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LAW·COMMISSION  
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*Preliminary Paper 29*

EVIDENCE LAW  
WITNESS ANONYMITY

*A discussion paper*

*The Law Commission welcomes your comments on this paper  
and seeks your response to the questions raised.*

These should be forwarded to:  
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by 30 September 1997

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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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# Preface

THE LAW COMMISSION'S evidence reference is:

Purpose: To make the law of evidence as clear, simple and accessible as practicable, and to facilitate the fair, just and speedy judicial resolution of disputes.

With this purpose in mind the Law Commission is asked to examine the statutory and common law governing evidence in proceedings before courts and tribunals and make recommendations for its reform with a view to codification.

The evidence reference may be read together with the criminal procedure reference, the purpose of which is:

To devise a system of criminal procedure for New Zealand that will ensure the fair trial of persons accused of offences, protect the rights and freedoms of all persons suspected or accused of offences, and provide effective and efficient procedures for the investigation and prosecution of offences and the hearing of criminal cases.

Both references were given to the Law Commission by the Minister of Justice in August 1989.

This is the eleventh in a series of Law Commission publications on aspects of evidence law. Papers on principles for the reform of evidence law, codification of evidence law, hearsay evidence, and expert and opinion evidence were published in 1991, while papers on documentary evidence and judicial notice and on the law of privilege appeared in 1994. The Commission also published *Criminal Evidence: Police Questioning* (NZLC PP21) in 1992, a major discussion paper jointly under the evidence and criminal procedure references. This was developed into the report *Police Questioning* (NZLC R31, 1994). Two further discussion papers under the evidence reference have been published in the last year, *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26) in October 1996, and *Evidence Law: Character and Credibility* (NZLC PP27) in February 1997.

The Law Commission began research into witness anonymity in 1996 as part of the evidence reference because of its concern that there had been no substantial inquiry into it. As a result of the Court of Appeal decision in *Hines* delivered on 15 August 1997, Government and Opposition representatives intimated that legislation was proposed. Since it is likely that there will be prompt action, it seemed to us desirable that others should have immediate access to our work to date. Publication of this paper has therefore been advanced.

We have employed the normal form of Law Commission preliminary papers, with questions and a closing date (30 September 1997) for responses. This paper therefore discusses the issues and poses questions for consideration. It also includes the Commission's provisional conclusions, a complete draft of the provisions on witness anonymity for a code, and a commentary on them. The intention is to enable detailed and practical consideration of the issues. We also envisage that this paper, and the responses to it from members of the public and the legal profession, will provide important information for members of Parliament in striking a proper balance between the two vital public interests which are in question.

We emphasise that we are not committed to the views indicated and our provisional conclusions should not be taken as precluding further consideration of the issues.

We are grateful for the assistance of the following people who provided comments on earlier drafts of this paper: Grant Burston (Luke Cunningham & Clere); Rodney Harrison <sup>QC</sup>; Richard Mahoney (Faculty of Law, University of Otago); New Zealand Police (Neville Trendle, Assistant Commissioner, and John Crookston, Chief Legal Advisor); and Scott Optican (Faculty of Law, University of Auckland). We emphasise, however, that the views expressed in this paper are those of the Commission and not necessarily those of the people who have helped us. The draft code provisions were prepared by Mr GC Thornton <sup>QC</sup>, legislative counsel. The Commission also acknowledges the work of several members of its staff, and in particular David Calder, Elisabeth McDonald and Susan Potter, in researching and preparing this paper for publication.

Submissions or comments on this paper should be sent by **30 September 1997** to the Director, Law Commission, PO Box 2590, DX SP23534, Wellington, or by email to [Director@lawcom.govt.nz](mailto:Director@lawcom.govt.nz). We prefer to receive submissions by email where possible. Any initial inquiries or informal comments can be directed to Susan Potter, Senior Researcher (Telephone: (04) 473 3453; fax: (04) 471 0959; E-mail: [SPotter@lawcom.govt.nz](mailto:SPotter@lawcom.govt.nz)).

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## Summary of views

- **A** MAJORITY OF THE COURT OF APPEAL has recently confirmed that a defendant in a criminal trial has an absolute right to know the identity of prosecution witnesses. The Court also held that Parliament, rather than the courts, is best placed to decide in which cases, if any, this right may be compromised and anonymity be granted to a witness. (Chapter 1)
  - The question whether to grant witness anonymity involves consideration of significant competing interests. The right of a defendant to a fair trial is of fundamental importance, and yet the right of the public to the protection of the law must not be unnecessarily compromised. Although no statistical information is available, reports from the Police, Crown prosecutors and the courts suggest that the incidence of witness intimidation is high enough to warrant consideration. (Chapter 2)
  - After considering the various public interests and the current law, both in New Zealand and overseas, the Law Commission provisionally concludes that, in exceptional cases, witnesses may be granted anonymity so that their identity is unknown to the opposing party, whether defence or prosecution. Witness anonymity may not, however, be granted if it would compromise the defendant's right to a fair trial. It may be possible to preserve this right under an appropriate formulation of the rule. (Chapter 3 and Appendix)
  - The Law Commission therefore proposes that witness anonymity may be granted only in serious criminal cases. The application for anonymity must be made to the High Court, and if an order is made, the trial must be conducted in the High Court. Any order will also apply during the depositions hearing. The court must first be satisfied on reasonable grounds that the witness, or any other person, will be at risk of serious bodily harm if the witness testifies. The court may then appoint independent counsel to make inquiries on behalf of the court into the background of the witness, in order to establish if there are concerns about the witness's credibility or reliability. Independent counsel may speak to the witness and must provide to the court information concerning the witness which is held by any party to the proceeding. The court may also hold a voir dire. (Chapter 4)
  - Once the court has received and considered all the information concerning the witness, it may grant an anonymity order as long as the court is satisfied, having regard to specific criteria, that the unfairness to the witness of requiring disclosure of their identity exceeds the possibility of unfairness to the defendant resulting from the trial being conducted without that disclosure. (Chapter 4)
  - The Commission also proposes that s 13A of the Evidence Act 1908, concerning the position of undercover police officers, be preserved. (Chapter 4)
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## Summary of questions

THE FOLLOWING IS A SUMMARY OF QUESTIONS on reform options discussed in Chapter 4:

- Q1 Should the law ever permit witnesses to give evidence anonymously?
  - Q2 Should s 13A of the Evidence Act 1908 (anonymity for undercover police officers testifying in certain trials) be re-enacted in the evidence code?
  - Q3 Should the power to order witness anonymity be available in all criminal proceedings? Should it be restricted to trials where a defendant is charged with a serious criminal offence, for example those offences which can be heard in the High Court?
  - Q4 What situation must exist with regard to actual or potential threats to a witness before a witness anonymity order can be granted? Should anonymity be granted only if the witness fears serious personal harm? Should financial harm or other types of harm also be included?
  - Q5 Must the judge be satisfied on reasonable grounds that the witness is at risk of serious personal harm if the witness testifies?
  - Q6 Should the judge also be able to order witness anonymity if satisfied on reasonable grounds that *another person* will be exposed to the risk of serious personal harm if the witness testifies?
  - Q7 Should the test for granting witness anonymity be that the judge is satisfied that no material has been adduced raising substantial doubt as to the truthfulness and reliability of the witness? Should the judge go further and assess the truthfulness and reliability of the witness before granting an anonymity order?
  - Q8 Should there be a list of factors which the judge must consider when making a decision relating to the truthfulness and reliability of the witness? What other factors should be considered?
  - Q9 Should independent counsel be appointed? What should be that counsel's function?
  - Q10 Should the evidence code set out a procedure for witness anonymity applications? If so, what kind of procedure should be provided?
  - Q11 Should the judge be able to consider evidence not normally admissible when considering the truthfulness of the witness?
  - Q12 Should s 379A of the Crimes Act 1961 be amended to give the Court of Appeal jurisdiction to hear appeals against pre-trial witness anonymity rulings?
  - Q13 Should the trial judge's discretion to make or discharge a witness anonymity order be expressly preserved in the evidence code?
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# 1

## Introduction

1 THIS DISCUSSION PAPER considers the current law and practice relating to witness anonymity, and explores options for reform. The law recognises two predominant values:

- The right of an accused to a fair and public hearing, to be presumed innocent until proved guilty according to law, to be present at the trial and to present a defence, and to examine the witnesses for the prosecution;
- The right of the public to maintenance of the law including the right of the Crown to a fair trial.

The issue considered is how these rights are to be reconciled, or which is to predominate, when they come into collision. The views expressed are provisional; the paper seeks to elicit comment which will assist the formation of policy and ultimate decision-making by Parliament.

2 In *R v Hughes* [1986] 2 NZLR 129, and in *R v Hines* (unreported, Court of Appeal, 15 August 1997, CA 465/96) a majority of the Court of Appeal determined that these issues should be decided by Parliament rather than by judicial decision. In *Hines* the Court proposed that the public interest questions should be resolved through the appropriate policy development processes, including consideration by the Law Commission. This paper addresses those questions.

3 In a number of recent cases, intimidation of prosecution witnesses or fear of retribution has led to applications by the prosecution to the court to exercise what was claimed to be its inherent jurisdiction to conceal the identity of witnesses from the accused. Whether such order is consistent with the application of the rule of law in New Zealand, and if so in what circumstances an order may be made without undue damage to the right of the accused to a fair trial, are constitutional issues of fundamental importance. To deprive an accused of the right to make an effective challenge of the accuser is simply unacceptable. And yet to permit a criminal to escape legal processes by threat of violence would challenge the right of other New Zealanders to the protection of the law on which the stability of society depends: the greater the threat, the greater the prospect of escaping criminal liability.

4 In this paper we consider the rules that are at present in force in New Zealand; the principles that lie behind them; and the competing values that must be weighed. We refer to the events in New Zealand and elsewhere that have led to calls to change the law that excludes anonymous evidence, and the practical consequences of change. We mention the experience in other jurisdictions, notably Australia, the United Kingdom, and Europe as well as the special conditions in South Africa under apartheid, and in the former Yugoslavia. We consider the implications of permitting evidence to be given anonymously, and the carefully defined and exceptional circumstances in which that might be accepted. The "slippery slope" argument against such a course is a potent one that requires particular attention. The course proposed is suggested to be consistent with the developing policy expressed by Parliament in enacting ss 13A and 23AA of the Evidence Act 1908 and s 344C of the Crimes Act 1961. If it is decided that legislative reform is needed, the draft legislation and commentary contained in this paper may be considered as a basis.

## THE EXISTING LAW

- 5 The fundamental question is whether a defendant's right to a fair trial can coexist with a court order allowing a witness to give evidence anonymously.<sup>1</sup>
- 6 The right of a defendant to a fair trial is a fundamental right, recognised in international law and affirmed in s 25 of the New Zealand Bill of Rights Act 1990. Important aspects of the right are the public nature of the hearing (s 25(a)), the right to be presumed innocent until proved guilty according to law (s 25(c)), the right to be present at the trial and to present a defence (s 25(e)), and the right to examine the witnesses for the prosecution (s 25(f)), also known as the right to confrontation and to face one's accuser.
- 7 The common law of New Zealand, stated by the Court of Appeal in *R v Hughes* and *R v Hines*, does not permit the giving of evidence anonymously and accordingly does not compromise the right of the accused to a fair trial. This approach suggests that the unjust avoidance of conviction by some criminals through witness intimidation is an acceptable price for ensuring that innocent people are not convicted and that the right to a fair trial is not diminished.
- 8 The disadvantage of this approach is that it allows determined criminals in some cases to place themselves above the law: to escape legal processes by threat of violence to witnesses who might bring them to justice. The fundamental purpose of the rule of law in society is to protect its citizens. Section 6(c) of the Official Information Act 1982 recording the public interest in terms of

the maintenance of the law, including the prevention, investigation and detection of offences, and the right to a fair trial.

includes the right of the Crown to bring offenders to justice. The rule of law depends on its ability to safeguard witnesses from fear of adverse consequences if they perform their civic duty.<sup>2</sup> If dissuasion of witnesses is not stopped, those charged with major crime will have considerable incentive to resort to threats in order to dissuade, rather than accept the consequences of uninhibited evidence. The present question is whether the problem is of such dimensions as to require a remedy, and if so of what nature.

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<sup>1</sup> In this paper "witness anonymity" means allowing a witness to testify without disclosing his or her name, address, occupation, or any other identifying particulars to the opposing party at any stage of the proceedings, including the trial. Additional methods may also be necessary in individual cases such as the use of a screen between a witness and the defendant, or closed-circuit television and the use of facial blurring techniques, and possibly even voice distortion. In *R v Coleman & Ors* (1996) 14 CRNZ 258, for example, Baragwanath J ordered the use of a screen between the witness and the defendant in addition to ordering non-disclosure of the witness's name, address, and occupation to the defence. The circumstances in which courts may order evidence to be given in alternative ways are considered in *The Evidence of Children and Other Vulnerable Witnesses* (nzlc pp26, 1996).

<sup>2</sup> See, for example, the similar point made in a recent appeal against the sentences imposed on two people convicted of witness intimidation offences: *R v Ngamu & Ryder* (unreported, Court of Appeal, 29 July 1997, CA 149/97, CA 150/97) 4.

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## 2

# Is there a need for change?

### THE NATURE OF THE PROBLEM

9 **T**HERE APPEARS TO BE A SIGNIFICANT AND GROWING PROBLEM of witness intimidation in New Zealand. The phenomenon is addressed by s 117 of the Crimes Act 1961 which imposes criminal liability on one who

(a) dissuades or attempts to dissuade any person, by threats, bribes or other corrupt means, from giving evidence in any cause or matter civil or criminal; or

...  
(d) wilfully attempts in any other way to obstruct, prevent, pervert or defeat the course of justice.

But the seven year penalty is of limited significance when compared with the consequences of a conviction for major crime; it has apparently failed to deter.

10 The dearth of statistical evidence prevents a categorical opinion being formed upon the issues. We infer that the absence of such evidence was material to the decision of the majority of the Court of Appeal in *Hines* that the issues should be addressed by Parliament rather than by the courts.

11 There is, however, evidence of an increase in violent crime in New Zealand. The Department of Justice publication *Conviction and Sentencing of Offenders in New Zealand 1986–1995* records a progressive increase in cases involving violent offences, from 7988 in 1986 to 16 778 in 1995.

12 There is also a body of evidence of specific episodes involving violence and intimidation.<sup>3</sup> The Commission is aware of circumstances that satisfied four judges of the High Court and two of the Court of Appeal that anonymity orders should be made: *Hines*; and *R v Coleman and others* (1996) 14 CRNZ 258, where the alleged crime occurred during a retaliatory raid which was observed by the anonymous witness.

13 The use of anonymous evidence by judges in Australia (see appendix, para A4), England (A7–A10) and Europe (A11–A15) suggests similar perceptions in analogous jurisdictions.

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<sup>3</sup> At least 14 specific instances of witness intimidation were reported in the news media in 1995–1997. Several newspaper articles have also been published detailing police measures against witness intimidation at trials. In the same period there was one reported instance of a trial in Christchurch being abandoned after a witness failed to show up, allegedly as a result of intimidation, see *Press*, 15 October 1996, 15. In New Plymouth on 6 October 1996 a potential witness, Christopher Crean, was killed before he could testify in a gang-related trial. The killing received widespread publicity at the time. The Police have a clear impression that the intimidation of witnesses has increased over the last few years. This cannot be confirmed by crime statistics, but there was, for example, an increase from 112 to 169 between 1993 and 1997 in the number of reported offences involving the obstruction of or attempts to pervert justice: letter from N B Trendle, Assistant Commissioner of Police, 25 July 1997.

- 14 Consultation with jury-warranted District Court judges,<sup>4</sup> Crown solicitors<sup>5</sup> and the Police indicates the nature of the problem. Intimidation arises particularly in cases that are gang-related and those concerning family violence.

## THE POLICY ISSUES

- 15 Parliament has already found it necessary to protect certain witnesses from intimidation in a number of ways. These include excluding the public from the courtroom while witnesses give evidence or permitting witnesses to give evidence via closed circuit video link from an undisclosed location.<sup>6</sup> The police also operate a witness protection programme.<sup>7</sup> In 1986, in response to the Court of Appeal decision in *R v Hughes*, Parliament passed s 13A of the Evidence Act 1908 allowing undercover police officers to testify using their cover names without disclosing their real identity.
- 16 The common law has never permitted anonymous evidence. Have social conditions so changed that there is now need for the law to consider providing such machinery? It is important not to overreact to public concern about intimidation.
- 17 The appropriate policy must balance a number of overlapping and conflicting public interests:<sup>8</sup>
- the defendant's right to a fair trial, which includes the right to examine witnesses;
  - the public interest in
    - the effective prosecution of serious criminal offences, by enabling important or crucial witnesses to testify;
    - open justice; and
    - protecting the safety of witnesses.

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<sup>4</sup> Research Counsel to Chief District Court Judge, "Witness Intimidation: results of consultation with jury-warranted judges", unpublished memorandum, 20 February 1997. Judges gave examples of intimidation including death threats, a gang member holding up a jacket in the courtroom so that the witness could see the gang patches, and the defendant's associates visiting the witness's workplace, staring at the witness, and then leaving.

<sup>5</sup> The Crown Law Office submitted an affidavit to the Court of Appeal in *R v Hines* containing information on cases of recent witness intimidation.

<sup>6</sup> See *M (CA 60/97) v Attorney-General* (unreported, Court of Appeal, 29 May 1997, CA 60/97).

<sup>7</sup> Police witness protection is given only in certain cases where:

- the witness identifies a real and genuine threat and makes a written statement detailing the nature and source of the threat, and justifying his or her fears;
- detectives investigate the threat and assess it as being real and genuine; and
- the case involves a defendant who is charged with an offence punishable by a maximum term of imprisonment of 7 years or more, or an offence dealing in Class A or B drugs; however, the police have a discretion to consider other cases involving a substantial period of imprisonment. (New Zealand Police Best Practice Manual 1994 and Ministry of Justice memorandum, "Protection of Witness Identity", 11 June 1996).

<sup>8</sup> The recent decision of the Court of Appeal, ruling that the High Court and District Courts have jurisdiction to make orders allowing witnesses to give evidence via a closed circuit video link from an undisclosed location, although not a decision granting witness anonymity, demonstrates that the Court is willing to balance the competing public interests and provide protection to witnesses as well as other participants in criminal proceedings. See *M (CA 60/97) v Attorney-General*, above n 6.

Also relevant are the general purposes underlying the law of evidence, including the rational ascertainment of facts, procedural fairness, and the preservation of public and social interests.<sup>9</sup> Evidential and procedural rules should take account of all of these rights and interests and arrive at a proper balance.

- 18 The Law Commission would prefer to have received statistical information about how often, and in what ways, witnesses are intimidated. In other circumstances we might have conducted our own survey. Without such statistics we cannot say definitely whether legislation is needed. Our provisional view is that the time has come; but we would be happy to be proved wrong.

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<sup>9</sup> As identified in *Evidence Law: Principles for Reform* (nzlc pp13, 1991) 12–19.

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# 3

## Current law and practice

### INTRODUCTION

- 19 **W**HILE *HUGHES* AND *HINES* PREVENT THE MAKING OF ANONYMITY ORDERS, some of the interests which such orders would recognise are protected under particular rules. This chapter considers current New Zealand law and practice. The law and practice in various overseas jurisdictions is discussed in the appendix. The principle of open justice, while of high importance, is generally not treated as absolute but is modified to recognise other public interests.

### THE COMMON LAW PRINCIPLE OF OPEN JUSTICE AND ITS EXCEPTIONS

- 20 The principles of the common law were stated by Viscount Haldane LC in *Scott v Scott* [1913] AC 417 (at pp 432–439):

[T]he general principles as regards publicity . . . are of much public importance . . . They lay down that the administration of justice must so far as the trial of the case is concerned, with certain narrowly defined exceptions . . . be conducted in open Court . . .

If there is any exception to the broad principle which requires the administration of justice to take place in open Court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge . . .

While the broad principle is that the courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions . . . but the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done . . .

It may well be that . . . a case may come before the judge in which it is evident that the choice must be between a hearing in public and a defeat of the ends of justice. Such cases do not occur every day. If the evidence to be given is of such a character that it would be impracticable to force an unwilling witness to give it in public, the case may come within the exception to the principle that . . . a public hearing must be insisted on in accordance with the rules which govern the general procedure in English Courts of justice . . . I think that to justify an order for hearing in camera it must be shewn that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made.

Lord Shaw of Dunfermline (416–418) warned that departures from settled practice can entail

not alone an encroachment upon and suppression of private right, but a gradual invasion and undermining of constitutional security. This result . . . is exactly the same result which would have been achieved under, and have accorded with, the genius and practice of despotism.

What happened is a usurpation – a usurpation which could not have been allowed even as a prerogative of the Crown, and most certainly must be denied to the judges of the land. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand . . . There is no greater danger of usurpation than that which proceeds little by little . . . at the instance of judges themselves.

These remarks, directed to a hearing behind closed doors, apply with stronger force to a case of a party, and an accused at that, being prevented from learning the identity of a witness.

## WITNESS ANONYMITY IN CONTEXT

- 21 Generally, the law requires the identity of all prosecution witnesses to be disclosed to the defence before trial to allow investigation into the backgrounds of those witnesses.<sup>10</sup> Witnesses must also identify themselves before giving evidence in the courtroom. The court is open to the public, and proceedings may be reported in the media. These general rules reflect the principle of open justice and are aimed at ensuring that the defendant in a criminal case receives a fair and public hearing.
- 22 There are a number of exceptions to the principle of open justice, in statute and common law, which also affect aspects of the defendant's right to a fair and public hearing.<sup>11</sup> For example:
- The courtroom is always cleared of the public while complainants give evidence in cases of a sexual nature.<sup>12</sup>
  - A court has a discretion to forbid publication of the name of a witness, or particulars likely to lead to identification of the witness, if the court is of the opinion that it would be in the interests of justice, or of public morality, or of the reputation of any victim of an alleged sexual offence or an offence of extortion, or of the security or defence of New Zealand.<sup>13</sup> A court also has the power to exclude people (other than participants in the proceedings) from the courtroom.<sup>14</sup>
  - In cases of a sexual nature, it is an offence to publish the name of a complainant or particulars likely to lead to the identification of that person, unless the complainant is older than 16 and the court expressly permits publication of those details.<sup>15</sup>
  - It is also an offence to publish the identity of witnesses under the age of 17 in criminal proceedings.<sup>16</sup>

<sup>10</sup> There is an established body of common law protecting the identity of informers who do not testify at trial, except where revealing an informer's identity would help prove the innocence of the defendant: see, for example, *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, followed in *Tipene v Apperley* [1978] 1 NZLR 761 and by the full Court of Appeal in *R v Hughes* [1986] 2 NZLR 129. Informer anonymity is not part of the topic for reform considered in this paper.

<sup>11</sup> See also the proposals of the Law Commission in *The Evidence of Children and Other Vulnerable Witnesses* (nzlc pp26, 1996) allowing certain witnesses to be screened or to give evidence on videotape.

<sup>12</sup> Section 375A(2) Crimes Act 1961. Apart from the usual participants in the proceedings such as counsel and the defendant, only accredited news media reporters, any person whose presence is requested by the complainant, and any person whom the judge expressly permits to be present, may remain in the courtroom.

<sup>13</sup> Section 138(2)(b) Criminal Justice Act 1985.

<sup>14</sup> Section 138(2)(c) Criminal Justice Act 1985.

<sup>15</sup> Section 139 Criminal Justice Act 1985.

<sup>16</sup> Section 139A Criminal Justice Act 1985.

- A court also has a discretion to prohibit the publication of the name, address and occupation of any person connected with the proceedings, or any particulars likely to lead to that person's identification.<sup>17</sup>
  - At common law witnesses are permitted to give evidence under a pseudonym, for example, Mr X, however the identity (name and address) of the witness must always be disclosed to the opposing party.<sup>18</sup>
- 23 There are also circumstances in which some or all of the identifying details of prosecution witnesses are withheld from the defence, prior to trial and in some cases during the trial itself:
- Prior to trial, the name and address of an identification witness (a person who claims to have seen the defendant in the circumstances of the offence) can be withheld from the defence if that is necessary for the protection of the identification witness or some other person.<sup>19</sup>
  - As a general rule complainants in sexual cases do not have to disclose their address and occupation to the defence (they have to disclose their name). Nor do they have to state those details in court unless the judge considers that the evidence "is of such direct relevance to facts in issue that to exclude it would be contrary to the interests of justice".<sup>20</sup>
- 24 Practical protection outside of the courtroom can also be given to some witnesses through the police witness protection programme.<sup>21</sup> The programme covers the period up to and after a trial, and usually involves police protection and relocation rather than assignment of a new identity.<sup>22</sup> A witness in the programme may be permitted to

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<sup>17</sup> Section 140 Criminal Justice Act 1985.

<sup>18</sup> *Attorney-General v Leveller Magazine Limited* [1979] AC 440 and other cases establish this as an occasionally proper practice in England. The practice was referred to in *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120, 129–130. Cooke P in *R v Hughes* [1986] 2 NZLR 129, 134, considered that the practice was available in New Zealand, although "it is a course never to be followed without some particular and sufficient reason apart from the mere preference of the witness for confidentiality". See also Somers J in *R v Hughes* at 157.

<sup>19</sup> Section 344C Crimes Act 1961. The view of the Crown Law Office is that the operation of s 344C up until the time the witness testifies means that disclosure at that point is of little assistance to the defendant since it is practically too late to make inquiries about the witness's reputation. The Office suggests extending its operation to permit a judge to make an order allowing a witness to give evidence anonymously where there is a reasonable basis for the witness's fear, and there appears nothing in the circumstances of the witness to suggest that revealing identity would assist the defendant's case in a material way: Ministry of Justice memorandum, "Protection of Witness Identity", 11 June 1996, 8. In *Criminal Procedure: Part One: Disclosure and Committal* (nzlc r14, 1990) the Commission stated that there were some situations where wider public interests outweighed the needs of the defendant (paras 80, 82). In para 81, the Law Commission recommended extending s 344C to *all* prosecution witnesses. We proposed that the prosecution should not have to disclose information to the defence if that would create a real and substantial risk of causing any person to be intimidated or physically endangered.

<sup>20</sup> Section 23AA Evidence Act 1908.

<sup>21</sup> See above n 7.

<sup>22</sup> See above n 7. In those cases where witnesses are assigned a new identity, ss 65 and 78 of the Births, Deaths and Marriages Registration Act 1995 protect the identity of a witness (where the Minister of Police makes a prescribed request) and restrict public access to any records indicating the assignment of a new identity.



give evidence from another unidentified town or city by closed circuit video link.<sup>23</sup> The Harassment and Criminal Associations Bill 1996 contains a new procedure for providing protection to people who are subject to ongoing and persistent harassment.<sup>24</sup>

## THE LEADING COURT OF APPEAL CASE ON WITNESS ANONYMITY: *R v HUGHES*

- 25 The leading New Zealand authority on witness anonymity is *R v Hughes* [1986] 2 NZLR 129. The Court of Appeal by a majority held that undercover police officers giving evidence in court must give their true name, at least to the defence, even though this may reveal their real identity and expose the officers to the risk of retaliation. This case led to the enactment of s 13A of the Evidence Act 1908 (see paras 30–32) which reversed the result. However, *Hughes* remains the leading case on witness anonymity because the principle stated by the majority is of general application, namely that prosecution witnesses must disclose their true identity to the defence, in order to allow the defence to make inquiries about their credibility.<sup>25</sup>

### The majority decision

- 26 The majority of the Court held that information about the identity of a prosecution witness is prima facie material to the defence of a criminal charge.<sup>26</sup> The true identity of an undercover police officer will normally be presumed to be relevant to credibility and should therefore be disclosed to the defence.<sup>27</sup> Richardson J stated that:

We would be on a slippery slope as a society if on a supposed balancing of the interests of the State against those of the individual accused the Courts were by judicial rule to allow limitations on the defence in raising matters properly relevant to an issue in the trial. Today the claim is that the name of the witness need not be given; tomorrow, and by the same logic, it will be that the risk of physical identification of the witness must be eliminated in the interests of justice in the detection and prosecution of crime, either by allowing the witness to testify with anonymity, for example from behind a screen in which case his demeanour could not be observed, or by removing the accused from the Court, or both. The right to confront an adverse witness is basic to any civilised notion of a fair trial. That must include the right for the defence to ascertain the true identity of an accuser where questions of credibility may be in issue. (148–149)

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<sup>23</sup> The Court of Appeal has recently ruled that District and High Courts have the power to order that intimidated witnesses be able to give evidence in criminal proceedings via a closed circuit video link from an undisclosed place outside the court: see *M (CA60/97) v Attorney-General*, above n 6.

<sup>24</sup> Part III of the Bill provides for the making of civil restraining orders. Persistent breach of an order will be an offence punishable by imprisonment for a maximum of two years.

<sup>25</sup> This was confirmed by the Court of Appeal in *R v Hines* (unreported, Court of Appeal, 15 August 1997, CA/465/96).

<sup>26</sup> Richardson J at 147. Somers J, at 155, made similar points in relation to the defendant's right of cross-examination being "emasculated", echoing the statement of Stewart J in the United States case *Smith v Illinois*; see appendix, para A26.

<sup>27</sup> Richardson J at 148; Somers J at 155; Casey J at 159.

## The minority decision

- 27 In contrast, the minority held that the Court did have the power to grant witness anonymity in exercise of its inherent jurisdiction and should do so. The approach preferred by the minority (Cooke P and McMullin J) was that the true identity of an undercover police officer should not be disclosed to the defence, unless the judge is satisfied that it is of such relevance to the facts in issue that to withhold it would be contrary to the interests of justice.<sup>28</sup>
- 28 The minority held that it is acceptable for an undercover police officer to give a cover name, providing that it is made clear that it is not the officer's real name.<sup>29</sup> The question of the officer's true identity may be brought up in cross-examination by the defence. It would then be for the prosecution to show that there was a legitimate reason for withholding the officer's true identity (eg, fear of violence).<sup>30</sup> If this were shown, then it would be for the defence to justify disclosure on the basis that to withhold it would be contrary to "the interests of justice". On what would amount to sufficient justification, Cooke P stated that
- the defence should have to satisfy the judge of no more than that the truth of the evidence of the undercover officer on a material matter of fact is genuinely in issue on substantial grounds; and that there accordingly arises a serious question as to the officer's credibility upon which it might be helpful to the defence to have his true name. To show this it should not be enough merely to say that the officer's account is not admitted or denied. An alternative account would have to be before the court. (143)<sup>31</sup>
- 29 The judge's function is not to determine whether or not the witness is truthful, but is limited to deciding whether there is some substantial ground for questioning the undercover officer's credibility. Once satisfied of this, the judge must direct the prosecution to disclose the witness's identity, despite the potential danger to the witness.<sup>32</sup>

## SECTION 13A OF THE EVIDENCE ACT 1908

- 30 In response to *R v Hughes*, Parliament enacted s 13A of the Evidence Act 1908 to allow undercover police officers to give evidence anonymously, thus following the minority approach of Cooke P and McMullin J.<sup>33</sup> Section 13A permits undercover police officers to state their cover name in court if the specified procedures are complied with. They do not need to state their true name or address, nor give particulars likely to lead to the discovery of their true identity, unless the court grants the defence leave to question them on these matters.

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<sup>28</sup> Cooke P at 145. One member of the majority, Casey J at 159, may have accepted that non-disclosure of the witness's identity to the defendant could be justified if that information was of no possible assistance to the defence in relation to the witness's credibility.

<sup>29</sup> Cooke P at 142–143; McMullin J at 152.

<sup>30</sup> Cooke P at 143; McMullin J at 152–153.

<sup>31</sup> McMullin J made a similar statement at 153.

<sup>32</sup> Cooke P at 143–144.

<sup>33</sup> Section 13A of the Evidence Act 1908 was inserted by s 2 of the Evidence Amendment Act 1986.

- 31 The protection is only available to undercover officers in cases involving certain drug offences,<sup>34</sup> or any offence tried on indictment which attracts a maximum penalty of at least 7 years imprisonment.<sup>35</sup> According to the prescribed procedure, a certificate is given to the court by the Commissioner of Police certifying, among other things, that the officer has not been convicted of any offence (including any offences under the Police Act 1958).<sup>36</sup> The certificate must also give notice of any occasion when the officer's credibility has been subject to adverse comment (s 13A(4)).
- 32 Once such a certificate is lodged in court, a judge will grant leave for the witness to be questioned about his or her true identity only if satisfied
- (a) That there is some evidence before the Judge that, if believed by the jury, could call into question the credibility of the witness; and
  - (b) That it is necessary in the interests of justice that the accused be enabled to test properly the credibility of the witness; and
  - (c) That it would be impracticable for the accused to test properly the credibility of the witness if the accused were not informed of the true name or the true address of the witness. (s 13A(7))

### CASE LAW DEVELOPMENT BETWEEN *R v HUGHES* AND *R v HINES*

- 33 In the last two years anonymity has been considered in a number of High Court decisions involving witnesses who were not undercover police officers.<sup>37</sup> In three cases anonymity was granted, on a basis now held by *R v Hines* to be incorrect and inconsistent with *R v Hughes*.
- 34 In *R v Coleman and others* (1996) 14 CRNZ 258 an identification witness refused to testify unless he could do so anonymously, fearing retaliation against himself or his family from the defendants or their associates. Baragwanath J, in a pre-trial decision,

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<sup>34</sup> Any offence against the provisions of the Misuse of Drugs Act 1975 except ss 7 and 13: s 13A(1)(b) Evidence Act 1908.

<sup>35</sup> The protection provided by s 13A is also available in prosecutions for conspiracy to commit, or for attempting to commit, any offences in these categories: s 13A(1)(c).

<sup>36</sup> See s 13A(3). The other matter which must be certified is that during the period specified in the certificate the witness was a member of the police and acted as an undercover police officer (para (a)).

<sup>37</sup> Two other cases, not discussed in the text, have considered anonymity of witnesses at preliminary hearings. In *R v McIntosh* (unreported, High Court, Invercargill, 11 May 1990, intitutment not supplied, Holland J), on the Friday before the preliminary hearing on the following Monday, the prosecution applied for an order under s 344C of the Crimes Act 1961 to withhold the names and addresses of witnesses from the defence. The prosecution also indicated that at the preliminary hearing it would apply for an order for witness anonymity. Holland J questioned whether the District Court had the power to make such an order at the preliminary hearing in light of *R v Hughes*. He considered that s 138(5) of the Criminal Justice Act 1985 prevented such an order (5). (Section 138 allows the court to make orders prohibiting the publication of the names and identifying details of witnesses, and s 138(5) provides that courts may only make orders according to the provisions of s 138 or any other enactment, and not in exercise of their inherent jurisdiction or any rule of law.) Holland J concluded that since a witness anonymity order could not be made at the preliminary hearing there was therefore no purpose in making an order under s 344C (6). In a later case, *Police v Stevens* [1995] DCR 791, Judge Moore permitted a witness at a preliminary hearing to give oral evidence from behind a solid screen so that he was not visible to the defendants, supplementing an earlier order made by Judge Joyce QC that the prosecution did not have to disclose the names and addresses of certain witnesses to the defence.

considered recent English decisions<sup>38</sup> and held that the evidence could be given anonymously. The witness's identity was to be withheld from the defence, and the witness was to be screened from the defendant with the court cleared of the public. The Judge stated that:

Having considered the competing arguments I am of the view that it is consistent both with the basic principles that underlie the common law and with the current needs of New Zealand society that the Court should accept jurisdiction to permit anonymous evidence in the very rare cases where:

- (i) The evidence is critical to whether the trial can take place at all;
- (ii) The Court is satisfied that there is no substantial reason, following due inquiry, to doubt the credibility of a witness;
- (iii) The Court is satisfied that justice can be done to the accused by the conduct of the trial and suitable directions to the jury at its conclusion;
- (iv) The Court is of the opinion that the public interest in the case proceeding to trial against the particular accused outweighs the disadvantages of that course. (273)

- 35 An appeal against this decision was dismissed on jurisdictional grounds. The Court of Appeal considered that its jurisdiction to hear appeals before trial, as set out in s 379A of the Crimes Act 1961, did not include hearing an appeal from a pre-trial order made in exercise of the High Court's inherent jurisdiction.<sup>39</sup> At the trial, Robertson J followed the decision of Baragwanath J.
- 36 In *R v Hines* witness anonymity was considered three times (in respect of the same witness, Witness A) during the course of the proceedings in the High Court.<sup>40</sup> The witness seeking anonymity had observed the stabbing with which the defendant had been charged. In the first ruling Ellis J considered himself bound by the decision of the majority in *R v Hughes*, and did not grant anonymity.<sup>41</sup> The prosecution decided not to call the witness and Ellis J discharged the jury and ordered a retrial.
- 37 Before the retrial, the prosecution made an application to Williams J that Witness A be permitted to give evidence anonymously.<sup>42</sup> The Judge considered *R v Hughes* and held that the majority decision had decided only that undercover police officers were not an exception to the general rule that witnesses must disclose their real names and addresses to the defence. In the light of English authorities decided since *R v Hughes* (see appendix, paras A7–A10), the High Court decision in *Coleman*, and other factors, Williams J decided that it was open to the Court to grant anonymity in appropriate circumstances (in this case withholding the name, address and occupation of the witness from the defendant).<sup>43</sup> The trial judge, Neazor J, followed the pre-trial ruling.

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<sup>38</sup> See the English decisions in the appendix paras A7–A10. These English cases were decided after *R v Hughes*. The decision in *Hughes* itself was not expressly considered in *Coleman*.

<sup>39</sup> *R v Coleman and others* [1996] 2 NZLR 525 (CA).

<sup>40</sup> The chronology of the trial proceedings in *R v Hines and others* is rather complicated. See *R v Hines and others* (unreported, High Court, Palmerston North, 20 June 1996, T 1/95, Williams J) 9–11 outlining the chronology of the trial itself.

<sup>41</sup> *R v Hines and others* (unreported, High Court, Palmerston North, 15 February 1996, T 1/95, Ellis J).

<sup>42</sup> *R v Hines*, above n 40, 1.

<sup>43</sup> Above n 40, 33–46.

- 38 In *R v Brown and others* (unreported, High Court, Christchurch, 22 August 1996, T 93/96, Moran J) the Crown also sought various pre-trial orders to protect the witnesses, including name suppression, closure of the court to the public, removal of the defendants while the witnesses were entering and leaving the court, and the use of screens. Defence counsel conceded that the witnesses could give evidence anonymously, and Moran J described this and other concessions as “realistic and responsible”.<sup>44</sup> The Judge did not refer to any case law on witness anonymity.
- 39 The most recent High Court decision to consider witness anonymity is *R v Quach* (unreported, High Court, Auckland, 12 March 1997, T 350/96, Tompkins J). The Judge, citing the High Court decision in *Coleman*, considered that the court had jurisdiction to make a witness anonymity order, but the application was too late to be practically effective.

## THE RIGHT TO EXAMINE PROSECUTION WITNESSES

- 40 Subsequent to *R v Hughes*, the New Zealand Bill of Rights Act was enacted in 1990. None of the High Court decisions decided after *Hughes* contain an extended analysis of s 25 of the Bill of Rights Act. In Williams J’s ruling in *R v Hines*, however, the Judge stated without discussion that the minimum standards in s 25(a) and (f) (the right to a fair and public hearing, and the right to examine witnesses) did not expressly bear on his decision, and did not prevent the Court exercising its inherent jurisdiction to make a witness anonymity order.<sup>45</sup>
- 41 Section 25 of the Bill of Rights Act, enacted to affirm the rights and protections guaranteed by the International Covenant on Civil and Political Rights, provides that everyone has certain minimum rights in a criminal trial. These include:
- (f) the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution.<sup>46</sup>
- 42 The leading case on s 25(f) is *R v L* [1994] 2 NZLR 54. The Court of Appeal upheld the admission at trial of a written statement, produced at depositions, of a rape complainant who had committed suicide after a preliminary hearing (at which she had not testified). The Court stated that the opportunity to cross-examine is not an absolute right to confront and question the witness at the trial itself (61). The Court stated further that

the common law, the Bill of Rights and a major international covenant [the European Convention on Human Rights] paralleling the provisions of the International Covenant on Civil and Political Rights which the Bill of Rights is designed to affirm, all bring out the role of cross-examination in ensuring fair trials. . . . In harmony with the justified limitations on the specified rights and freedoms recognised by s 5, *the Court may properly assess the*

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<sup>44</sup> Defence counsel also consented to the depositions of all of the witnesses apart from witness C being read to the jury at the trial. Moran J ordered that witness C be permitted to give evidence from behind a screen at trial, as well as being screened so that the witness could not be seen entering and leaving the court. See *R v Brown and others* (unreported, High Court, Christchurch, 22 August 1996, T 93/96, Moran J) 2–3.

<sup>45</sup> Above n 40, 50.

<sup>46</sup> Section 25(f) expressly provides a right to the *defendant*. Although it seems less likely in practice, witness anonymity could also be granted to a witness for the defence in a criminal case. In such a situation the Crown’s right to a fair trial, including the testing of the evidence of witnesses via cross-examination, would need to be considered.

*practical implications of the absence of an opportunity for cross-examination in the particular case. It is not enough for an accused to assert a defence and a desire to cross-examine to support the defence. The likely veracity of the complainant's statement is a crucial consideration.*<sup>47</sup> (emphasis added)

According to *R v L*, the defendant's right to a fair trial does not necessarily carry with it an absolute right to cross-examine in every case.

## THE COURT OF APPEAL IN *R v HINES*

43 Denis Hines was convicted of wounding with intent to cause grievous bodily harm after a trial in which a prosecution witness, who observed the incident from a portable toilet, was permitted by the trial judge to give evidence "anonymously". On appeal against conviction, Richardson P posed the central question for the Court of Appeal as "whether the trial Judge erred in law in allowing a key witness for the prosecution to give evidence without disclosing his name and address" (1). The Court answered this question by raising and responding to several others, namely

whether the Judge was at liberty to depart from *Hughes*; whether this Court should now review its decision in *Hughes* with a view to changing the common law of New Zealand as declared in *Hughes*; and if so, what should the law be. (2)

44 As acknowledged in all the judgments,<sup>48</sup> the questions before the Court involved an assessment of "the relevant considerations of precedent, legal principle and policy, not least the respective roles of the judiciary and the legislature in determining complex public interest questions" (Richardson P at 2). The view of the majority (Richardson P, Keith and Blanchard JJ) that this particular complex question is properly viewed as a matter for Parliament, not the courts, answered the issue on appeal. The trial judge, in failing to apply *Hughes*, was held to have erred in law and a re-trial was ordered. Despite the majority's view that the Court of Appeal's decision in *Hughes* should not be reviewed, the judgments contain useful arguments addressing the appropriateness of witness anonymity as a question of public policy. The minority decisions also discuss possible tests and procedures for the granting of anonymity.

45 Gault J, as one of the minority, stated that the conflicts of rights present in such cases have been resolved by the Crown in not insisting that the witness give evidence:

While that course relieves a witness of his or her burden and saves the accused from what is claimed to be denial of the right to a fair trial, it does not meet the interest of the community in having serious criminal conduct tried and, if proved, punished. This case raises the question of whether this means of resolving the issue necessarily represents the best balance of the competing rights. (2)

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<sup>47</sup> [1994] 2 NZLR 54, 63. See also the comments of the Court of Appeal in *M (CA 60/97) v Attorney-General*, above n 4. In that case the Court, discussing the factual basis for the video link order, stated that the existence of a right to confrontation was doubted in *R v Accused (T48)* [this appears to be a typographical error and seems to refer to *R v Accused (T4/88)* [1989] 1 NZLR 660] and that "in the context of a preliminary hearing, the loss of this feature would not appear to be of real significance" (10).

<sup>48</sup> The judgment of Richardson P and Keith J was delivered by the President. Gault, Thomas and Blanchard JJ each delivered separate judgments.

- 46 In his view an absolute rule (as established in *Hughes*) is “merely an invitation for intimidation of witnesses” (5). He concluded that
- the interests of justice would be better served by the adoption of a rule permitting case by case consideration in preference for the absolute rule ... I have no doubt that it will be possible in certain circumstances for there to be a fair trial – fair both to the accused and to the public – without the disclosure of the identity of the witness. (7)
- 47 Thomas J also concluded “[r]ights are not regarded as absolute” (40). He noted that Parliament (in the New Zealand Bill of Rights Act) has
- expressly entrusted the Courts with the task of balancing those rights against such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society ... It would be an absurd anomaly for the overriding right to a fair trial to be subject to such a qualification because it is in the Bill of Rights, but the right to know the identity of every witness ... not to be qualified in that way. (33)
- 48 Richardson P, however, confirmed the decision in *Hughes* that “information about the identity of a prosecution witness ... is relevant to issues of credibility, is prima facie material to the defence of a criminal charge and must be disclosed to the defence” (16). The President also noted the “obvious exception [to this requirement] where the only reason for seeking identity information has nothing to do with credibility or the issues in the trial” (16), clearly acknowledging that where credibility is not an issue, such information need not be disclosed. The decision about the relevance of the information to an assessment of credibility therefore becomes a crucial one.
- 49 Although agreeing that “now is not the time for the Judges to make such a fundamental change in the law” (3), Blanchard J also discussed the approach he would favour, if *Hughes* were to be reviewed. In such a situation he stated he would depart from *Hughes* and allow anonymity to be granted to a prosecution witness
- if the Court determines, after independent investigation conducted on its behalf and a *voir dire*, (a) that the trial will remain fair to the accused and (b) that the revelation of the witness's identity will place the witness or any other person at serious risk of physical harm. (3)
- 50 Three of the five judges therefore acknowledged that it is possible, and desirable, to achieve an appropriate balance between the significant competing rights present in such a situation.

### Need for legislative rather than common law reform

- 51 Richardson P and Keith J held that as “court processes do not allow public policy to be developed in the systematic way that is regarded as desirable elsewhere in government” (at 13), the matter should be dealt with as part of the Law Commission’s work.
- 52 Blanchard J also considered that the issue should be dealt with as part of the general work by the Law Commission, noting that the “outmoded restrictions of the hearsay rule” preventing the admissibility of a reliable out-of-court statement is also problematic in this area.<sup>49</sup>
- 53 The minority, Gault and Thomas JJ, considered the issue could be appropriately resolved by the courts. They noted that injustice may well result from waiting for the often slow process of law reform to be completed.

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<sup>49</sup> Reform of the hearsay rule was also proposed by Gault J, (at 7).

## Considerations for the granting of witness anonymity

- 54 In short, three of the five judges supported granting witness anonymity in appropriate cases. Blanchard J commented briefly on the need for a judicial inquiry (see above), while the minority judgments discussed their preferred procedure in more detail.
- 55 Gault J favoured legislative reform in the most general terms, leaving it to the courts to determine whether it should be applied in any particular case (8). He also stated that permission to withhold identity should be granted only when necessary (if other means of protection are inadequate); that anonymity must not deprive the particular accused of a fair trial; that anonymity should not be granted when the witness's credibility "reasonably is in issue"; and that the court should be satisfied (preferably through independent inquiry) that "there are no aspects of the background of the witness potentially undermining of general credibility" (13).
- 56 Thomas J stated that the judge must first be satisfied that the witness or other persons will be exposed to the risk of serious physical harm if the witness testifies.<sup>50</sup> The witness's fear of harm must be "reasonable and justified". The judge will also need to consider other means of protection. At all times the judge must be satisfied that the witness's anonymity would not deprive the defendant of a fair trial. If an anonymity order would prevent the defendant from properly testing the credibility of the witness, genuinely called into question, it may not be made. Thomas J stated that the resolution of these questions would "be likely to require a *voir dire*", but all other matters of procedure could be worked out in practice on a case by case basis (40). He concluded that
- the evidence and arguments which the prosecution advance in support of its claim that an order is in the interests of justice will [also] evolve in response to the strict standards which the Courts will undoubtedly insist upon before permitting a witness anonymity. (40)

## SUMMARY

- 57 In 1986 the Court of Appeal in *R v Hughes* [1986] 2 NZLR 129 held by a majority that an undercover police officer could not give evidence without revealing his or her true identity to the defence. Parliament quickly enacted s 13A of the Evidence Act 1908 to reverse that decision. However, as settled in *Hines*, *Hughes* is still the leading case on witness anonymity because the principle stated in the majority decision is of general application, ie, that the right to confront an adverse witness must include the right of the defence to ascertain the identity of a witness (accuser) where questions of credibility may be in issue.
- 58 Since *Hughes*, the New Zealand Bill of Rights Act 1990 has been enacted. Section 25(f) expressly recognises that the defendant has the right to examine witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution.

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<sup>50</sup> Thomas J also left open the question of whether threat of damage to property would suffice (at 39–40)



- 59 In the last 10 years or so, the incidence of witness intimidation has increased. In the last 2 years, at least six applications have been made to the High Court for a prosecution witness to give evidence anonymously. The High Court has not been consistent either in the way it has dealt with these applications, nor in its interpretation of *Hughes*. The Court of Appeal in *Hines* has now held that the common law does not permit the making of anonymity orders in the exercise of the inherent jurisdiction. It is therefore timely to consider whether, and if so in what way, the law should be reformed.
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## 4 Reform options

### INTRODUCTION

- 60 THE APPROACH OF THE MAJORITY in *R v Hughes*, in terms of general principle, was that anonymity should never be granted since it denies the defendant the right to a fair trial, and in particular the opportunity to investigate the witness and effectively test the witness's credibility through cross-examination. Under this approach, other public interests in protecting witnesses from harm and prosecuting serious criminal offences cannot be allowed to override such an important procedural protection. Some also argue that the gradual diminishing of rights recognised by s 25 of the New Zealand Bill of Rights Act 1990, for example, by the enactment of legislation permitting undercover police officers to give evidence anonymously, will inevitably lead to further compromises of procedural protections in the criminal justice system.
- 61 The increasing incidence of violent offending and of witness intimidation in recent years has raised the question whether the principle in *R v Hughes* should be re-considered. The fundamental choice in legislative reform is whether witnesses should ever be able to give evidence anonymously.

Should the law ever permit witnesses to give evidence anonymously?

- 62 Our provisional view is "yes". We reach that conclusion with reluctance; and are satisfied that anonymity is justifiable only in exceptional circumstances and subject to the most stringent conditions.
- 63 There are two major objections to permitting witness anonymity. The first is apparent: that, deprived of the opportunity to identify the witness, it is impossible to be certain that disclosure of the witness's particulars could not have made any difference. In an analogous context Sir Robert Megarry VC stated in *John v Rees* [1970] 1 Ch 345, 402:
- It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious," they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.
- 64 The second objection is not apparent but insidious. A judge at first instance is faced with the enormity of the specific crime and the behaviour of the particular accused,

and will be under pressure to respond to what may be seen as the justice of the particular case: perhaps saving a witness from apprehension; or hesitating to exclude the only evidence that will bring a bad criminal to trial. Excessive use of an anonymity procedure risks a wholesale change in criminal procedure in, for example, gang cases, drug charges and indecency prosecutions where the witnesses are unknown to the accused. This is the “slippery slope” of which Richardson J (as he then was) spoke in *Hughes*.<sup>51</sup>

- 65 Law reformers must take a long view, standing back from the heat and controversy of a particular case. It can be powerfully argued that to allow anonymous evidence entails a cure that is worse than the disease, responding to the mischief of witness intimidation by depriving accused persons of the right to full cross-examination that has protected individual freedoms in England and New Zealand for hundreds of years. The only justification for change can be that proposed by Gault J – that an absolute rule of exclusion is “an invitation for intimidation of witnesses”.
- 66 We agree that the power is needed, as a reserve power to meet such abuse. But it must be most carefully circumscribed, to avoid a distortion of our system of justice in a way that, being more insidious, is even more dangerous than witness intimidation.

## PROPOSALS FOR REFORM

### Preserving section 13A of the Evidence Act 1908

- 67 Section 13A already provides a specific procedure allowing undercover police officers to testify using their cover names. The salient features are:
- the procedure is only available to undercover police officers;
  - it is only available in trials of certain drug offences and serious criminal offences;
  - once the Commissioner of Police certifies to the court matters relating to the officer’s credibility, the officer automatically receives protection; and
  - the officer may not be questioned about his or her true identity unless the defence satisfies the court that it is in the interests of justice that the defendant be able to test the credibility of the witness, and that this cannot be done without knowing the true identity of the witness.
- 68 The Law Commission agrees that the nature of the work of undercover police officers justifies the special procedure. To reveal their identity may damage their continuing effectiveness as undercover officers. In addition, they are often required to betray apparent friendships, and as a result may be subject to retaliation if their true identities are exposed. The operation of s 13A has been successful in practice. In our view it should be re-enacted, but redrafted in the plain language style of the evidence code.

Should s 13A of the Evidence Act 1908 (anonymity for undercover police officers testifying in certain trials) be re-enacted in the evidence code?

### A proposed power to grant witness anonymity

- 69 In the following part we discuss various aspects of a proposed power to grant anonymity to testifying witnesses other than undercover police officers. Our proposal is designed

<sup>51</sup> [1986] 2 NZLR 129, 148–149. Portia made the same point in her response to Bassanio in the *Merchant of Venice* Act 4, Scene 1, lines 211–219.

to protect the public-spirited honest bystander who is in a position to give reliable evidence. How, it may be asked, can defence counsel establish the witness does not come into that category (perhaps because of some personal grudge against the accused, or a racist or anti-gang bias) if defence counsel does not know the identity of the witness? In principle, if witness anonymity can be ordered at all it should be potentially available to all witnesses. In practice however it will almost always be prosecution witnesses who seek anonymity. We therefore discuss the impact of anonymity on procedural rights from the perspective of defendants. We make the following proposals.

### *Applications to be made to the High Court*

- 70 First, we propose that such orders may be made only by the High Court, with a right of appeal to the Court of Appeal by either defence or prosecution. The proposal is made because of the exceptional and invasive nature of the jurisdiction. Its confinement to the smaller number of judges of the High Court will aid in preserving consistency of approach. It is the function of the High Court by prerogative writs and other processes to oversee the general application of the rule of law in New Zealand. The profound constitutional importance of the proposal and the interference with important rights is comparable to the invasion of bodily integrity by the compulsory taking of blood samples pursuant to s 13 of the Criminal Investigations (Blood Samples) Act 1995, which may be performed only by the authority of an order of a High Court judge.

### *Appointment of independent counsel*

- 71 Secondly, since an anonymity order necessarily deprives the accused and defence counsel of the normal right to knowledge of the witness's identity, we propose that independent counsel be appointed by the court, at public expense, to conduct an inquiry into the witness's truthfulness and reliability and the evidence which the witness will give in the proceeding. The purpose of such appointment will be to compensate as far as practicable for the disadvantage to the defence occasioned by the order. The selection of such counsel will be of crucial importance; he or she must be well experienced at the criminal bar. It will be desirable that such counsel enjoy the confidence of the court, of the defence and of the Crown.

### *Independent counsel to be provided with all relevant information*

- 72 Thirdly, independent counsel must be provided with relevant information in the possession of the Police (if the anonymous witness is called by the prosecution) or by the defence (if the application is by the defence).

### *Independent counsel to report*

- 73 Fourthly, independent counsel must make available to the court the information compiled in the inquiry.

### *Court satisfied of risk of serious personal harm*

- 74 Fifthly, the court must be satisfied on reasonable grounds that the witness or some other person will be exposed to the risk of serious personal harm if the witness gives evidence in the proceeding.

*Court satisfied that witness is truthful and reliable*

- 75 Sixthly, the court must be of the opinion that, having regard to all the available information, no material has been adduced raising substantial doubt as to the truthfulness and credibility of the witness.

*Court satisfied that unfairness to the witness exceeds the possibility of unfairness to the defendant*

- 76 Seventhly, the court must be satisfied that, having regard to
- the general right of an accused to know the identity of the witness;
  - the principle that anonymity orders are justifiable only in exceptional circumstances in order to discourage intimidation of witnesses;
  - the importance of the witness's evidence;
  - the effect a witness anonymity order would have on the ability of a defendant to conduct a proper defence;
  - whether it is practical for the witness to be protected by means other than a witness anonymity order; and
  - the seriousness of the offence,
- that the unfairness to the witness of requiring disclosure of the witness's identity exceeds the possibility of unfairness to the defendant resulting from the trial being conducted without such disclosure.
- 77 We propose that each element must be satisfied before anonymity can be granted. Requiring the judge to be *satisfied* does not require proof beyond reasonable doubt, nor does it impose an onus of proof. The judge must simply form an opinion on the issue.<sup>52</sup>
- 78 We discuss procedural aspects in more detail below (see paras 90–99).

*In trials for serious criminal offences*

- 79 To date, the courts in New Zealand and overseas have only granted anonymity to witnesses in trials for serious criminal offences.<sup>53</sup> Section 13A of the Evidence Act (which allows undercover police officers to give evidence using their cover names) is expressly limited to trials of most types of drug offences and other criminal offences with a maximum penalty of 7 years' imprisonment or more.

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<sup>52</sup> See, for example, the Court of Appeal case of *R v White (David)* [1988] 1 NZLR 264, 268, where McMullin J stated that the phrase "is satisfied" means simply "makes up its mind" and is indicative of a state where the court on the evidence comes to a judicial decision. Examples of this formulation in the Evidence Act 1908 are s 13A(7) (undercover police officers) and s 23A(3) (evidence of complainants in sexual cases). Examples in the Crimes Act 1961 are s 312C (matters on which the judge must be satisfied in respect of applications for warrants to intercept personal communications) and s 345C(5) (trial judge may excuse disclosure of information relating to police investigation).

<sup>53</sup> For example in *R v Coleman and others* (1996) 14 CRNZ 258 the defendants were charged with a variety of violent crimes including wounding with intent to facilitate the commission of a crime. In *R v Hines and others* (unreported, High Court, Palmerston North, 20 June 1996, T 1/95, Williams J) the defendants were charged with alternative counts of attempted murder and wounding with intent to cause grievous bodily harm. See also the overseas cases discussed in the appendix. For example, anonymity was granted to a witness in *R v Taylor* [1994] Times LR 484, [1995] Crim LR 253 in which the defendant was charged with murder.

- 80 We propose that witness anonymity should be available in all indictable criminal proceedings, which must then be heard in the High Court, if other requirements of the rule, as discussed below, are satisfied. We consider that such a serious limitation on a party's rights is not justified in the prosecution of minor offences or in civil proceedings. Our view is that the public interest in protecting witnesses and allowing proceedings to continue should only be safeguarded in more serious criminal proceedings.
- 81 However, we seek comment on whether the availability of anonymity orders should be further restricted. For example, the power to order witness anonymity could be restricted to those trials where a defendant is charged with a purely indictable criminal offence, or with conspiracy to commit, or attempting to commit, a purely indictable offence.<sup>54</sup>

Should the power to order witness anonymity be available in all criminal proceedings? Should it be restricted to trials where a defendant is charged with a serious criminal offence, for example those which can be heard in the High Court?

### *The substance of a witness's fear of intimidation*

- 82 Anonymity is usually granted to protect witnesses from retaliation. There are a number of elements to consider in determining whether, and in what form, retaliation is likely:
- whether an actual threat must be proved;
  - the kind of harm feared by the witness;
  - whether the belief or state of mind of the witness is relevant; and
  - the standard of proof to be met.
- 83 In the United States the cases appear to require an actual threat to the life of the witness to be shown before anonymity will be granted (see appendix, para A28). However, the Law Commission's view is that to require an applicant to show that there has been an actual threat against the life of the witness is to set the standard too high. Lesser threats of physical violence against witnesses are equally effective at dissuading people from testifying. Further, it is the *fear* of harm which will often influence a witness's conduct.
- 84 In England the courts require that there be "real grounds for fearing the consequences" if a witness testifies (see appendix, para A10). The cases do not specify what the feared "consequences" of testifying must be before a witness anonymity order is granted. The Law Commission proposes that the fear of the witness should relate to the risk of *serious personal harm* (serious physical harm to a person). Although fear of financial harm may also be sufficient to persuade a potential witness not to testify, the Commission's view is that a witness anonymity order should only be granted in exceptional

<sup>54</sup> Purely indictable offences are those indictable offences not included in the First Schedule to the Summary Proceedings Act 1957 (which lists indictable offences triable summarily by District Court Judges). See the list of purely indictable offences in appendix H of *Criminal Prosecution* (nzlc pp28, 1997). This category of offences includes ss 116 (conspiring to defeat justice) and 117 (corrupting juries and witnesses) of the Crimes Act 1961. Some purely indictable offences have a maximum penalty of less than seven years' imprisonment, eg ss 80 (oath to commit offence), 82 (seditious conspiracy), 101(2) (bribery of court officer), and 197 (disabling) of the Crimes Act 1961. The only purely indictable offences in the Misuse of Drugs Act 1975 are s 6 (dealing in controlled class A or B drugs) and s 10, where subs (2)(a) applies (aiding offences against corresponding law of another country).

circumstances. At present we are not persuaded that extending the test in this manner is justified. We seek views on whether it would be appropriate to extend the test to include a witness's fear of the risk of property damage, financial harm, or other categories of harm.

What situation must exist with regard to actual or potential threats to a witness before a witness anonymity order can be granted? Should anonymity only be granted if the witness fears serious personal harm? Should financial harm or other types of harm also be included?

- 85 We also consider that the basis of a witness's fear, or the extent of the risk, must be able to be assessed objectively by the judge. We propose that the judge should be satisfied on reasonable grounds that the witness risks exposure to serious personal harm if the witness testifies. This test would allow the judge to inquire into the circumstances of the case and the risk of intimidation or retaliation.

Must the judge be satisfied on reasonable grounds that the witness is at risk of serious personal harm if the witness testifies?

- 86 Intimidation may be aimed at the testifying witness, or another person. The result may be just as effective. The English Court of Appeal recognised this in *R v Taylor*.<sup>55</sup> Therefore we propose that the judge should be able to act if satisfied on reasonable grounds that *another person* will be exposed to the risk of serious personal harm if the witness testifies. It would be difficult, if not impossible, to categorise the different kinds of relationships between a witness and the intimidated person which will affect the behaviour of the witness. Indeed, it is possible to imagine cases where a threat of serious personal harm to a person unrelated and unknown to the witness will influence the witness's behaviour. The Law Commission proposes that the circumstances surrounding a witness's fear of harm to another person should be assessed by the judge on a case by case basis.

Should the judge also be able to order witness anonymity if satisfied on reasonable grounds that *another person* will be exposed to the risk of serious personal harm if the witness testifies?

### *Truthfulness and the usefulness of information about identity*

- 87 The credibility of a witness will always be of primary concern, in particular the truthfulness of the witness and whether the witness has any motive to fabricate evidence against the defendant. Knowing a witness's identity is often the first prerequisite in effectively challenging the witness's evidence. In some cases, such as *R v Hines*<sup>56</sup> where the witness was an uninvolved bystander, the issue for the defence is likely to be the reliability of the evidence rather than the witness's truthfulness.

<sup>55</sup> The consequences if a witness testifies and the witness's identity is revealed need not be limited to the witness: see appendix, para A10 setting out the factors to be satisfied in the English test.

<sup>56</sup> *R v Hines and others* (unreported, High Court, Palmerston North, 20 June 1996, T 1/95, Williams J).

Reliability is a matter which may be fully explored on cross-examination without knowing the witness's identity. We do not propose that the judge form a personal judgment as to the truthfulness of the witness, beyond determining that no material has been adduced raising substantial doubt as to truthfulness or reliability. The European Court of Human Rights has commented that the judicial assessment of the witness's credibility is one of the counterbalancing judicial procedures where there is non-disclosure of the witness's identity to the defence.<sup>57</sup> We are not attracted to this approach. There is a risk that one or more jurors would be aware that the judge is required to make a personal assessment of truthfulness, and be influenced by it.

Should the test for granting witness anonymity be that the judge is satisfied that no material has been adduced raising substantial doubt as to the truthfulness and reliability of the witness? Should the judge go further and assess the truthfulness and reliability of the witness before granting an anonymity order?

- 88 The cases indicate that courts in New Zealand and other jurisdictions have considered the following factors when deciding matters relating to the credibility (truthfulness) and reliability of the witness:
- the relationship if any of the witness to any of the parties;
  - whether the witness was previously known to the defendant;
  - any interest the witness may have in the outcome of the case;
  - any facts or circumstances which call into question the credibility and reliability of the witness; and
  - whether there is any evidence which contradicts in a material way the evidence of the witness which, if believed by the jury, will call into question the witness's credibility or reliability.
- 89 According to the proposed procedure for witness anonymity applications (see below from para 90), information on these factors, and other matters if relevant, will be provided to the judge by the applicant (usually the prosecution). The factors are not exclusive but they are mandatory. We propose that judges must have regard to these factors when deciding matters relating to the truthfulness and reliability of the witness. We welcome comment on whether a list of factors would be helpful.

Should there be a list of factors which the judge must consider when making a decision relating to the truthfulness and reliability of the witness? What other factors should be considered?

## A PROCEDURE FOR WITNESS ANONYMITY APPLICATIONS

### Information provided to the court: the appointment of independent counsel

- 90 In order to decide whether to grant anonymity, the judge must be provided with some information about the witness. We propose that the judge should have a duty, before making an anonymity order, to appoint independent counsel to investigate the

<sup>57</sup> See eg, *Kostovski v Netherlands*, discussed in the appendix at A13.



truthfulness of the witness and the reliability of the evidence the witness is to give.<sup>58</sup> The function of the counsel would be to act as *amicus curiae* ("friend of the court") to assist the judge and to safeguard the interests of the party against whom the anonymous evidence is to be given. The court-appointed counsel should have access to police files, medical records and any other relevant information held by the prosecution (or information held by the defence in the case of a defence application) and may speak with and question the witness.

Should independent counsel be appointed? What should be that counsel's function?

### The court's determination of the application

- 91 The court will initially consider whether the application has sufficient merit to require the appointment of independent counsel. Counsel for the defendant (when a prosecution witness is seeking anonymity) will be notified of the application and will be entitled to make submissions on its merits. Defence counsel should be given any information concerning the witness and the application which does not risk disclosure of the witness's identity. Appointment of independent counsel may, of course, be waived with the consent of the parties.
- 92 If an appointment is made, the application would be dealt with on the *voir dire* at the conclusion of the enquiry by independent counsel. The judge would conduct the hearing with both parties present so far as practicable, but would proceed in the absence of the defendant and defence counsel and make such orders for exclusion of the public and screening of the witness as are necessary to maintain the witness's anonymity. The independent counsel would be present throughout and play whatever part necessary to protect the interests of the person against whom the anonymous evidence is to be given, including the examination or cross-examination of any witnesses called.

Should the evidence code set out a procedure for witness anonymity applications? If so, what kind of procedure should be provided?

- 93 The Law Commission has considered, but rejected as a possible solution, an arrangement under which a witness is identified to a defendant's counsel on the basis that this information may not be passed on by lawyer to client. This solution seems to us unacceptable. We form this view not so much on the basis of the unseemly inquests that would necessarily follow if in fact the information were disclosed, but on a more fundamental matter of principle. Although solicitors and counsel have an obligation to the court that prevails over their obligation to their client, the relationship of lawyer and client is one of good faith requiring candid disclosure by the lawyer to the

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<sup>58</sup> Independent counsel would be paid from funds appropriated by Parliament for the purpose, see draft legislation Section 1(9).

client of all information received by the lawyer that relates to the client's affairs.<sup>59</sup> There is a notable exception where this issue is one relating to the custody of a child.<sup>60</sup> But this is based on the fact that in cases concerning the welfare of a child the court is not deciding between adversaries but exercising the state's power as *parens patriae*. No such considerations apply in the context of a criminal prosecution. The Commission is aware of the technique, used in civil cases, of confining inspection of discovered sensitive documents to parties' advisers to the exclusion of the parties themselves (the cases are conveniently collated in *McGehan on Procedure* para HR 307.07). We do not think that these civil processes are an appropriate analogue to a situation where the physical safety of a witness or members of a witness's family may be at stake.

## Evidence considered in applications

- 94 Generally the rules of evidence apply to the determination of preliminary matters in criminal trials. However, there may be exceptions.<sup>61</sup> In *M (CA 60/97) v Attorney-General* (unreported, 29 May 1997, CA 60/97), a decision upholding the use of video links to enable intimidated witnesses to give evidence from undisclosed venues, the Court of Appeal stated that the inquiry into the risk of harm to the witnesses<sup>62</sup> must be assessed in all the circumstances. In this regard the court stated that

The inquiry is not in the nature of the trial of an issue, where rules of evidence and the burden of proof feature. It would be unreal to ignore the fact that the appellant is charged with the murder of a witness who was to testify against him on another charge – the presumption of innocence does not alter that fact, or its significance. Inferences can be drawn. It may also be appropriate to take into account information which falls within the hearsay rule, although the weight to be given to it will of course require careful consideration. (9–10)

- 95 The evidence code will propose rules of admissibility more relaxed than the present rules. The Law Commission seeks comment on whether there should be further relaxation to permit the judge to consider evidence not normally admissible, such as inadmissible confessions by the defendants, when considering the risk of harm to the witness, as well as the truthfulness of the witness (eg, any motive to lie).

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<sup>59</sup> *McKaskell v Benseman* [1989] 3 NZLR 75. In *R v Davis* (1993) 97 Cr App R 110 the English Court of Appeal, considering an application by the prosecution for non-disclosure of certain documents to the defendant, agreed that it would not be right for defence counsel to undertake to the court not to reveal what passes in court to the defendant. The court stated that "[I]t would wholly undermine counsel's relationship with his client if he were privy to issues in court but could reveal neither the discussion nor even the issues to his client" (113). See also *R v Preston* [1994] 1 AC 130, 153 per Lord Mustill where the House of Lords confirmed the principle in *R v Davis*. The Diplock Commission also made the point that in this situation defence counsel will be exposed to a conflict between duty to his client and duty to the State, inconsistent with the role of a defence lawyer in the judicial process: para 20; quoted by Marcus, "Secret Witnesses" [1990] Public Law 207 at 211.

<sup>60</sup> See *In re K Infants* [1965] AC 201, the Guardianship Act 1968 s 29A(4) and the decision by Gallen J regarding that provision in *M v B* (1993) 10 FRNZ 433.

<sup>61</sup> See *Cross on Evidence* (Butterworths, Wellington, 1996), para 3.8. It is impossible to describe with any certainty which rules may be waived and in what circumstances. The one modern New Zealand authority cited in *Cross on Evidence* is *R v Gray* (unreported, 21 August 1985, Court of Appeal, CA 114/85) in which the Court of Appeal decided that preliminary facts about a local body voting system could not be proved by hearsay.

<sup>62</sup> And other people who may be in their vicinity when giving evidence in the courtroom.

Should the judge be able to consider evidence not normally admissible when considering the truthfulness of the witness?

### **Appeal of pre-trial rulings on witness anonymity**

- 96 Applications for witness anonymity are usually made in respect of crucial prosecution witnesses. Therefore, the outcome of the application will often determine whether the prosecution continues. At present the Court of Appeal has no jurisdiction to hear appeals against pre-trial witness anonymity rulings made in exercise of inherent jurisdiction (see *R v Coleman and others* [1996] 2 NZLR 525 (CA)). It is critical that there be a right of appeal for such an important pre-trial ruling and we propose that s 379A should be amended to give such jurisdiction.

Should s 379A of the Crimes Act 1961 be amended to give the Court of Appeal jurisdiction to hear appeals against pre-trial witness anonymity rulings?

### **The trial judge's discretion to make or discharge orders**

- 97 The application for an anonymity order would be made before trial. Necessarily the evidence is incomplete at that point; any decision at that stage must be reviewed at trial in the light of changes in the evidence and the perception of the issues. The practical difficulty for the trial judge in limiting the scope of cross-examination to maintain the witness's confidentiality must not be underestimated. The judge must constantly bear in mind the potential need to bring the proceedings to a halt by requiring a Crown election between disclosure and discharge, as a lesser evil than unfair constraint upon cross-examination which might entail risk of unsafe conviction.
- 98 Section 344A of the Crimes Act 1961 expressly preserves the discretion of the trial judge to admit or exclude evidence, notwithstanding any pre-trial orders relating to the admissibility of evidence.<sup>63</sup> We propose that similar express provision should be made to preserve the trial judge's power to make or discharge pre-trial witness anonymity rulings, to cater for changing circumstances during the course of the trial.

Should the trial judge's discretion to make or discharge a witness anonymity order be expressly preserved in the evidence code?

### **Judicial warnings concerning anonymous witnesses**

- 99 The Law Commission does not consider it appropriate to provide for a form of warning in any legislation dealing with these matters. Although a warning to the jury not to draw any adverse inferences from the way the witness gives evidence (as currently provided in Section 23H(a) of the Evidence Act 1908) is clearly desirable, the formulation of such a warning is appropriately the task of the trial judge.

<sup>63</sup> The draft Section was altered at select committee stage to achieve this: (1980) 433 NZPD 3519.

## SUMMARY

- 100 The Law Commission's view is that legislative reform is desirable. There are two basic options for such reform:
- a rule in the evidence code that no witness may testify anonymously; or
  - a rule in the evidence code allowing witnesses to testify anonymously in certain well-defined circumstances.
- 101 We propose that s 13A of the Evidence Act 1908 (undercover police officers) be retained and redrafted in the plain language style of the proposed evidence code. In addition, we propose that any witness, whether for the prosecution or the defence, should be able to apply to the court for an order permitting them to give evidence without revealing his or her identity.
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DRAFT  
WITNESS ANONYMITY  
PROVISIONS FOR AN  
EVIDENCE CODE,  
WITH COMMENTARY

CONTENTS

- 1 Applications for witness anonymity order
  - 2 Witness anonymity orders
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-

## WITNESS ANONYMITY

*The following definition should be presented with other definitions:*

**witness anonymity order** means an order made in a criminal proceeding by the High Court restricting disclosure of the identity of a witness in accordance with Section xx;

**1 Applications for witness anonymity order**

- (1) Counsel for the prosecution or a defendant in a criminal proceeding in which a defendant is charged with an indictable offence or a person who expects to be called as a witness in such a proceeding may apply to the High Court for a witness anonymity order.
- (2) If, after considering an affidavit or affirmation of the witness and any submissions made by the parties to the proceeding, the court is satisfied on reasonable grounds that the witness, or some other person, will be exposed to the risk of serious personal harm if the witness gives evidence in the proceeding, the court shall appoint an independent counsel as *amicus curiæ*
  - (a) to conduct an inquiry into the witness's truthfulness and reliability and the evidence which the witness will give in that proceeding; and
  - (b) to provide the court with the information compiled in the course of that inquiry.
- (3) The independent counsel must conduct the inquiry in such a way as to safeguard the interests of the party against whose interests the evidence of the witness is to be given while protecting the anonymity of the witness. The independent counsel may speak with and question the witness.
- (4) If the witness is to be a prosecution witness, the police officer in charge of the investigation that led to the proceeding must provide the independent counsel with all the relevant information in the possession of or available to the police and must also provide that counsel with an affidavit sworn or affirmed by that police officer confirming that all relevant information has been disclosed to the independent counsel.
- (5) If the witness is to be a defence witness, the counsel for the defendant who intends to call the witness must provide the independent counsel with all the relevant information in the possession of or available to counsel for that defendant or to that defendant and must also provide the independent counsel with an affidavit sworn or affirmed by the defendant's counsel confirming that to the best of his or her belief all relevant information has been disclosed to the independent counsel.
- (6) The independent counsel
  - (a) is entitled, if the witness is to be a prosecution witness, to have access to all police records relating to the investigation that led to the proceeding, including any medical, scientific or other forensic reports or advice held by or available to the police; and
  - (b) is entitled, if the witness is to be a defence witness, to have access to all relevant records held by the defendant who is to call the witness or by that defendant's counsel relating to that defendant's defence, including any medical, scientific or other forensic reports or advice held by or available to the defendant.

Section 1 continues overleaf

## COMMENTARY

### Section 1

- C1 This Section is new for New Zealand law. It sets out the procedure for witness anonymity applications in respect of witnesses other than undercover police officers. Any witness who expects to testify in any criminal proceeding concerning an indictable offence may apply for a witness anonymity order.
- C2 The application is made to the High Court and, if an order is made, the trial must be held in the High Court so as to allow a High Court judge to make any variations to the order. The application would be made before the depositions hearing and any resulting order would apply to the depositions process and to any other preliminary matters. Counsel for the opposing party will be given notice of the application and may make submissions as to the merits of the case (that is, whether there are reasonable grounds) and may receive any relevant information as ordered by the court.
- C3 *SubSection (2)* requires the court to appoint independent counsel to conduct an inquiry concerning the witness, if satisfied on reasonable grounds that the witness risks exposure to serious personal harm. Independent counsel need not be appointed by consent of the parties.
- C4 *SubSection (3)* states the function of independent counsel. Independent counsel may also participate in any voir dire and perform such a role as the court sees fit (see *subSection (7)*).
- C5 The court needs certain information about the witness in order to assess whether the witness should be granted anonymity under the rule (as set out in *Section 2*). *Subsections (4)* and *(5)* require the party applying for a witness anonymity order to swear or affirm to the court that diligent inquiries have been made into the truthfulness of the witness, having regard to the factors in *Section 2(2)*, and that the nature and results of that inquiry have been disclosed to independent counsel.
- C6 *SubSection (6)* gives independent counsel power to make relevant inquiry.

- (7) After receiving the information compiled by the independent counsel, the court may dispose of the application or before doing so conduct a voir dire at which the independent counsel is to participate in such a way as to safeguard the interests of the party against whose interests the evidence of the witness is to be given while protecting the anonymity of the witness.
- (8) The court may for the purposes of the voir dire give such directions as are necessary to preserve the anonymity of the witness, including directing the party against whose interests the evidence is to be given and that party's counsel to withdraw from the court, clearing the court of members of the public, and screening the witness from persons other than counsel calling the witness, the judge, and court officials.
- (9) An independent counsel is entitled to be paid a fee and reasonable expenses as determined by the court and paid from funds appropriated by Parliament for the purpose.



*Section 1 continued*

- C7 *SubSection (7)* clarifies the role of independent counsel during a voir dire.
- C8 Under *subSection (8)* the hearing on the voir dire is conducted inter partes but subject to the court's maintaining the anonymity of the witness by whatever orders are required for that purpose, including if need be hearing evidence in the absence of the party against whom the evidence is proposed to be adduced.
- C9 *SubSection (9)* provides for the payment for the services of independent counsel.

## 2 Witness anonymity orders

- (1) The court may make a witness anonymity order if the court
  - (a) is satisfied on reasonable grounds that the witness or some other person will be exposed to the risk of serious personal harm if the witness gives evidence in a criminal proceeding; and
  - (b) is of the opinion that, having regard to all the available information, no material has been adduced raising substantial doubt as to the truthfulness and reliability of the witness; and
  - (c) is satisfied, having regard to
    - (i) the general right of an accused to know the identity of such witness; and
    - (ii) the principle that witness anonymity orders are justified only in exceptional circumstances in order to discourage intimidation of witnesses; and
    - (iii) the importance of the witness's evidence to the case of the party who wishes to call that witness; and
    - (iv) the effect that a witness anonymity order would have on the ability of a defendant to conduct a proper defence; and
    - (v) whether it is practical for the witness to be protected by means other than a witness anonymity order; and
    - (vi) the seriousness of the offence,that the unfairness to the witness of requiring disclosure of the witness's identity exceeds the possibility of unfairness to a defendant resulting from the trial being conducted without that disclosure.
- (2) Without limiting the factors that the court may take into account when assessing the truthfulness and reliability of the witness, the court must have regard to
  - (a) the relationship, if any, of the witness to any of the parties to the proceeding or to the person against whom the alleged offence was committed; and
  - (b) whether the witness is known to the defendant; and
  - (c) any interest that the witness may have in the outcome of the proceeding; and
  - (d) any facts or circumstances which call into question the truthfulness or reliability of the witness; and
  - (e) whether there is any evidence which contradicts in a material way the evidence of the witness which if believed by the finder of fact will call into question the witness's truthfulness or reliability.
- (3) Before determining an application for a witness anonymity order, the court may receive and take into account any relevant evidence or information, whether or not that evidence or information would be admissible in the hearing of the proceeding, and must have regard to
  - (a) the information provided by independent counsel to the court in accordance with Section xx; and
  - (b) the voir dire proceeding (if any); and
  - (c) any submissions that counsel representing any of the parties to the proceeding may wish to make.

Section 2 continues overleaf

## Section 2

- C10 *SubSection (1)(a)* requires the court to be satisfied on reasonable grounds that the witness or another person will be exposed to the risk of serious personal harm if the witness gives evidence in the proceeding.
- C11 *SubSection (1)(b)* requires the court to be satisfied that no material has been adduced raising substantial doubt as to the truthfulness and reliability of the witness.
- C12 *SubSection (1)(c)(i)–(vi)* sets out a list of factors which the court may have regard to in determining whether anonymity should be granted, but the court must be satisfied that the defendant's right to a fair trial is not compromised.
- C13 The factors in *subSection (2)* are mandatory. We concluded that these factors would always be mandatory in effect, therefore it was better that this be made express in the rule. Those making inquiries into the truthfulness and reliability of the witness should have regard to these factors.
- C14 The opening words of *subSection (3)* provide that the court may take into account relevant evidence and information which would not normally be admissible. In the paper we discuss this proposal and seek comment. Apart from requiring the judge to have regard to certain information provided to the court, the procedure for determining witness anonymity applications is left to the judge's discretion. In the paper we seek comment on whether the code should specifically provide a procedure for witness anonymity applications.

- (4) If the court makes a witness anonymity order, the court may, for the purposes of the proceeding, give such directions as are necessary to preserve the anonymity of the witness, including directing the party against whose interests the evidence is to be given and that party's counsel to withdraw from the court, clearing the court of members of the public, screening the witness from persons other than counsel calling the witness, the judge, the jury (if any) and court officials.
- (5) If the court makes a witness anonymity order in respect of a witness
  - (a) the order has an effect at all stages of the proceeding, including the preliminary hearing;
  - (b) the witness must not be required to state his or her true name, address or occupation or to give any particulars likely to lead to the discovery of that name, address or occupation; and
  - (c) no evidence can be given and no question can be put to the witness or any other witness relating directly or indirectly to the true name, address or occupation of the witness; and
  - (d) no barrister, solicitor, officer of the court or other person involved in the proceeding can state in court the true name, address or occupation of the witness or give any particulars likely to lead to the discovery of that name, address or occupation.
- (6) The court may at any time, either on the application of a party to the proceeding or on its own initiative, discharge or vary a witness anonymity order.

*Section 2 continued*

- C15 *SubSection (4)* provides that the court should maintain the anonymity of the witness who is subject to an anonymity order throughout the trial process by making whatever orders are necessary.
- C16 *SubSection (5)* protects the identity of the witness during the trial, as currently provided for undercover police officers under s 13A of the Evidence Act 1908.
- C17 *SubSection (6)* expressly preserves the trial judge's discretion to make, discharge or vary witness anonymity orders.

### 3 Anonymity of undercover Police officers

(1) In this section

**serious offence proceeding** means a proceeding in which a person is being or is to be proceeded against by indictment for

- (a) an offence that is punishable by imprisonment for life or for a term of not less than 7 years; or
- (b) an offence against any provision of the Misuse of Drugs Act 1975 except Section 7 or 13; or
- (c) an offence of conspiracy to commit or attempting to commit an offence described in paragraph (a) or (b);

**undercover Police officer** in relation to a serious offence proceeding, means a member of the Police whose identity was concealed for the purposes of any investigation relevant to the proceeding.

(2) If it is intended to call an undercover Police officer as a witness for the prosecution in a serious offence proceeding, the Commissioner of Police may, at any time before an indictment is presented, file in the court in which the proceeding is to be held a certificate signed by the Commissioner:

- (a) stating that during the period specified in the certificate, the witness was a member of the Police and acted as an undercover Police officer; and
- (b) stating that the witness has not been convicted of any offence, or the witness has not been convicted of any offence other than the offence or offences described in the certificate; and
- (c) stating that the witness has not been found guilty of an offence of misconduct or neglect or duty under the Police Act 1958, or has not been found guilty of any such offence or offences except as described in the certificate; and
- (d) if, to the knowledge of the Commissioner, the truthfulness and reliability of the witness in giving evidence at any other proceeding has been the subject of adverse comment by the judge or other person before whom that proceeding was held, stating the relevant particulars.

(3) For the purposes of subSection (2), it is sufficient if a certificate states the nature of any offence or comment referred to in the certificate and the year in which the offence was committed or the comment made, and it is not necessary to state the venue or the precise date of the proceeding or any other particulars that might enable the true name or true address of the witness to be discovered.

Section 3 continues overleaf

### Section 3

C18 *Section 3* re-enacts s 13A of the Evidence Act 1908 in the style of the proposed evidence code.

- (4) If the Commissioner of Police files a certificate in a serious offence proceeding in accordance with subSection (2), the following provisions apply:
  - (a) if a witness is subsequently called by the prosecution and gives evidence that during the period specified in the certificate he or she was a member of the Police and acted as an undercover Police officer under the name specified in the certificate, it is presumed, in the absence of proof to the contrary, that the certificate was given in respect of that witness; and
  - (b) it is sufficient if the witness is identified in that proceeding by the name by which the witness was known while acting as an undercover Police officer, and, unless leave is given under paragraph (c), the witness must not be required to state his or her true name or address or to give any particulars likely to lead to the discovery of that name or address; and
  - (c) except with the leave of the court, no evidence can be given and no question can be put to the witness or any other witness relating directly or indirectly to the true name or address of the witness; and
  - (d) unless leave is given under paragraph (c), no barrister, solicitor, officer of the court or other person involved in the proceeding can state in court the true name or address of the witness or give any particulars likely to lead to the discovery of that name or address.
- (5) An application for leave under subSection (4)(c)
  - (a) may be made from time to time and at any stage of the proceeding; and
  - (b) must, where practicable, be made and dealt with in chambers; and
  - (c) if the proceeding is before a jury, must be dealt with and determined by the judge in the absence of the jury.
- (6) On an application for leave under subSection (4)(c), the certificate filed by the Commissioner of Police is, in the absence of evidence to the contrary, sufficient evidence of the particulars stated in it.
- (7) The court must not grant leave under subSection (4)(c) unless satisfied that
  - (a) there is some evidence before the judge that, if believed by the jury, could call into question the truthfulness and reliability of the witness; and
  - (b) it is necessary in the interests of justice that the defendant be enabled to test properly the truthfulness and reliability of the witness; and
  - (c) it would be impracticable for the defendant to test properly the truthfulness and reliability of the witness if the defendant were not informed of the true name or address of the witness.
- (8) Where the Commissioner of Police files a certificate under this Section in respect of a witness, the Commissioner must serve a copy of the certificate on the defendant or any solicitor or counsel acting for the defendant, at least 14 days before the witness is to give evidence.



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## Appendix

### Law and practice in other jurisdictions

- A1 **T**his appendix discusses relevant cases on witness anonymity from other domestic and international jurisdictions. All are criminal cases. No common law jurisdiction has enacted governing legislation and no other law reform agencies have considered witness anonymity.

#### AUSTRALIA

- A2 There are only two reported cases in Australian state courts where the disclosure of a witness's identity to the defence has been directly considered.<sup>64</sup> Both cases considered *R v Hughes* [1986] 2 NZLR 129, see paras 25–29.
- A3 In *R v The Stipendiary Magistrate at Southport ex parte Gibson* [1993] 2 Qd R 687 the Full Court of Queensland held that the true identity of a witness must be disclosed to the defence during committal proceedings and at trial.<sup>65</sup> In that case Williams J's view was that to hold otherwise would infringe a basic principle of natural justice that a defendant should know the name of the principal prosecution witness and not be deprived of the opportunity of testing the prosecution's evidence.<sup>66</sup>
- A4 In *Jarvie and another v The Magistrates' Court of Victoria at Brunswick and others* [1995] 1 VR 84 the Supreme Court of Victoria declined to follow the Queensland decision in *ex parte Gibson*. At issue was whether the true identity of two undercover police officers could be withheld from the defendant at the committal proceedings. The Court decided that the lower court had jurisdiction to make an anonymity order and that the witnesses should be permitted to give evidence without disclosing their real identities. The terms of the Court's judgment relate to proceedings at trial, as well as committal proceedings. The Court held that:
- at a minimum the true name and address of a witness must always be disclosed in confidence to the court (88);
  - the same policies which justify the protection of informers as an aspect of public immunity also justify the protection of undercover police officers (88). However, the claim to anonymity can also extend to other witnesses whose personal safety is endangered by disclosure of their identity (99);
  - in deciding whether an undercover police officer should be granted anonymity, the court must balance the competing public interests (the preservation of anonymity against the right of the defendant to a fair trial, which includes being able to establish those matters going to credit, and the interest in public proceedings) (88–89); and

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<sup>64</sup> These Australian decisions were not cited in *R v Coleman and others* (HC) or *R v Hines and others* (HC). See paras 33–39.

<sup>65</sup> Williams J at 692–693; Cooper J at 704–705.

<sup>66</sup> [1993] 2 Qd R 687, see eg, comments at 690, 691, 692, 694.

- once the defence establishes that there is good reason to think that non-disclosure would result in substantial prejudice to the defendant, disclosure must be directed. (90) In a strong enough case, the necessary substantial prejudice to the defendant could consist in the inability to gather and use material bearing on the credibility of an important prosecution witness, where that witness's credibility was really in question. (91)<sup>67</sup>

## CANADA

- A5 Witness anonymity has not been directly considered by the Supreme Court of Canada. The protection of intimidated witnesses was referred to in *R v Stinchcombe* (1991) 68 CCC 3d 1 in the context of a decision on pre-trial disclosure to the defence of the statement of a potential prosecution witness. The Court acknowledged that disclosure might be properly delayed in order to protect witnesses, but that witnesses who have information favourable to the defendant must have their identity disclosed sooner or later.
- A6 Most subsequent Supreme Court cases referring to or applying *R v Stinchcombe* are either irrelevant to the issue of witness anonymity, or have concerned disclosure of documents held by third parties (eg, counselling records of complainants in sexual cases). Two cases have considered the prosecution's duties in respect of pre-trial disclosure of the identity of police informers to the defence: see *R v Khela* (1995) 129 DLR 4th 289; 102 CCC 3d 1; and *R v Leipter* (1997) 143 DLR 4th 38; 112 CCC 3d 385.

## ENGLAND

- A7 In England witnesses have given evidence anonymously in certain circumstances.<sup>68</sup> The decisions have been made under the courts' inherent jurisdiction. While acknowledging that the witness's identity is important information for the defence, the courts are prepared to grant anonymity to protect the interests of intimidated witnesses thereby facilitating the prosecution of crime.
- A8 The starting point is the Court of Appeal decision in *R v DJX, SCY, GCZ* (1990) 91 Cr App R 36. Although this case concerned children giving evidence screened from the defendants,<sup>69</sup> subsequent cases on witness anonymity have applied the general principles stated by Lord Lane CJ:

The learned judge has the duty on this and on all other occasions of endeavouring to see that justice is done. Those are high sounding words. What it really means is, he has got to see that the system operates fairly: fairly not only to the defendants but also to the prosecution and also to the witnesses. Sometimes he has to make decisions as to where the

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<sup>67</sup> In discussing the balancing exercise which the court must undertake, Brooking J described the judgment of Cooke P in *R v Hughes* as "particularly helpful": [1995] 1 VR 84, 92.

<sup>68</sup> The cases are discussed in the text. See also the Northern Ireland Crown Court case *R v Murphy and Maguire* (April 1989, unreported) commented on by Marcus, "Secret Witnesses" [1990] Public Law 207, 213–217 (the judge ordered that the identity of certain witnesses could be withheld from the defendants, and that they could give evidence from behind a screen).

<sup>69</sup> See (1990) 91 Cr App R 36, 39. The defendants were convicted of a large number of sexual offences. The defendants and complainants were all related to one another by blood or marriage.

balance of fairness lies. He came to the conclusion that in this case the necessity of trying to ensure that these children would be able to give evidence outweighed any possible prejudice to the defendants by the erection of the screen.<sup>70</sup>

- A9 In *R v Watford Magistrates ex parte Lenman* [1992] Times LR 285, [1993] Crim LR 388 witnesses to an incident, where a group of youths had rampaged through Watford violently attacking four people, had serious concerns about their personal safety. Applying the general principles stated in *R v DJX, SCY, GCZ* a Divisional Court upheld the decision to allow the witnesses to give evidence anonymously at the committal stage. The witnesses were screened from the defendant but not counsel, their voices were disguised, and their names were withheld from the defence.
- A10 In *R v Taylor* [1994] Times LR 484, [1995] Crim LR 253, the Court of Appeal upheld a decision at trial to grant anonymity. The witness's evidence was crucial as it provided the only independent corroboration of the removal of the victim's body from the pub where the murder was alleged to have occurred. The Court of Appeal referred to both *R v DJX, SCY, GCZ* and *R v Watford Magistrates ex parte Lenman* as authorities. The Court held that the following factors must be satisfied before witness anonymity can be granted:
- there must be real grounds for fearing the consequences if a witness gives evidence and his or her identity is revealed. Those consequences need not be limited to the witness himself or herself;
  - the evidence must be sufficiently relevant and important to make it unfair to compel the prosecution to proceed without it;
  - the prosecution must satisfy the court that the creditworthiness of the witness has been fully investigated and the results of that inquiry disclosed to the defence, so far as is consistent with the anonymity sought;
  - the court must be satisfied that no undue prejudice is caused to the defendant (the term "undue" is used deliberately since some prejudice will be inevitable); and
  - the court can balance the need for anonymity – including the consideration of other ways of providing witness protection eg, screening the witness or holding an *in camera* hearing<sup>71</sup> – against the unfairness or appearance of unfairness in the particular case.

The factors set out in *Taylor* have been most recently considered and endorsed in *R v Liverpool City Magistrate's Court ex parte Director of Public Prosecutions* (CO1148 Queen's Bench Division, judgment 19 July 1996, Bedlam LJ and Smith J).

## EUROPE

- A11 Article 6 of the European Convention on Human Rights specifies the standards for a fair trial in member states of the European Community. Article 6(1) provides:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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<sup>70</sup> Above n 69, 40.

<sup>71</sup> A hearing from which members of the public are excluded.

Article 6(3)(d) provides:

Everyone charged with a criminal offence has the following minimum rights: . . . (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him . . .<sup>72</sup>

A12 The general approach of the European Court of Human Rights to Article 6 is that the defendant must have an adequate and proper opportunity to challenge and question a witness giving evidence against the defendant.<sup>73</sup> The European Court has considered cases where the statements of witnesses (sometimes anonymous) were admitted as evidence without the defendant having an opportunity, at some stage of the proceedings, to examine those witnesses.<sup>74</sup>

A13 In *Kostovski v The Netherlands*<sup>75</sup> the applicant (defendant) was convicted on the basis of statements from two anonymous witnesses. In discussing the impact of witness anonymity, and the applicant's lack of opportunity to challenge and question the witnesses, the Court commented that:

If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculcating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious. (para 42)

There were other factors affecting the applicant's right to a fair trial: the magistrates who examined one of the anonymous witnesses did not themselves know the identity of the witness, the other anonymous witness was not examined by a magistrate at all; and the trial courts were not able to hear the witnesses themselves and assess their reliability. After referring to these the Court concluded that "[i]n these circumstances it cannot be said that the handicaps under which the accused laboured were *counter-balanced by the procedures followed by the judicial authorities*" such as disclosing the identity of the witness to the examining magistrate, interviewing of the witness in person by the examining magistrate, ensuring the presence of the defendant and counsel at those interviews, and ensuring that the anonymous witness gives evidence in person at the trial.<sup>76</sup>

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<sup>72</sup> The terms of Articles 14(1) and 14(3)(e) of the International Covenant on Civil and Political Rights 1966 are similar to these provisions of the European Convention. The texts of these Articles in the European Convention and the International Covenant are set out in Brownlie (ed), *Basic Documents on Human Rights* (3rd ed, Clarendon Press, Oxford, 1993) at pages 329 and 130–131 respectively.

<sup>73</sup> *Kostovski v The Netherlands* [1989] Ser A Vol 166; (1990) 12 EHRR 434, 448. See also *Windisch v Austria* [1990] Ser A Vol 186; (1991) 13 EHRR 281.

<sup>74</sup> The inquisitorial systems of some European countries permit witnesses to be examined by investigating magistrates prior to trial. At this stage of proceedings the prosecution and defence also have the opportunity to examine the witness. Relevant cases are *Unterpertinger v Austria* [1986] Ser A Vol 110; (1991) 13 EHRR 175; *Delta v France* [1990] Ser A Vol 191A; (1993) 16 EHRR 574; *Isgro v Italy* [1991] Ser A Vol 194A; [1991] Yearbook of the European Convention on Human Rights 184; *Ludi v Switzerland* [1992] Ser A Vol 238; [1992] Yearbook of the European Convention on Human Rights 155.

<sup>75</sup> [1989] Ser A Vol 166; (1990) 12 EHRR 434.

<sup>76</sup> Para 43, emphasis added.

A14 In another case concerning the use at trial of the written statement of an undercover police officer, the European Court indicated that such counterbalancing procedures would have been possible and therefore anonymity would not have violated the applicant's (defendant's) right to a fair trial:

[I]t would have been possible to [have provided the defence with an opportunity at trial to question the officer and cast doubt on his credibility] . . . in a way which took into account the legitimate interest of the police authorities, in a drug trafficking case, in preserving the anonymity of their agent, so that they could protect him and also make use of him again in the future.<sup>77</sup>

A15 More directly in point is *Kurup v Denmark* (1984) 8 EHRR 93, a decision of the European Commission of Human Rights concerning an application for the European Court to hear a Danish case on whether witness anonymity at trial breached Article 6.<sup>78</sup> In *Kurup*, a drugs case, the applicant (defendant) was not present in the trial court when the witnesses gave evidence, their identities were withheld from him, and he was excluded from the part of the prosecutor's summing up which dealt with the statements of these witnesses. The applicant was informed of the contents of the witnesses' statements but without any identification. Defence counsel also undertook to refrain from discussing with the applicant parts of the witnesses' statements which would have revealed their identities. The role of defence counsel was an important factor in the Commission's judgment. In relation to anonymity, the Commission considered the situation in which the defence as a whole (not just the applicant) was placed, including the fact that no other restrictions had been placed on the applicant and counsel in relation to preparing a proper defence. It decided that the restrictions did not affect the applicant's right to prepare his defence to such an extent that it amounted to a violation of Article 6(3)(b) or (d).<sup>79</sup>

A16 In Poland witnesses have been eligible to remain anonymous since November 1995.<sup>80</sup> The Provincial Prosecutor's Office in Warsaw reports that it seeks anonymity only in "exceptional" cases, although the courts lack the equipment necessary to preserve anonymity (for example, one-way mirrors). It appears that an anonymous witness will be placed in a separate room and asked questions by a judge who will go back and forth between the room and the court.

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<sup>77</sup> *Ludi v Switzerland* [1992] Yearbook of the European Convention on Human Rights 155, 157.

<sup>78</sup> One of the functions of the European Commission of Human Rights is to receive complaints alleging breaches of the European Human Rights Convention and to refer cases to the European Court of Human Rights if no friendly settlement is reached. See *A New Zealand Guide to International Law and its Sources* (nzlc r34, 1996) 68–69.

<sup>79</sup> (1984) 8 EHRR 93, 94. Article 6(3)(b) of the European Convention on Human Rights provides that everyone charged with a criminal offence has the right to adequate time and facilities for the preparation of a defence. In relation to the applicant's (defendant's) complaint that he had to leave the court when the witnesses gave evidence, the European Commission held that Article 6(3)(d) was not violated. Although a prima facie breach of the minimum rights in Article 6(3) was not found, the European Commission also considered whether Article 6(1) had been breached and concluded that there was no indication that the applicant had not received a fair hearing within the meaning of that Article.

<sup>80</sup> Report from *Voice* (English language paper), 27 October 1996.

## FORMER YUGOSLAVIA

A17 Article 21 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991<sup>81</sup> sets out the rights of the defendants appearing before the Tribunal. Article 21(2) specifies that a defendant is entitled to a “fair and public hearing”, subject to Article 22 which provides:

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.

A18 In *Prosecutor v Tadic* the Tribunal decided that the identities of several victims and witnesses could be withheld indefinitely from the defendant and his counsel.<sup>82</sup> The majority identified five criteria as relevant to the balancing of interests when determining whether to grant anonymity:<sup>83</sup>

- there is a real fear for the safety of the witness or his or her family;
- the testimony of the witness is important enough that it would be unfair to compel the prosecution to proceed without it;
- the court is satisfied that there is no prima facie evidence that the witness is untrustworthy and that the witness is not impartial;
- the ineffectiveness or non-existence of a witness protection programme is taken into account; and
- the measures taken are strictly necessary so that the defendant suffers no undue avoidable prejudice.

A19 Writing about the case, Chinkin notes that the Tribunal's decision to grant anonymity must be seen in the context of the unique legal framework within which the Tribunal is operating. Unlike the International Covenant on Civil and Political Rights and the European Convention on Human Rights, there is an express obligation (contained in Article 22 of the Tribunal's Statute) on the Tribunal to protect witnesses.<sup>84</sup> In reply to Chinkin, Leigh favoured Stephen J's dissent in *Tadic*, and criticised the Tribunal's

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<sup>81</sup> Articles 21 and 22 of the Statute of the International Tribunal are set out in (1993) 32 ILM 1198–1199.

<sup>82</sup> *Prosecutor v Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, UN Doc IT-94-1-T (Aug 10, 1995). One judge of the three, Stephen J, dissented. See also the “Amicus Curiae Brief on Protective Measures for Victims and Witnesses, Submitted by Dean and Professor of Law Christine Chinkin” [to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991] (1996) 7 Criminal Law Forum 179, 192.

<sup>83</sup> *Prosecutor v Tadic* as reported in the International Criminal Tribunal Bulletin, (LEXIS transcript, 5). In addition the majority set out four procedural safeguards: the judges must be able to observe the demeanour of the witness in order to assess the reliability of testimony; they must be aware of the identity of the witness in order to test the reliability of the witness; the defence must be allowed ample opportunity to question the witness on issues unrelated to the witness's identity or current address; and the identity of the witness must be released when there are no longer reasons to fear for the security of the witness.

<sup>84</sup> Chinkin, “Due Process and Witness Anonymity” (1997) 90 The American Journal of International Law 75, 76.

decision, saying that the two majority judges acted without authority in making the ruling.<sup>85</sup> Leigh also states that:

It is a radical proposition to suggest that the minimum rights of the accused to a fair trial can be diminished in order to protect witnesses and victims. This point was made in Judge Stephen's dissent, which Ms Chinkin makes no attempt to rebut. He said that, "while Article 22 specifically contemplates non-public hearings, it certainly does not contemplate unfair hearings." (81)

In my view, international law has not yet accepted the position that the accused's right to a fair trial is subject to discount and "balancing" in order to provide anonymity to victims and witnesses. (83)

## SOUTH AFRICA

A20 There are some relevant South African decisions from the 1980s<sup>86</sup> concerning the protection of former members of the African National Congress who were to appear as state witnesses. These are useful to examine because South African courts generally rely to some degree on English authorities. These decisions have not been referred to in the New Zealand judgments.<sup>87</sup>

A21 In *S v Leepile* (5) 1986 (4) SA 187 (W) Ackermann J refused an application that the true identity of a witness not be disclosed to the defence and the court,<sup>88</sup> observing that:

The wide direction regarding secrecy sought by the State in the present application has far more drastic consequences for the accused than an *in camera* hearing with a restriction on the publication to the public of a witness's identity. The consequences to the accused of such a wide direction are, *inter alia*, the following:

- (a) No investigation could be conducted by the accused's legal representatives into the witness's background to ascertain whether he has a general reputation for untruthfulness, whether he has made previous inconsistent statements nor to investigate other matters which might be relevant to his credibility in general.
- (b) It would make it more difficult to make enquiries to establish that the witness was not at places on the occasions mentioned by him.
- (c) It would further heighten the witness's sense of impregnability and increase the temptation to falsify or exaggerate. (189)

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<sup>85</sup> "Witness Anonymity is Inconsistent with Due Process" (1997) 91 *The American Journal of International Law* 80.

<sup>86</sup> There have been no South African cases on witness anonymity since 1986.

<sup>87</sup> *S v Leepile* (5) 1986 (4) SA 187 (W) was referred to in *R v Taylor* [1994] Times LR 484, [1995] Crim LR 253.

<sup>88</sup> In an earlier ruling in the same case, Ackermann J ruled that a witness's residential address could not be withheld from the defence: *S v Leepile* (4) 1986 (3) SA 654 (W).

A22 However, in *S v Pastoors* 1986 (4) SA 222 (W)<sup>89</sup> the court allowed the identity of a prosecution witness to be withheld from the defence. The reasoning of the court was limited. After establishing that there was a “real risk” that the witness would be attacked or even killed (224–225), the Judge stated that:

In every case of this nature the Court is confronted by a conflict of interest. In resolving this conflict the Court must protect those interests which, on the facts of the particular case, weigh in favour of proper administration of justice. Such protection, if granted, should therefore not go further than is required by the exigencies of the case. (226)

A23 The Judge in *Pastoors* specifically ruled that should the defence at any later stage of the proceedings consider that it required and was entitled to know the witness's true identity, it would be able to make a further application for disclosure (226).

## UNITED STATES

A24 The position in the United States must be viewed in light of constitutional rights, and in particular the Sixth Amendment of the United States Constitution:<sup>90</sup> “the accused shall enjoy the right . . . to be confronted with the witnesses against him.” The right of the defendant to cross-examine witnesses flows directly from this right of confrontation. The two leading decisions of the Supreme Court are *Alford v United States* 282 US 687 (1931) and *Smith v Illinois* 390 US 129 (1968).

A25 In *Alford* the Supreme Court held that the trial court had abused its discretion by permitting a witness to give evidence without revealing his address. The Court held that asking a witness where he lived “was an essential step in identifying the witness with his environment, to which cross-examination may always be directed” (693). The Court stated that

no obligation is imposed on the court . . . to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional right from self-incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him . . . But no such case was presented here. (694)

Witness safety did not appear to be an issue in the case.

A26 In *Smith v Illinois* the witness had refused to answer questions about his real name and address. Stewart J delivered the majority judgment on behalf of six members of the Supreme Court. Quoting from *Alford*, Stewart J took the approach that when the credibility of the witness is in issue, the starting point in making inquiries about a witness's credibility is his name and address:

The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself. (390 US 129, 131)

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<sup>89</sup> *S v Pastoors* refers to the judgment of Ackermann J in *S v Leepile (1)* 1986 (2) SA 325 (W) but not *S v Leepile (5)*. In *S v Leepile (1)* the prosecution applied for an order that the witness give evidence without disclosing the witness's identity to the defence, but Ackermann J's conclusions on another matter meant that it was unnecessary for him to consider the issue.

<sup>90</sup> By reason of the Fourteenth Amendment constitutional rights also apply to the states: *Pointer v Texas* 380 US 400 (1965).



White and Marshall JJ pointed out that the prosecution had not given any reasons justifying the witness's refusal to answer questions on cross-examination about his name and address. (134) For this reason they concurred with the majority opinion on the express understanding that it was not inconsistent with their view that *it may be appropriate to excuse a witness from answering questions about his or her identity if the witness's personal safety was endangered* (emphasis added, 133–134).<sup>91</sup>

- A27 Subsequent cases in lower courts have relied on this aspect of the White and Marshall JJ judgment and have held that the right to cross-examine witnesses is not unlimited when the safety of the witness is in doubt.<sup>92</sup> That approach has been interpreted as permitting the judge to allow a witness to withhold current address or employment, or even name, where there is evidence that the witness's safety would be endangered.<sup>93</sup> The judge balances the interests of the witness and the public interest in prosecuting crime, against those of the defendant to a fair trial. When considering this balancing process the judge has regard to the level of potential danger, the importance of the witness's credibility to the case, and whether the information which is sought will assist an inquiry into the witness's credibility.<sup>94</sup>
- A28 At the outset the prosecution must show that there has been an actual threat to the life of the witness.<sup>95</sup> The burden then shifts to the defence to show the "materiality of the request"<sup>96</sup> for the information about the witness's identity. In at least one state the prosecution must disclose to the defence the results of its investigations into the witness's credibility if the witness is granted anonymity.<sup>97</sup>
- A29 Since *Smith v Illinois* the Supreme Court has declined to review any lower court cases on witness anonymity. Some commentators suggest that this indicates that the Court considers the law to be developing satisfactorily.<sup>98</sup>

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<sup>91</sup> It was not clear in *Smith v Illinois* whether the defence ever knew the real name of the witness or his address at the time of the trial.

<sup>92</sup> For an example of a recent Federal case see *United States v Fenech* 943 FSupp 480, 487–488 (ED Pa 1996). At 488 the Judge lists some relevant Federal cases. See also the list of cases cited by the Judge in *United States v Saletko* 452 F2d 193, 196 (7th Cir 1971). The rule has also been applied at state level, see eg *Alvarado v The Superior Court* Cal App LEXIS 99 (2nd Dist 1997). See also *United States v Doe* 655 F2d 920 (9th Cir 1980).

<sup>93</sup> See for example *United States v Varelli* 407 F2d 735, 749–750 (7th Cir 1969) (following the minority in *Smith v Illinois* and setting out a procedure for determining whether non-disclosure is appropriate); *United States v Palermo* 410 F2d 468, 472 (7th Cir 1969); *United States v Ellis* 468 F2d 638, 639 (9th Cir 1972) (distinguishing *Smith v Illinois* because the prosecution failed to provide substantial reasons justifying non-disclosure of the witness's name); *United States v Saletko* 452 F2d 193, 195–196 (7th Cir 1971); *United States v Crovedi* 467 F2d 1032, 1034–1035 (7th Cir 1972).

<sup>94</sup> See for example *United States v Crovedi* 467 F2d 1032, 1034–1035 (7th Cir 1972) and *Alford v Superior Court for County of Alameda* 105 Cal Rptr 713, 716 (1st Dist 1972).

<sup>95</sup> See eg *United States v Palermo* 410 F2d 468, 472 (7th Cir 1969).

<sup>96</sup> *United States v Varelli* 407 F2d 735, 750 (7th Cir 1969); *United States v Palermo* 410 F2d 468, 472 (7th Cir 1969).

<sup>97</sup> See Kohn, "Conspirator's Statements Admitted: Narcotics Case Ruling Also Addresses Use of Anonymous Witnesses" [1989] *New York Law Journal* 1; LEXIS transcript, 2, referring to a case where the judge ordered the prosecution to investigate and disclose any past and present "bad acts and criminal history of the witness".

<sup>98</sup> See Hall (ed), *The Oxford Companion to the Supreme Court of the United States* (Oxford University Press, 1992) 132

## SUMMARY

- A30 In a number of overseas jurisdictions witnesses have been permitted to give evidence without revealing their name, address or occupation to the defence. The courts balance the right of the defendant to a fair trial against the public interest in the prosecution of offences. Although there are relatively few cases (and even fewer expressly declining anonymity) the principles applied by courts in determining whether a particular witness should be granted anonymity are similar. Important considerations are whether:
- the witness has a real fear of harm;
  - the evidence of the witness is important to the party's case;
  - the witness's credibility is a real issue in the particular case;
  - the name, address and occupation of the witness will assist an inquiry into the witness's credibility; and
  - undue prejudice is caused to the defendant.
- A31 Decisions where anonymity has not been granted, and critics of witness anonymity, have given a number of reasons why the real identity of a witness must always be disclosed to the defendant. According to these cases and commentators, to grant witness anonymity:
- results in dangerous consequences for the defendant, including the limitation on the defendant's ability to investigate the witness's credibility, and the increase in the temptation for the witness to fabricate evidence or exaggerate;
  - effectively destroys the defendant's right to cross-examination; and
  - infringes a basic principle of natural justice and the defendant's right to a fair trial, an argument based on the view that the defendant's right cannot be protected other than by disclosure of witness identity, nor balanced or discounted against other public interests such as the safety and protection of witnesses.
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