies 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 prosecutor or 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 prior to 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 an accused 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 which corroborates the witness’s evidence.

“(6) If a pre-trial witness anonymity order is made under this section,—

“(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 counsel, solicitor, 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 particulars likely to lead to the witness’s identification.

“(7) 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.

“13c. Witness anonymity order for purpose of High Court trial—(1) This section applies if a person is charged with an indictable offence and either—

“(a) Is committed to the High Court for trial; or

“(b) Is committed to 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 prosecutor 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 untruthful, 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 an accused 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 which corroborates the witness’s evidence.

“(6) If a witness anonymity order is made under this section,—

- “(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 counsel, solicitor, 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 proceeding, the name, address, or occupation of the witness, or any particulars likely to lead to the witness’s identification.

“13D. 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 13C 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 13C, 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.

“13E. Judge may appoint independent counsel to assist—(1) For the purposes of considering an application for a

witness anonymity order under section 13C, 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 paragraphs (a) and (b) of section 13C (4) 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 that 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 subsection (6); and

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

“(4) The bill of costs rendered by a counsel appointed under this section must be given to the Registrar of the 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 such order varying or confirming the decision as the Judge considers fair and reasonable.

“(6) The Governor-General may from to time, by Order in Council, make regulations making provision for the determination of the amount of fees and expenses, including minimum and maximum amounts, payable in respect of professional services provided by counsel appointed under this section.

“13F. **Directions to jury**—In a trial to which a witness anonymity order applies, the Judge must, unless he or she considers it inappropriate, advise the jury to the effect that—

“(a) The jury is not to draw any adverse inference against the accused from the fact that the order has been made; and

“(b) If directions have been given under section 13C concerning the mode of giving evidence, the jury is not to draw any adverse inference against the

accused from the fact that directions have been given.

“13G. Judge may make orders and give directions to preserve anonymity of witness—(1) A Judge who makes an order under section 13B or section 13C may, for the purposes of the preliminary hearing or trial (as the case may be), also make such orders and give such directions as 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 powers 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.

“13H. 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 13c.

“13i. Witnesses in Police witness protection programme—If, at any time after the events which 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.

“13J. 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 13B, intentionally contravenes paragraph (b) or paragraph (d) of subsection (6) of that section.

“(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 13C, intentionally contravenes paragraph (c) or paragraph (e) of subsection (6) of that section.

“(3) If a person contravenes paragraph (b) or paragraph (d) of section 13B (6) or paragraph (c) or paragraph (e) of section 13C (6), and that contravention does not constitute an offence against subsection (1) or subsection (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.”

4. Review of operation of Act—(1) As soon as practicable after the expiry of the period of 3 years beginning on the date of commencement of this Act, the Ministry of Justice must—

(a) Review the operation of sections 13B to 13J of the principal Act since the date of commencement of this Act; and

(b) Consider whether any amendments to those sections of the principal Act are necessary or desirable; and

(c) Report its findings to the Minister of Justice.

(2) As soon as practicable after receiving a report from the Ministry under subsection (1) (c), the Minister must present a copy of that report to the House of Representatives.

5. Amendments to other Acts—The Acts specified in the Schedule are amended in the manner indicated in that schedule.

6. Application of this Act to proceedings in progress on commencement—(1) Sections 13B to 13J of the principal Act apply to charges laid but not determined before the date this Act comes into force, and to charges re-laid on or after that date.

(2) This section applies despite anything to the contrary in any other enactment or rule of law.

Section 5

SCHEDULE
ENACTMENTS AMENDED

Enactment	Amendment
<p>1957, No. 87—The Summary Proceedings Act 1957 (R.S. Vol. 9, p. 583)</p>	<p>By adding to section 5, as subsection (2), the following subsection:</p> <p>“(2) No preliminary hearing of a charge may be conducted by Justices if a pre-trial witness anonymity order under section 13B of the Evidence Act 1908 applies to the proceeding and the witness to whom the order applies is to give oral evidence at the hearing.”</p> <p>By adding to section 168AA (as substituted by section 8 (1) of the Summary Proceedings Amendment Act 1991) the following subsection:</p> <p>“(5) Nothing in this section applies to a proceeding involving a witness who is the subject of an anonymity order made under section 13C of the Evidence Act 1908.”</p> <p>By repealing section 178A (as inserted by section 4 of the Summary Proceedings Amendment Act (No. 2) 1986), and substituting the following section:</p> <p>“178A. Persons who may sign statements by assumed name—(1) A deposition or other written statement of evidence given by an undercover Police officer (within the meaning of section 13A (2) of the Evidence Act 1908) may be given and signed in the name by which the officer was known during the relevant investigation.</p> <p>“(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 13B or section 13C of the Evidence Act 1908, or is the subject of an anonymity order made under either of those sections, may be given and signed by the witness using the term ‘witness’ followed by an initial or mark.</p> <p>“(3) This section overrides any contrary provision in this Part.”</p>
<p>1961, No. 43—The Crimes Act 1961 (R.S. Vol. 1, p. 635)</p>	<p>By adding to section 379A (1) the following paragraph:</p> <p>“(f) Against the making of an anonymity order under section 13C of the Evidence Act 1908, or</p>

SCHEDULE—*continued*
ENACTMENTS AMENDED—*continued*

Enactment	Amendment
1961, No. 43—The Crimes Act 1961 (R.S. Vol. 1, p. 635)— <i>continued</i>	against the refusal of a Judge to make an anonymity order under that section.”

This Act is administered in the Ministry of Justice.
