E31AE

Report 42

Evidence Law
Witness Anonymity

October 1997

Wellington, New Zealand

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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Contents

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Dear Minister

I am pleased to submit to you Report No 42 of the Law Commission, *Evidence Law: Witness Anonymity*. It is the first report published by the Law Commission on an aspect of evidence law reform.

The entitlement in law to know one's accuser is deep seated; as is the principle that no-one may evade the law by threatening a witness. The difficulty arising where the principles conflict is seen in the division of opinion of the Court of Appeal in *R v Hines* (unreported, 15 August 1997, Court of Appeal, CA 465/96) and in its earlier decision in *R v Hughes* [1986] 2 NZLR 129.

The Law Commission issued a discussion paper on the topic following the decision in *R v Hines*, in the expectation that Parliament would wish to consider the policy issues. We received valuable responses from a wide range of individuals and institutions, public and private.

The Government has decided to grasp the nettle of how the competing principles are to be reconciled, by introducing legislation. We have followed our normal practice of issuing a final report, recording our considered opinion in the light of the exchange of views that has now taken place.

We recognise that there is a range of legitimate opinion on what is a most troubling problem. We trust that this report will assist members of Parliament and of the public as they debate the issues and resolve the principles and procedures for balancing the values at stake.

Yours sincerely

The Hon Justice Baragwanath
President

The Hon Douglas Graham MP
Minister of Justice
Parliament House
WELLINGTON

Preface

The Law Commission's evidence reference from the Minister of Justice includes the following:

> 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 twelfth 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 Law 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). Aside from *Evidence Law: Witness Anonymity* (NZLC PP29, 1997), published prior to this report in September 1997, 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.

This is the first report published by the Law Commission on an aspect of evidence law reform. It contains final recommendations following receipt of submissions on *Evidence Law: Witness Anonymity*, a discussion paper which sought comment on a proposal to permit witnesses, other than undercover police officers, to give evidence anonymously.

The Commission received submissions on the *Evidence Law: Witness Anonymity* discussion paper from the Acting Chief Justice (the Hon Justice Gallen), High Court Judges at Auckland, the Police and the New Zealand Police Association (a voluntary service organisation representing sworn and non-sworn members of the Police), individual

lawyers, practitioner groups, community groups including victims' interest groups, individuals, two government departments and one independent Commissioner. We are very grateful for the helpful comments on our proposals generally, and on the draft legislation set out in the discussion paper. The draft rules were initially prepared by Mr Garth Thornton QC, legislative counsel. In order to present this report in time for parliamentary consideration, it has not been possible to finalise some details of the draft legislation. We emphasise, however, that the views expressed in this report, except where expressly acknowledged in the text, are those of the Law Commission and not necessarily of the people who helped us.

1
Summary and context

BACKGROUND TO THE LAW COMMISSION'S INVOLVEMENT

1 In 1996 the Law Commission began research into witness anonymity as part of its review and codification of evidence law. In accordance with its usual practice, it was the Law Commission's intention to publish the material in a discussion paper to be used as the basis of consultation, before making recommendations for inclusion in the final report on evidence law reform.

2 On 15 August 1997 the Court of Appeal gave judgment in *R v Hines* (unreported, CA 465/96). Almost immediately the Government intimated it would introduce legislation to overturn that decision. The Law Commission decided to advance publication of its discussion paper so that its consideration of the issues would be available to the public. *Evidence Law: Witness Anonymity* (NZLC PP29, 1997) was published on 5 September 1997 and sent to judges, lawyers, academics, and community and other interest groups, seeking comment on the Law Commission's proposals for reform.

3 A Bill proposing witness anonymity legislation will soon be introduced into the House of Representatives by the Minister of Justice. The Bill will probably be referred to a select committee. This report contains the Law Commission's final recommendations and is published with the intention that it will inform public and parliamentary debate, and influence the content of any law reform.

BALANCING RIGHTS AND INTERESTS

4 Witness anonymity refers to the ability of a person to give evidence in court without disclosing identity, even to the party against whom the evidence is given. The fundamental right to a fair trial is recognised at common law and in international law, and is affirmed in s 25 of the New Zealand Bill of Rights Act 1990. This right to a fair trial is critical to avoid conviction of the innocent. An important aspect of a fair trial is the right of an accused person to challenge his or her accusers. Any limitation on the ability of an accused person to cross-examine prosecution witnesses may impact on the right to a fair trial. Yet, if offenders are able to avoid punishment by intimidating potential witnesses into silence, the integrity of the criminal justice system will be undermined and the law will fall into disrepute.

5 A resolution of the issues raised by the need for witness anonymity therefore requires the balancing of two fundamental and conflicting public interests: of not convicting the innocent, and of bringing offenders to justice. These issues are fully discussed in the *Evidence Law: Witness Anonymity* discussion paper.

6 The Law Commission received 27 submissions on the discussion paper. Our final recommendations in this report take account of those submissions.

STRUCTURE AND CONTENT OF THIS REPORT

7 In chapter 2 we refer briefly to the discussion of the main issues that were raised in the form of questions in chapter 4 of *Evidence Law: Witness Anonymity*. We summarise the submissions and set out the Law Commission's policy decisions, some of them revised, in relation to each issue. In essence, chapter 2 sets out the Law Commission's final answers to the questions posed in the discussion paper.

8 Chapter 3 concerns the application of the legislation to alleged offences occurring prior to its enactment, a topic which was not considered in the discussion paper. The Law Commission considers that any law change should not apply to the retrial in *R v Hines*.

9 The report concludes with revised draft legislation which incorporates the Law Commission's final recommendations. The revised commentary gives guidance to users of the legislation, the judiciary and counsel. It appears at pages 27–42.

10 The appendix lists the names of all those who made submissions on our discussion paper. We thank them for their valuable contribution.

SUMMARY OF FINAL RECOMMENDATIONS

11 This report contains the following final recommendations on the proposal to enact legislation enabling witnesses, in certain circumstances, to give evidence anonymously:

- "Witness" should continue to be defined broadly as any person who gives evidence in a proceeding, thus including complainants who give evidence.

- Applications for a witness anonymity order should be made in the High Court.

- Witness anonymity orders should be available only in indictable proceedings. If a High Court judge makes an anonymity order, the trial should be heard in the High Court. This recommendation may require consequential legislative amendments.

- The judge must appoint independent counsel if satisfied on reasonable grounds that there is a risk of serious harm to the witness or some other person or to property.

- The function of independent counsel is 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 (probably the defendant).

- Once independent counsel has conducted an inquiry into the witness's truthfulness and reliability, and given the judge the information compiled in the course of that inquiry, the judge determines the witness anonymity application. Anonymity may be granted to a witness if:

  – the judge is satisfied on reasonable grounds that there is a risk of serious harm to the witness or some other person or to any property;

- no material has been adduced raising substantial doubt as to truthfulness or reliability of the witness's evidence;

- 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.

- The judge has a discretion about the procedure by which the application should be determined. While the judge should be required to have regard to certain specific matters, a general provision enables the judge to adopt any procedure for dealing with the application that is suitable for the particular circumstances of the witness and the case.

- The judge, when considering a witness anonymity application, should be permitted to consider relevant evidence and information, whether or not that evidence would be admissible at trial.

- Legislation should be enacted to provide an appropriate penalty for breach of witness anonymity orders, at a level similar to the maximum punishment provided by s 117 of the Crimes Act 1961.

- The discretion of the trial judge to make or discharge witness anonymity orders should be expressly preserved in legislation.

- Section 379A of the Crimes Act 1961 should be amended to permit the pre-trial appeal of rulings on witness anonymity. Courts should ensure that a transcript is made of all witness anonymity application hearings, to allow appeals to be heard *de novo* on the record. This will permit the Court of Appeal to review the High Court judge's exercise of discretion.

- A warning to a jury not to draw any adverse inferences from the way in which a witness gives evidence is desirable in cases where a witness is granted anonymity. However, the Law Commission does not recommend that a form of the warning be provided for in legislation. The content of such a warning is appropriately a task for the trial judge.

- Section 13A of the Evidence Act 1908 should be preserved and re-enacted in the plain language style of the proposed evidence code.

- The legislation should apply to all future trials other than the retrial in *R v Hines*.

2
Summary of submissions and final recommendations

A PROPOSED POWER TO GRANT WITNESS ANONYMITY

12 Almost all submissions indicated strong support for legislative reform in this area. At the same time they stressed that witness anonymity should only be granted in exceptional circumstances and that strong safeguards should protect the interests of defendants. Both the Police and the New Zealand Police Association outlined the nature of the problem from their perspectives and referred to what they perceive as the increase in witness harassment by gangs and "other elements of the criminal fraternity". The New Zealand Police Association also stated that legislation must reflect the fact that any one person, whether a member of an established gang or an individual acting alone, is capable of employing intimidation tactics.

13 The New Zealand Law Society, Criminal Bar Association, and Ministry of Pacific Island Affairs all expressed reluctance about the proposals. The Ministry expressed the view that it would have been preferable for a statistical assessment of the significance and extent of the problem, to enable a firmer national perspective to be formed on the need for such a change. The New Zealand Law Society, supported by the Criminal Bar Association, stated that while there is a problem which must be addressed, witness anonymity must not be allowed in any but the most exceptional of cases. They argued that the consequences of allowing anonymity are disruptive to an ordinary trial and inevitably heavily prejudice the defendant. The Law Society also expressed concern that the existence of the power will of itself encourage applications and create a climate in which the need for witness protection will be seen as a normal part of the criminal process.

14 Three submissions opposed witness anonymity legislation, one describing it as "draconian" and another describing it as "fascist". However, only one submission gave any reasons for this opposition, relying in particular on the view that the defendant's right to a fair trial requires knowledge of the identity of his or her accuser. The submission stated that the witness anonymity proposal watered down the defendant's right to a fair trial and that the suggested safeguards are no substitute for the defendant's own inquiries into the witness's background. The submission suggested that resources should be put into protecting witnesses rather than into changing the law.

15 The Law Commission acknowledges and understands these concerns. We have spent considerable time debating the issues. We agree that anonymity orders should be confined to exceptional cases and that strong safeguards should be in place for defendants. In practice, the number of cases where the provision of anonymity will practically assist a witness is likely to be quite small. This is because most witnesses are usually known to a defendant.

DEFINITIONS

"Witness" includes a complainant

16 *Evidence Law: Witness Anonymity* did not include a definition of witness in its draft legislation. In *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996), the Law Commission defined a witness as "a person who gives evidence in a proceeding" (p56, para C11). This definition includes complainants or victims of an alleged offence.

17 The current law already provides that complainants in sexual cases do not have to disclose their address and occupation to the defence; however they do have to disclose their name (s 23AA Evidence Act 1908). They also do not have to state their address or occupation 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" (s 23AA(3)).

18 Nga Whiitiki Whänau Ahuru Möwai O Aotearoa/National Collective of Rape Crisis and Related Groups of Aotearoa Inc submitted that the witness anonymity provisions should be used to protect a minority of their clients (complainants in sexual cases) where there is a risk of retribution. According to their records, 9.1% of their clients over the last five years (1991–1996) were sexually assaulted by strangers, and around 3% of their clients were sexually violated by gang members (an underestimated figure according to Rape Crisis/Whänau Ahuru Möwai). In such a situation the complainant will be known to the alleged offender only by her appearance, or perhaps her residential address at the time the offence occurred. In many cases it is likely that the defendant will not know the complainant's name, new address (if she has one), or occupation. Witness anonymity is therefore a practical procedure for protecting the identity of the primary witness/complainant.

19 It has been pointed out that a witness anonymity order will be ineffectual if a complainant's name must be included in the indictment. Section 328(1) of the Crimes Act 1961 provides that all indictments must be in Form 4 of the Second Schedule to the Act, or "to the like effect". The examples in the Schedule contemplate naming the complainant if there is one, as well as including information about the time, date and place at which the offence is alleged to have occurred. However, the effect of s 329(4) (contents of counts) and s 331 (certain objections not to vitiate counts) is that a count in an indictment will not necessarily be vitiated if the complainant is not named. The Law Commission's view is therefore that where complainants in sexual cases are granted anonymity, they will not have to disclose their name to the defendant in any manner, including in the indictment. As the figures provided by Rape Crisis/Whänau Ahuru Möwai show, this is likely to occur in only a small number of cases.

APPLICATIONS FOR WITNESS ANONYMITY ORDERS

Applications to be made to the High Court

20 In *Evidence Law: Witness Anonymity* the Law Commission proposed that orders should be made only by the High Court, with a right of appeal to the Court of Appeal by either defence or prosecution (NZLC PP29, 1997, para 70, *section 1(1)*). If an order were made, then the trial should be conducted in the High Court to allow a High Court judge to make any necessary variations to the order (para 70, C2). The proposal was made because of

the exceptional and invasive nature of the jurisdiction. The profound constitutional importance of the proposal and the interference with important rights are comparable to the invasion of bodily integrity by the compulsory taking of blood samples under s 13 of the Criminal Investigations (Blood Samples) Act 1995, which may be performed only on the authority of a High Court order. Confinement to the smaller number of judges of the High Court will also aid in preserving consistency of approach.

21 While some submissions supported this proposal, others argued that District Court judges should also have jurisdiction to make orders, in part because witness anonymity orders were also viewed as appropriate in criminal proceedings heard in the District Court (see paras 25–27). For the reasons now given, however, the Law Commission has decided to maintain its original proposal and recommends that only High Court judges should have the power to order witness anonymity.

Orders only available in indictable proceedings

22 In *Evidence Law: Witness Anonymity* the Law Commission proposed that witness anonymity should be available in all indictable criminal proceedings which must then be heard in the High Court (NZLC PP29, para 80).

23 There was a range of submissions on these proposals. The Acting Chief Justice agreed that orders should be available only in the High Court, and that they should be available in all criminal proceedings in that Court (jury and judge alone criminal trials). The Wellington Women Lawyers' Association and individual lawyers also agreed with the Law Commission's proposal.

24 The New Zealand Law Society and the Criminal Bar Association submitted that orders should only be available in the most serious of criminal cases, ie, where the offence is punishable by imprisonment for a term of 14 years or more. This would limit the availability of witness anonymity to mandatory jury trials in the High Court. The Ministry of Pacific Island Affairs supported limiting the power to purely indictable offences.

25 A number of organisations made submissions that witness anonymity should be available in both District Court and High Court jury trials. Rape Crisis/Whänau Ahuru Möwai submitted that witness anonymity should be available in all trials of sexual assault, rape, indecent assault and sexual violation. The Wellington Community Law Centre made a similar point in submitting that the power to order anonymity should be available in *all* indictable proceedings. The New Zealand Council of Victim Support Groups stated that it was their "earnest recommendation" that the power to order witness anonymity be available to all witnesses in all types of criminal proceeding, but at the very least it should be available to witnesses in District Court and High Court jury trials.

26 The Police also made an extensive argument for witness anonymity orders being available in jury trials in both the District and High Courts. They gave the following reasons:

- the mechanics of applying the legislation are well within the ability of District Court judges;

- the District Courts currently have jurisdiction to make orders under s 13A of the Evidence Act 1908 (undercover police officers) and s 344C of the Crimes Act 1961 (information relating to identification witness to be supplied to defendant);

- in practice the District Courts have been applying the High Court rulings in *Hines* and *Coleman*;

- since 1991 there are very few crimes which cannot be dealt with in the District Courts;

- the issue of which court should have jurisdiction to make orders needs to be considered in the light of the present trend to devolve from the High Court matters which previously were exclusively dealt with by that Court;

- the increase in jurisdiction of registrars and the creation of community magistrates are both moves designed to free District Court judges for dealing with more serious matters; and

- intimidation of witnesses is not confined to serious crime.

27 The New Zealand Police Association, the Commissioner for Children and one individual also submitted that the power to order witness anonymity should be available in all criminal cases.

28 The Law Commission remains of the view and therefore recommends that the availability of witness anonymity should be restricted to indictable proceedings which must then be heard in the High Court. Police have a choice when commencing proceedings to lay the charge summarily or indictably. The police may decide whether it is preferable to commence the proceedings indictably in order to have available the protection of witness anonymity orders. This recommendation may require consequential legislative amendments.

Establishing the risk of harm to the witness

29 The Law Commission originally proposed in *section 1(2)* that, before appointing independent counsel (see paras 42–46), the judge 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 a criminal proceeding. Requiring judges to make this preliminary inquiry involved consideration of a number of issues:

- whether the judge should objectively assess the risk of harm;

- the types of harm covered by the test;

- whether the risk of harm to another person should be included; and

- whether there needs to be an actual threat.

An objective assessment of the risk of harm by the judge

30 In the discussion paper the Law Commission proposed that the judge must 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 (NZLC PP29, para 85).

31 Most submissions expressed agreement with the Law Commission's proposal. The New Zealand Law Society pointed out that the proposed standard is much lower than the criminal standard of proof. Some submissions, including that of the Acting Chief Justice, referred to the possibility of incorporating a subjective element into the test. The Law Commission considers, however, that the test it originally proposed, and now recommends, should be an objective one. If the witness does not subjectively fear the possibility of harm, then it is unlikely that the witness will seek a witness anonymity order. The Law Commission considers that an objective inquiry will provide an important measure of control on the granting of anonymity orders.

Types of harm

32 The Law Commission originally proposed that the fear of the witness should relate to the risk of *serious personal harm to a person* (ie, serious physical harm). The test did not include the risk of property damage, financial harm, or other categories of harm (NZLC PP29, para 84).

33 The majority of submissions, however, including the Acting Chief Justice, Auckland High Court judges, community groups and the Wellington Women Lawyers' Association, supported widening the definition of harm. They suggested that it should also include the risk of damage to property and the risk of financial harm.

34 The Commissioner for Children commented that while children who give evidence as witnesses already enjoy special protections (see, for example, the Children, Young Persons and Their Families Act 1989), there are occasions when anonymity should be considered for child witnesses. Anonymity could be used to protect them from threats or pressure to withdraw or change their evidence or to give false evidence. The Commissioner submitted that witness anonymity should also be available to witnesses under the age of 18 years who may be subject to improper or unlawful pressure in relation to the giving of evidence. In the Law Commission's view, this concern can be adequately addressed by broadening the definition of harm.

35 In view of the submissions on this point, the Law Commission now recommends that witness anonymity orders be available when there is risk of serious harm to the witness, or some other person (see paras 37–39) or to property of any kind. This is the formulation suggested by the Auckland High Court judges.

36 Two submissions commented on the difficulty of interpreting the word "personal" in the original phrase "serious personal harm". The New Zealand Police Association asked whether it meant harm to the body of the witness, or whether it also extended to reputation, finances, future earning capacity, enjoyment of lifestyle, physical damage to personal effects or personal property. The provision now recommended responds to the submission by not including the term "personal".

The risk of harm to another person

37 The Law Commission proposed in *Evidence Law: Witness Anonymity* that the judge should be able to act if satisfied on reasonable grounds that *another person* would be exposed to the risk of serious harm if the witness testified. We proposed 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 (NZLC PP29, para 86).

38 The Ministry of Pacific Island Affairs pointed out that for Pacific peoples the concept of extended family ties will have some bearing on the safety element in that a Pacific witness would regard a threat to extended family members as a direct threat to him/herself. This results from the collective ownership of the burden by the family, and the obligation to contribute to the costs (emotional and financial) involved in rectifying the harm done to others in the family.

39 Of those who commented on this issue , there was universal agreement with the Law Commission's proposal which we now endorse.

No actual threat is necessary

40 The Law Commission's view expressed in *Evidence Law: Witness Anonymity* was 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 (NZLC PP29, para 83). 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. In such cases, there may be no actual threat but the circumstances of the case suggests that threats and actual harm are likely.

41 Of the five submissions which commented directly on this point in the discussion paper, two preferred that actual threats should have occurred before anonymity can be granted. Others submitted that it would be excessive to restrict the rule to actual threats. The Law Commission remains of the view and therefore recommends that the existence of actual threats to the witness (or another person) is not necessary. In fact, actual threats may indicate that the identity of the person is already known and that therefore a witness anonymity order would be of no practical value.

The mandatory appointment of independent counsel

42 In *Evidence Law: Witness Anonymity* the Law Commission proposed that, once the risk of harm to the witness is established, the judge should have a duty to appoint independent counsel to investigate the truthfulness of the witness and the reliability of the evidence the witness is to give, before making an anonymity order. The purpose of such appointment was to compensate as far as practicable for the disadvantage to the defence of not being able to investigate and interview the witness. (NZLC PP29, para 90, *section 1(2)*)

43 There was widespread support in submissions for the independent counsel proposal, many of those emphasising that it was essential that independent counsel be appointed. Only one submission did not favour the proposal. It queried the role that independent counsel would play and argued that prosecution and defence counsel would be able to resolve the issues before the judge.

44 The Ministry of Pacific Island Affairs commented that, from a Pacific peoples perspective, it is also crucial that independent counsel have some understanding or awareness of the cultural aspects. This may mean that translation services and other forms of support must be provided. This point is also relevant to Mäori and other ethnic groups.

45 The New Zealand Law Society expressed more cautious support for the appointment of independent counsel. It stated that on balance, and "not without some hesitation", it was of

the view that independent counsel was a necessary and appropriate check. The Criminal Bar Association supported the Law Society's submission and added that it had concerns about protection for independent counsel.

46 The Law Commission remains firmly of the view that the mandatory appointment of independent counsel is an essential component of the recommended witness anonymity rules. The role of independent counsel (see the discussion below) is crucial to the judge's inquiry into the reliability and truthfulness of the witness, and therefore the risk that injustice will occur if effective cross-examination on these matters does not take place. In essence, independent counsel is appointed to do what defence counsel would ordinarily – but cannot – do.

The functions of independent counsel

47 The Law Commission proposed that 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. This 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 (NZLC PP29, paras 71–73, 90).

48 Not all submissions made express comment on all procedural aspects of the witness anonymity rule proposed by the Law Commission. Some submissions agreed with the Law Commission that independent counsel should have the functions as set out in para 90 of the discussion paper. The New Zealand Law Society expressed the view that the role and details which prescribe how the counsel will operate in the process were not fully developed in the discussion paper. One submission expressed concerns about the release to independent counsel of sensitive information, particularly in relation to police informers. There was a corresponding concern about the use or disclosure of such information in court and in a court ruling. One submission suggested that independent counsel should be free to liaise with defence counsel when conducting the inquiry into the witness, and another suggested that independent counsel should also report to defence counsel.

49 In framing the function and role of independent counsel prior to and during the determination of the application by the judge, the Law Commission was concerned to make explicit the role of independent counsel in safeguarding the interests of the defendant (or the party against whose interests the evidence of the witness is to be given). At the same time we did not want to set out many detailed and intricate rules which could have the effect of fettering independent counsel. The Law Commission believes that its original proposals strike the right balance. We have however, made some additions to the commentary to the legislation which should provide guidance for the courts, as well as those appointed to act as independent counsel, regarding counsel's role and obligations.

GRANTING WITNESS ANONYMITY

50 The proposed *section 2(1)* set out the matters on which the judge must be satisfied before witness anonymity could be granted, based on the information prepared for the judge by independent counsel. The Law Commission's original proposals, submissions on them, and our final recommendations on the provision are discussed below.

Establishing the risk of harm to the witness

51 *Section 2(1)(a)* now requires the judge to be satisfied on reasonable grounds that the witness or some other person or property will be exposed to the risk of serious harm if the witness gives evidence in a criminal proceeding. (See the discussion of the submissions on the Law Commission's proposals at paras 29–41.)

Inquiry into the truthfulness of the witness

52 The Law Commission did not consider it appropriate that the judge form a personal view as to the truthfulness of the witness, beyond determining that "no material has been adduced raising substantial doubt as to truthfulness or reliability" (*section 2(1)(b)*). The majority of submissions on this question supported the Law Commission's proposal which we now confirm.

53 The Law Commission proposed that judges be required to take into account certain factors when considering matters relating to the truthfulness and reliability of the witness (*section 2(2)*):

- 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 truthfulness 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 truthfulness or reliability.

The Law Commission drafted the rule so that consideration of the factors was mandatory but that judges would be able to consider other factors (NZLC PP29, para 89).

54 Most submissions supported the inclusion of a list of factors in the rule to act as a guide for judges, and agreed judges should not be limited to only those factors. The Acting Chief Justice submitted that the list should not be exclusive and should in each case depend upon the circumstances. Two submissions argued that the list of factors was not necessary.

55 The list of factors sets out the circumstances when, in the Law Commission's view, it would (or would not) usually be safe to allow a witness to testify anonymously without prejudicing the defendant's right to a fair trial. The Law Commission now recommends their inclusion as a necessary safeguard for the defendant. At the same time, we confirm our view that an exhaustive list is undesirable as it would preclude the consideration of circumstances which may be significant in any particular case.

Unfairness to the witness exceeds the possibility of unfairness to the defendant

56 The Law Commission proposed that the judge, before granting a witness anonymity order, must be satisfied that, having regard to:

- the general right of a defendant 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,

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 (NZLC PP29, para 76, *section 2(1)(c)*).

57 Only a few submissions commented on this requirement. One opposed the wording of the proposed rule, submitting that the "question begging" references to unfairness should be avoided in the interests of clarity and consistency. It stated that it may always be unfair for a witness's identity to be revealed if there is even a slight risk of harm if the witness testifies. The Law Commission considers that the meaning of "unfairness" is clear in the context of the recommended legislation. The wording describes the essence of the competing concerns and is broad enough to cover a range of situations.

The determination of the application

58 *Section 2(3)* of *Evidence Law: Witness Anonymity* set out the information which the judge must have regard to when determining a witness anonymity application. However, it was not the Law Commission's intention to limit in any way the procedure adopted by any judge considering a particular application. Paragraph 92 of the discussion paper described the usual procedure that the Law Commission envisaged would be followed by the judge:

> If an appointment [of independent counsel] is made, the application would be dealt with on the voir dire at the conclusion of the inquiry 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 [see *section 1(8)*]. 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.

59 The Law Commission considered, but rejected, 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. Such an arrangement could put defence counsel in a situation of conflicting interests.

60 The Acting Chief Justice, and community and other interest groups, supported the procedures set out in the discussion paper. Only one of the submissions on the point did not support legislation setting out a procedure for witness anonymity applications (no reasons were given for this view). Some submissions raised issues concerning the permissible range of cross-examination during a voir dire, for example, focusing on the witness's motives for giving evidence or the scope of the inquiry conducted by independent counsel. The Law Commission considers that the judge hearing the application could permit such cross-examination in appropriate cases, as a matter of discretion.

61 The Ministry of Pacific Island Affairs commented that additional time and resources will be required which will entail costs for the courts as well as the parties. For Pacific peoples, issues of cost and length of process have a direct effect on their decision whether or not to access justice. The Law Commission recognises these concerns. However, our view is that these safeguards are vital to ensure the fair determination of a witness anonymity application.

62 In conclusion, there was general support for the procedure for witness anonymity applications as set out in *section 2(3)*. The Law Commission considers that they provide a flexible and appropriate procedure for the consideration of applications. The commentary, revised in this report, also explains the purpose of those provisions and discusses the options which a judge may adopt.

Evidence considered in applications

63 The Law Commission proposed that a judge, when determining the risk of harm to the witness as well as the truthfulness of the witness (for example, any motive to lie), should be able to consider evidence not normally admissible, such as inadmissible confessions by the defendant (NZLC PP29, paras 94–95, *section 2(3)*).

64 Most submissions agreed with this proposal. The Acting Chief Justice submitted that independent counsel also ought to be able to consider evidence not normally admissible. Two submissions disagreed, arguing it was unnecessary given that the evidence rules in general will be more relaxed under the Law Commission's proposed evidence code. Dr DL Mathieson QC proposed a rule that the judge

> may consider any evidence which [the judge] considers reliable, whether it would be admissible for other purposes or not, but not including any evidence of a confession or admission by the defendant which would be inadmissible at the trial of the defendant.

65 After considering these submissions, the Law Commission now recommends that the judge should be able to consider relevant evidence and information, whether or not that evidence would be admissible at the trial. Any inadmissible confession could be considered by the judge for the purposes of determining a witness anonymity application but it would remain inadmissible at the trial. The Law Commission considers that the wording of the draft legislation (*section 1(4) and (5)*), which refers to "all relevant information", clearly allows independent counsel to consider inadmissible evidence. We do not consider a reliability filter necessary since the judge will not be sitting with a jury and can be relied on to give what weight to the evidence as is appropriate.

Preserving the witness's anonymity at trial

66 *Section 2(4)* of the witness anonymity rule, as originally drafted, provided that

> 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. [emphasis added]

The provision was expressed to operate in addition to the prohibitions in *section 2(5)* and repeated the powers available to the judge during the application hearing (*section 1(8)*).

67 The New Zealand Law Society expressed the "utmost concern" about this provision, submitting that the prejudicial effect in terms of the jury's perception would be immense. The Criminal Bar Association also expressed the "gravest concern" at this proposal, instead preferring legislation stating that, as an exception to counsel's obligation to disclose to clients, certain matters could not be disclosed relating to the identity of witnesses.

68 The Law Commission has reconsidered the draft rule and recommends that the judge have the powers as set out in *section 2(4)* but not the power to order the party or that party's counsel (usually the defendant and defence counsel) from the court. We recognise the fundamental right of defendants to be present at their trial and the safeguard that defence counsel provides for defendants. Where there is a concern that no-one should see the anonymous witness, the judge has the power to shield the witness's identity by the use of screens and other appropriate means.

69 One submission suggested that certain procedures allowing witnesses to give evidence from outside the courtroom should be codified. This has already been proposed by the Law Commission in *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996). This matter will be further discussed in the final report on the evidence code which will be published in early 1998.

Penalty for breach of an anonymity order

70 The New Zealand Police Association submitted that there should be a penalty for breach of a witness anonymity order in order to deter or punish breaches. Without a specific penalty provision, breach of a witness anonymity order would be a contempt of court (see s 401 Crimes Act 1961). However, the maximum penalty for contempt is imprisonment for a period not exceeding 3 months, or a fine not exceeding $1 000. The Law Commission's view is that this level of punishment is inadequate as a deterrent in situations where to reveal a witness's identity could expose that person to the risk of serious physical harm or even death. A more appropriate offence provision is s 117(d) of the Crimes Act 1961 which makes it an offence to wilfully attempt to obstruct, prevent, pervert, or defeat the course of justice. The maximum penalty for this offence is imprisonment for a term not exceeding 7 years.

We now recommend that legislation be enacted to provide for a similar level of punishment if a witness anonymity order is breached.

The trial judge's discretion to make or discharge orders

71 The Law Commission also proposed that the trial judge's discretion to make or discharge pre-trial witness anonymity rulings be preserved, in order to cater for changing circumstances during the course of the trial. There was strong support for this proposal, which the Law Commission now endorses.

OTHER ISSUES

Appeal of pre-trial rulings on witness anonymity

72 The Law Commission stated in *Evidence Law: Witness Anonymity* that it is critical that there be a right of appeal for such an important pre-trial ruling. We proposed that s 379A of the Crimes Act 1961 be amended to give such jurisdiction. Given the significant support for this proposal the Law Commission now recommends such an amendment. Courts should ensure that a transcript is made of all witness anonymity application hearings to allow appeals to be heard *de novo* on the record. This will allow the Court of Appeal to review the High Court judge's exercise of discretion.

Judicial warnings concerning anonymous witnesses

73 The Law Commission remains of the view that it is not 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 s 23H(a) of the Evidence Act 1908) is clearly desirable, the content of such a warning should be left to the trial judge and adopted to suit the case.

Preserving section 13A of the Evidence Act 1908

74 In the discussion paper the Law Commission proposed re-enacting s 13A (anonymity for undercover police officers), but redrafted in the plain language style of the evidence code (NZLC PP29, paras 67–68). Almost all submissions commenting on this issue agreed with the Law Commission's proposal. Only one suggested that s 13A should not be preserved and that undercover police officers should be subject to the same rule as ordinary witnesses. This suggestion was earlier considered by the Law Commission but rejected, because of the nature of the work undercover police officers do and the particular safeguards available in their case which are not available for ordinary witnesses (for example, the certificate provided by the Commissioner of Police certifying matters relating to the officer's credibility). The Law Commission therefore recommends that s 13A of the Evidence Act 1908 be re-enacted as drafted on pages 38–42 of this report.

SUMMARY OF RECOMMENDATIONS

75 In summary the Law Commission recommends legislation to enable witnesses in certain circumstances to give evidence anonymously. In particular:

- "Witness" should continue to be defined broadly as any person who gives evidence in a proceeding, thus including complainants who give evidence.

- Applications for a witness anonymity order should be made in the High Court.

- Witness anonymity orders should be available only in indictable proceedings. If a High Court judge makes an anonymity order, the trial should be heard in the High Court. This recommendation may require consequential legislative amendments.

- The judge must appoint independent counsel if satisfied on reasonable grounds that there is a risk of serious harm to the witness or some other person or to property.

- The function of independent counsel is 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 (probably the defendant).

- Once independent counsel has conducted an inquiry into the witness's truthfulness and reliability, and given the judge the information compiled in the course of that inquiry, the judge determines the witness anonymity application. Anonymity may be granted to a witness if:

  – the judge is satisfied on reasonable grounds that there is a risk of serious harm to the witness or some other person or to any property;

  – no material has been adduced raising substantial doubt as to truthfulness or reliability of the witness's evidence;

  – 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.

- The judge has a discretion about the procedure by which the application should be determined. While the judge should be required to have regard to certain specific matters, a general provision enables the judge to adopt any procedure for dealing with the application that is suitable for the particular circumstances of the witness and the case.

- The judge, when considering a witness anonymity application, should be permitted to consider relevant evidence and information, whether or not that evidence would be admissible at trial.

- Legislation should be enacted to provide an appropriate penalty for breach of witness anonymity orders, at a level similar to the maximum punishment provided by s 117 of the Crimes Act 1961.

- The discretion of the trial judge to make or discharge witness anonymity orders should be expressly preserved in legislation.

- Section 379A of the Crimes Act 1961 should be amended to permit the pre-trial appeal of rulings on witness anonymity. Courts should ensure that a transcript is made of all witness anonymity application hearings, to allow appeals to be heard *de novo* on the record. This will permit the Court of Appeal to review the High Court judge's exercise of discretion.

- A warning to a jury not to draw any adverse inferences from the way in which a witness gives evidence is desirable in cases where a witness is granted anonymity.

However, the Law Commission does not recommend that a form of the warning be provided for in legislation. The content of such a warning is appropriately a task for the trial judge.

- Section 13A of the Evidence Act 1908 should be preserved and re-enacted in the plain language style of the proposed evidence code.

3
Application of the proposed legislation

76 In *Evidence Law: Witness Anonymity* (NZLC PP29, 1997) the Law Commission did not consider whether the proposed legislation should apply only prospectively (to cases commenced after the legislation comes into force), or whether it should have some retrospective application. However, indications are that witness anonymity legislation soon to be introduced into the House of Representatives will apply the new law to all pending and future trials (including those where the alleged offence occurred before the amendment comes into force), and to the *Hines* retrial. In addition several submissions commented on the potential for the legislation to apply retroactively. The Law Commission therefore decided to consider the issue in this report.

GENERAL PRINCIPLE

77 The Legislation Advisory Committee, in *Recurring Issues* (Report No 9, Wellington, 1996), noted two arguments of principle concerning legislation which overrides judgments given or proceedings already begun:

> (a) Legislation should, in general, have prospective effect only; in particular it should not interfere with accrued rights and duties, nor should it create offences retrospectively; and
>
> (b) Legislation should not, in general, deprive individuals of their right to benefit from the judgments they obtain in proceedings brought under earlier law, or to continue proceedings asserting rights and duties under that law. (para 164)

78 It is a general principle of jurisprudence that law should have prospective effect only (*A New Interpretation Act* (NZLC R17, 1990) para 142). Retrospective legislation is inconsistent with the rule of law which underlies our legal system. A legal system exemplifies the rule of law to the extent its rules are prospective and not retrospective: Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980) 270.

79 There are several reasons why retrospective legislation is undesirable (see generally NZLC R17, 1990, paras 192–227). First, it is ineffective because people cannot organise their actions in a way that complies with a law which is not yet written. Secondly, it is unjust for someone to be subject to criminal penalty for something that was not unlawful at the time of the alleged offence. That principle is affirmed in s 10A of the Crimes Act 1961 and s 26 of the New Zealand Bill of Rights Act 1990. A third, related point is that it is unfair for legislation to deprive someone of the benefit of a favourable judgment which has already been delivered.

80 These principles have given rise to a general presumption against retrospective legislation. Section 20(e) of the Acts Interpretation Act 1924, relating to the repeal of Acts, creates a presumption that repeal does not affect "any existing status or capacity" or "any right, interest or title already acquired, accrued or established". (See also, for example, *Cooper*

v Attorney-General [1996] 3 NZLR 480, 498, in which the court adopted a citation by Lord Mustill in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, 524.)

AN EXCEPTION FOR PROCEDURAL MATTERS

81 The general principle that legislation should not affect existing rights and existing proceedings

> does not apply to legislation concerned merely with matters of procedure; on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament. For this purpose 'procedure' includes matters relating to remedies, defences, penalties, evidence . . . . (44(1) *Halsbury's Laws of England* (1995) para 1287)

82 The application of this exception or qualification of general principle can be seen in a number of cases. See, for example, *Wildman v The Queen* (1985) 12 DLR (4th) 641; *Selangor United Rubber Estates Ltd v Cradock No. 2* [1968] 1 WLR 319, 321.

83 The most striking New Zealand case on point is *R v Cann* [1989] 1 NZLR 210, where on 27 September 1988 an application was made for Cann's discharge upon a count alleging use of a document to obtain a pecuniary advantage with intent to defraud (s 229A of the Crimes Act 1961). The application was adjourned to 19 October 1988 for argument. In the meantime on 11 October 1988 the Inland Revenue Department Amendment Act (No. 2) 1988 received the Royal Assent. It was assumed for the purposes of the argument that but for the passing of the amendment (which relieved departmental officers of their obligation to maintain secrecy) the evidence would not have been admissible on a prosecution brought under the Crimes Act 1961. Counsel for the appellant submitted that the Inland Revenue Department Amendment Act (No. 2) 1988 should not be given retrospective effect. McMullin J noted that:

> [I]t was not in issue that the relevant evidence was not admissible at the date when the depositions were taken. [Counsel for the appellant] contended that to admit it at the trial would be to take away the appellant's right to have the case against him determined according to the law as it was at that date.
>
> The general rule of the common law is:
>
> . . . that a statute changing the law ought not, *unless the intention appears with reasonable certainty*, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events *(Maxwell v Murphy* (1957) 96 CLR 261 per Dixon CJ at p 267). [emphasis added]
>
> But the amendment is quite clear in its terms. It relates to the divulgence or communications of any matter or thing or the production of any book or document in any Court on or after 11 October 1988. *It does not make an act illegal which was legal at the time it was committed.* At the time the offence alleged was committed on 25 May 1987 the Crown alleges that what the appellant did was already an offence. It does not need retrospective legislation to make that claim. *The amendment is not a matter which goes to the substance of the offence but rather to the admissibility of the evidence tendered in proof of its commission.*

> *Therefore in no sense can the amendment be said to be retrospective*. (214) [emphasis added]

In effect, the court treated the legislation as not being retrospective rather than as an exception to general principle.

THE WITNESS ANONYMITY LEGISLATION

Submissions on retrospective legislation

84 In their submission on the Law Commission's discussion paper, which did not consider this point, the Police argued that cases currently before the courts should have the benefit of the legislation, including *R v Hines*. They queried whether there was any difference between applying a Court of Appeal decision in the retrial of *Hines* and applying it in all other proceedings currently awaiting trial or where the charges are withdrawn because of the Court of Appeal's decision. In their words, "to make a distinction solely on the basis that it was *Hines* who took the issue on appeal does not support making other than a universal amendment to the law".

85 The New Zealand Council of Victim Support Groups also submitted that the new legislation should apply to all cases within the judicial system at the date of enactment, stating that it would be wrong to have the provisions only applying from the date of enactment.

The Law Commission's view

86 Following the principle that emerges from the cases, there is no impediment to applying the proposed amendment to future trials, whether the alleged offence occurred before or after the date on which the amendment comes into force.

87 The case of *R v Hines* raises a further point. Hines was convicted at a trial in which anonymous evidence was adduced. He appealed successfully to the Court of Appeal, which allowed his appeal and quashed his conviction, directing a new trial on the ground that the law did not permit the giving of anonymous evidence. If the amendment were to apply to his retrial, he could fairly complain that the law had been changed to alter the result of his success in the Court of Appeal on that very point. There is a contrary argument that Hines is not being deprived of the benefit of a judgment. That benefit is the quashing of his conviction which gives him a new chance of aquittal. It is not being interfered with simply because the new rules will apply at the retrial.

88 On balance, the Law Commission prefers the view that for the amendment to apply to the *R v Hines* retrial would be to deprive Hines of the benefit of a judgment already delivered by the Court of Appeal: but for the amendment, it is highly unlikely he would face a retrial. To apply the amendment would therefore be objectionable in principle. It would also lead to an absurdity in practice: the witness who gave evidence anonymously at the trial leading to Hines's overturned conviction would, in the likely event of being granted anonymity, give the same evidence in the same way at the retrial.

SUMMARY

89 In general, legislation should have prospective effect only. It should not create offences retrospectively, nor deprive individuals of their right to benefit from the judgments they obtain in proceedings brought under earlier law or to continue proceedings asserting rights and duties under that law. An exception or qualification to these general principles is legislation concerning matters of procedure. The Law Commission's view is that witness anonymity legislation, which relates to procedural and evidential matters, can be applied to all pending and future trials with the exception of *R v Hines*. In relation to the *Hines* case, the retrospective application of the new law would alter the result of the judgment of the Court of Appeal and is therefore inappropriate.

DRAFT WITNESS ANONYMITY PROVISIONS FOR AN EVIDENCE CODE, WITH COMMENTARY

CONTENTS

WITNESS ANONYMITY

The following definitions will appear with other definitions in the evidence code:

witness means a person who gives evidence in a proceeding;

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 or any property will be exposed to the risk of serious 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.

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. In order to be practically effective, 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 or some other person or any property is at risk of exposure to serious harm. See also *section 2(1)(a)*.

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)*).

Section 1 commentary continues overleaf

(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 or 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 or by the defendant 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.

(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 commentary continued

C5 The court needs certain information about the witness in order to assess whether the witness should be granted anonymity under *section 2*. *Subsections (4)* and *(5)* require the party applying for a witness anonymity order to swear or affirm to the court that all relevant information has been disclosed to independent counsel. Both the party making such an oath or affirmation, and independent counsel, should have regard to the factors in *section 2(2)*.

C6 *Subsection (6)* gives independent counsel power to make relevant inquiry.

C7 *Subsection (7)* clarifies the role of independent counsel during a voir dire. For example, independent counsel may cross-examine the witness before the court on any of the factors listed in *section 2(2)*. The transcript of the voir dire will be available in the case of an appeal against the court's ruling. It is not envisaged that independent counsel will have a continuing role in the trial, unless there is reason for the trial judge to reconsider the witness anonymity order.

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. See also *section 2(3)*.

C9 *Subsection (9)* provides for payment for the services of independent counsel, which may include expenses such as translation services if necessary. See para 44.

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 or any property will be exposed to the risk of serious 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 a defendant 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 considering material relating to 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.

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, or the property of the witness or that other person, will be exposed to the risk of serious harm if the witness gives evidence in the proceeding. It is envisaged that it will be rare that a witness or other person will fear harm to their property but not physical harm to themselves.

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 must have regard to in determining whether the appropriate balance between the two competing interests has been reached.

C13 The factors in *subsection (2)* are mandatory and must be considered by the court before making a determination under *section 2(1)(b)*. Consideration of these matters should assist the court in determining whether the defence (usually) case can be conducted effectively without knowledge of the witness's identity, and therefore whether the defendant's right to a fair trial will be compromised. Those making inquiries into the truthfulness and reliability of the witness should have regard to these factors. The factors are, however, not exclusive and the court and independent counsel may have regard to other factors which they consider are relevant to their inquiries.

Section 2 commentary continues overleaf

(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

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. 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. Ordinarily, when independent counsel is appointed under *section 1(2)* the witness anonymity application would be dealt with on the voir dire at the conclusion of the inquiry by independent counsel. The judge would conduct the voir dire with both parties present so far as practicable, but could 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 (see *section 1(8)*). 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. The Law Commission envisages that independent counsel will usually cross-examine the witness in front of the judge, and in the presence of the prosecutor (in the cases where the witness is a prosecution witness).

Section 2 commentary continues overleaf

(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 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 commentary 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. However, unlike the power in relation to witness anonymity application hearings in *section 1(8)*, the judge does not have the power to exclude a party or the party's counsel from the court. Instead the judge may make other orders, such as the use of screens and voice distortion, in order to preserve the witness's anonymity. It is open to the court to make other orders available under existing legislation in order to protect the identity of the witness, for example name suppression orders under ss 138–140 of the Criminal Justice Act 1985. See also *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996) in which the Commission discusses the current law and proposals regarding modes of evidence (eg, permitting a witness to give evidence by closed circuit television from a location outside the courtroom).

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. The general practice of the court and counsel will be to address the witness as "witness", or, for example, "Witness A". In para 70 of the report the Law Commission recommends that a penalty provision be enacted in order to deter breaches of witness anonymity orders, especially disclosure of the witness's name.

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 of 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.

Section 3 continues overleaf

(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.

APPENDIX
List of respondents

The Law Commission wishes to acknowledge the submissions on *Evidence Law: Witness Anonymity* (NZLC PP29, 1997) made by the following organisations and people:[1]

Births Deaths and Marriages
Criminal Bar Association
Commissioner for Children
Department for Courts
High Court Judges at Auckland
Ministry of Pacific Island Affairs
National Council of Women/Te Kaunihera Wahine O Aotearoa
New Zealand Council of Victim Support Groups
New Zealand Law Society
New Zealand Police
New Zealand Police Association
Nga Whiitiki Whänau Ahuru Möwai O Aotearoa/National Collective of Rape Crisis and Related Groups of Aotearoa Inc
Wellington Community Law Centre
Wellington Women Lawyers' Association
The Hon Justice Gallen, Acting Chief Justice
Senior Sergeant P Berry
J Billington QC
N Cox, barrister
KM France
J Girvan, University of Canterbury
Dr DL Mathieson QC
MA Norder
CM Paul
C Pidgeon QC
JCS Sandston (Partner, McFadden McMeeken Phillips)
PA Williams QC

[1] One submission, made by an individual member of the public, was made expressly confidential.

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D v National Society for the Prevention of Cruelty to Children [1978] AC 171

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R v DJX, SCY, and GCZ (1990) 91 Cr App R 36

R v Keane [1994] 2 All ER 478

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Former Yugoslavia

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