

CAYMAN ISLANDS



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**A BILL FOR A LAW TO MAKE PROVISION FOR THE PROTECTION
OF WITNESSES DURING AN INVESTIGATION INTO A CRIMINAL
OFFENCE; TO MAKE FURTHER PROVISION FOR THE
PROTECTION OF WITNESSES IN CRIMINAL PROCEEDINGS; AND
FOR INCIDENTAL AND CONNECTED PURPOSES**

THE CRIMINAL EVIDENCE (WITNESS ANONYMITY) BILL, 2010

MEMORANDUM OF OBJECTS AND REASONS

This Bill seeks to make provision for the protection of witnesses.

The Bill makes provision for the making of an investigation anonymity order by a magistrate in relation to a person who is able to assist the police with a criminal investigation, where that person would not otherwise do so for fear of harm.

It also makes provision for the making of a witness anonymity order by the courts in relation to a person who is able to give evidence in criminal proceedings, where that person would not otherwise do so for fear of harm.

THE CRIMINAL EVIDENCE (WITNESS ANONYMITY) BILL, 2010

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FOR INCIDENTAL AND CONNECTED PURPOSES**

ENACTED by the Legislature of the Cayman Islands.

PART I – PRELIMINARY

1. This Law may be cited as the Criminal Evidence (Witness Anonymity) Law, 2010. Short title

2. In this Law - Interpretation

“common law anonymity order” means an order made, pursuant to common law rules, by a court for securing that the identity of a witness in criminal proceedings is withheld from the defendant or, on a defence application, from other defendants;

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

“defendant”, in relation to any criminal proceedings, means any person charged with an offence to which the proceedings relate, whether or not convicted;

“firearms” has the meaning ascribed to it in the Firearms Law (2008 Revision); (2008 Revision)

“investigation anonymity order” means an order made pursuant to section 6;

“investigative authority” means a person or body that the Governor in Cabinet may prescribe as an investigative authority for the purposes of this Law;

(2007 Revision)

“offensive weapon” has the meaning ascribed to it in the Penal Code (2007 Revision);

“prosecutor” means a person or body charged with duties to conduct criminal prosecutions;

“witness”, in relation to any criminal proceedings, means any person called, or proposed to be called, to give evidence at the trial or hearing in question;

“witness anonymity order” means an order made by a court that requires such specified measures to be taken in relation to a witness in criminal proceedings as the court considers appropriate to ensure that the identity of the witness is not disclosed in, or in connection with, the proceedings.

Application of the Law

3. This Law applies to criminal investigations and criminal proceedings in cases where -

- (a) the investigation, trial or hearing begins on or after the commencement of this Law; or
- (b) the investigation, trial or hearing has begun, but has not ended, before the commencement of this Law.

PART II – ANONYMITY IN INVESTIGATIONS

Qualifying offences

4. (1) For the purposes of this Part, a qualifying offence is an offence -

- (a) listed in subsection (2); and
- (b) where, in relation to the offence mentioned in subsection (2)(a), (b) or (c), the injury or death was caused by a firearm or other offensive weapon; or
- (c) where, in relation to the offence mentioned in subsection (2)(d), (e) or (f), the commission of the offence involved a firearm or other offensive weapon.

(2) The offences referred to in subsection (1) are -

- (a) murder;
- (b) attempted murder;
- (c) manslaughter;
- (d) robbery;

- (e) attempted robbery;
- (f) rape.

(3) The Governor in Cabinet may, by order, amend subsection (2).

5. For the purposes of this Part, a qualifying criminal investigation is a criminal investigation conducted by the Royal Cayman Islands Police Force or any other investigative authority wholly or in part with a view to ascertaining -

Qualifying criminal investigations

- (a) whether a person should be charged with a qualifying offence; or
- (b) whether a person charged with a qualifying offence is guilty of it.

6. (1) A magistrate may grant an order, in relation to a specified person, prohibiting the disclosure of information -

Investigation anonymity order

- (a) that identifies the specified person as a person who is or was able or willing to assist a specified qualifying criminal investigation; or
- (b) that might enable the specified person to be identified as such a person.

(2) The prohibition in an investigation anonymity order is subject to subsections (3) to (9).

(3) A person who discloses information in contravention of an investigation anonymity order commits an offence and is liable on summary conviction to a fine of twenty thousand dollars or to imprisonment for four years or to both.

(4) A person shall not contravene an investigation anonymity order by the disclosure of such information as regards the specified person as is described in subsection (1), if the person disclosing the information does not know and has no reason to suspect that such an order has been made in relation to the specified person in connection with the specified qualifying criminal investigation.

(5) A person shall not contravene an investigation anonymity order by the disclosure of such information as regards the specified person as is described in subsection (1)(b), if the person disclosing the information does not know and has no reason to suspect that the information disclosed is information that might enable the specified person to be identified as a person of the sort described in subsection (1)(a) in relation to the specified qualifying criminal investigation.

(6) Where, a person knows that another person is aware that the person specified in an investigation anonymity order is a person who is or was able or willing to assist a criminal investigation relating to the qualifying offence, and that person discloses to that other person that an investigation anonymity order

has been made in relation to the specified person in connection with the criminal investigation of a qualifying offence, he shall not contravene the order.

(7) A person, who discloses information to which an investigation anonymity order relates, shall not contravene the order if -

- (a) the disclosure is made to a person who is involved in the specified qualifying criminal investigation or in the prosecution of an offence to which the investigation relates; and
- (b) the disclosure is made for the purposes of the investigation or the prosecution of an offence to which the investigation relates.

(8) A person shall not contravene an investigation anonymity order by a -

- (a) disclosure in pursuance of a requirement imposed by any law; or
- (b) disclosure made in pursuance of an order of a court.

(9) A person who discloses such information as regards another person as is described in subsection (1) may not rely on subsection (8) in a case where -

- (a) it might have been determined that the person was required or permitted to withhold the information, whether on grounds of public interest immunity or on other grounds; and
- (b) the person disclosed the information without there having been a determination as to whether the person was required or permitted to withhold the information,

and the disclosure for the purposes of seeking such a determination is not a contravention of an investigation anonymity order.

(10) In this section “specified” means specified in the investigation anonymity order concerned.

Application for
investigation anonymity
order

7. (1) An application for an investigation anonymity order may be made to a magistrate by -

- (a) the Commissioner of Police; or
- (b) the Attorney General.

(2) An applicant for an investigation anonymity order shall not be required to give notice of the application to -

- (a) a person who is suspected of having committed or who has been charged with an offence to which the qualifying criminal investigation relates; or
- (b) that person's legal representative.

(3) An applicant for an investigation anonymity order shall, unless the magistrate directs otherwise, inform the magistrate of the identity of the person who would be specified in the order.

(4) A magistrate may determine the application without a hearing.

(5) If a magistrate determines an application for an investigation anonymity order without a hearing, the magistrate shall notify the applicant of the determination.

(6) The Governor in Cabinet may, by order, amend subsection (1).

8. (1) A magistrate may make an investigation anonymity order if satisfied that there are reasonable grounds for believing that the conditions set out in subsection (2)(a), (b) and (c) and either (d) or (e) are met.

Conditions for making
an order

(2) The conditions referred to in subsection (1) are -

- (a) that a qualifying offence has been committed;
- (b) that the person who would be specified in the order has reasonable grounds for fearing intimidation or harm if identified as a person who is or was able or willing to assist the criminal investigation as it relates to the qualifying offence;
- (c) that the person who would be specified in the order -
 - (i) is able to provide information that would assist the criminal investigation as it relates to the qualifying offence; and
 - (ii) is more likely than not, as a consequence of the making of the order, to provide such information;
- (d) that the person likely to have committed the qualifying offence is a person who was at least sixteen years of age at the time the offence was committed;
- (e) that the person likely to have committed the qualifying offence is likely to have been a member of a group falling within subsection (3) at the time the offence was committed.

(3) A group falls within this subsection if -

- (a) it is possible to identify the group from the criminal activities that its members appear to engage in; and
- (b) it appears that the majority of the persons in the group are at least sixteen years of age.

(4) If it is suspected that the qualifying offence was committed by two or more persons, it is sufficient for the purposes of subsection (1) that the magistrate

is satisfied that there are reasonable grounds for believing that the conditions in subsection (2) are satisfied in relation to one person.

(5) The Governor in Cabinet may, by order, amend subsection (2)(b), (d) and (e) and subsection (4).

Appeal against refusal to make an order

9. (1) Where a magistrate refuses an application for an investigation anonymity order, the applicant may appeal to a judge against that refusal.

(2) An applicant may not appeal under subsection (1) unless the applicant indicates -

- (a) in the application for the order; or
- (b) if there is a hearing of the application before the magistrate, at the hearing,

that the applicant intends to appeal a refusal.

(3) If an applicant has indicated an intention to appeal a refusal, a magistrate who refuses an application for an investigation anonymity order shall make the order as requested by the applicant.

(4) An order made under subsection (3) has effect until the appeal is determined or otherwise disposed of.

(5) The judge to whom an appeal is made shall consider afresh the application for an investigation anonymity order and section 7(3) to (5) applies accordingly to the determination of the application by the judge.

Discharge of order

10. (1) A magistrate may discharge an investigation anonymity order if it appears to the magistrate to be appropriate to do so.

(2) The magistrate may discharge an investigation anonymity order on an application by the person on whose application the order was made or any person specified in the order.

(3) An application may not be made under subsection (2) unless there has been a material change of circumstances since the relevant time.

(4) Any person eligible to apply for the discharge of the order is entitled to be party to the proceedings on the application in addition to the applicant.

(5) If an application to discharge an investigation anonymity order is made by a person other than the person specified in the order, the magistrate may not determine the application unless -

- (a) the person specified in the order has had an opportunity to oppose the application; or
- (b) the magistrate is satisfied that it is not reasonably practicable to communicate with the person.

(6) A party to these proceedings may appeal to a judge against the magistrate's decision.

(7) If during the proceedings a party indicates an intention to appeal against a determination to discharge the investigation anonymity order, a magistrate who makes such a determination shall provide for the discharge of the order not to have effect until the appeal is determined or otherwise disposed of.

(8) In this section "the relevant time" means -

- (a) the time when the order was made; or
- (b) if a previous application has been made under subsection (2), the time when the application, or the last application, was made.

PART III- ANONYMITY IN CRIMINAL PROCEEDINGS

11. (1) A court may make a witness anonymity order to ensure that the identity of the witness is not disclosed in or in connection with the criminal proceedings.

Witness anonymity
order

(2) The measures that may be required to be taken in relation to a witness to which a witness anonymity order applies, include measures for securing one or more of the following -

- (a) that the witness's name and other identifying details may be -
 - (i) withheld; or
 - (ii) removed from materials disclosed to any party to the proceedings;
- (b) that the witness may use a pseudonym;
- (c) that the witness is not asked questions of any specified description that might lead to the identification of the witness;
- (d) that the witness is screened to any specified extent; or
- (e) that the witness's voice is subjected to modulation to any specified extent.

- (3) Subsection (2) does not affect the generality of subsection (1).
- (4) Nothing in this section authorises the court to require -
 - (a) the witness to be screened to such an extent that the witness cannot be seen by -
 - (i) the judge or other members of the court, if any; or
 - (ii) the jury, if there is one;
 - (b) the witness's voice to be modulated to such an extent that the witness's natural voice cannot be heard by any persons within paragraph (a)(i) and (ii).
- (5) In this section "specified" means specified in the witness anonymity order concerned.

Application for witness
anonymity order

12. (1) An application for a witness anonymity order to be made in relation to a witness in criminal proceedings may be made to the court by the prosecutor or the defendant.

- (2) Where an application is made by the prosecutor, the prosecutor shall -
 - (a) unless the court directs otherwise, inform the court of the identity of the witness; and
 - (b) not be required to disclose in connection with the application -
 - (i) the identity of the witness; or
 - (ii) any information that might enable the witness to be identified,to any other party to the proceedings or his legal representative.
- (3) Where an application is made by the defendant, the defendant shall -
 - (a) inform the court and the prosecutor of the identity of the witness; and
 - (b) not be required to disclose in connection with the application, if there is more than one defendant,
 - (i) the identity of the witness; or
 - (ii) any information that might enable the witness to be identified,to any other defendant or his legal representative.
- (4) Where the prosecutor or the defendant proposes to make an application under this section in respect of a witness, any relevant material which is disclosed by or on behalf of that party before the determination of the application may be disclosed in such a way as to prevent -
 - (a) the identity of the witness; or
 - (b) any information that might enable the witness to be identified,

from being disclosed except as required by subsection (2)(a) or (3)(a).

(5) In this section “relevant material” means any document or other material which falls to be disclosed, or is sought to be relied on, by or on behalf of the party concerned in connection with the proceedings or proceedings preliminary to them.

(6) The court shall give every party to the proceedings the opportunity to be heard on an application under this section.

(7) The court may, notwithstanding subsection (6), hear one or more parties in the absence of a defendant and his legal representative, if it appears to the court to be appropriate to do so in the circumstances of the case.

(8) Nothing in this section is to be taken as restricting any power to make rules of court.

13. (1) Upon an application pursuant to section 12, the court may make a witness anonymity order only if it is satisfied that the following conditions are met -

Conditions for making
an order

- (a) that the measures to be specified in the order are necessary -
 - (i) in order to protect the safety of the witness or another person or to prevent any serious damage to property; or
 - (ii) in order to prevent real harm to the public interest, whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities, or otherwise;
- (b) that, having regard to all the circumstances, the taking of those measures would be consistent with the defendant receiving a fair trial; and
- (c) that the importance of the witness's testimony is such that in the interests of justice the witness ought to testify and -
 - (a) the witness would not testify if the proposed order were not made; or
 - (b) there would be real harm to the public interest if the witness were to testify without the proposed order being made.

(2) In determining whether the measures to be specified in the order are necessary for the purpose mentioned in subsection (1)(a)(i), the court shall have regard, in particular, to any reasonable fear on the part of the witness -

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

if the witness were to be identified.

Relevant considerations

14. (1) When deciding whether the conditions in section 13 are met in the case of an application for a witness anonymity order, the court shall have regard to -

- (a) the considerations mentioned in subsection (2); and
- (b) such other matters as the court considers relevant.

(2) The considerations referred to in subsection (1) are -

- (a) the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings;
- (b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his evidence comes to be assessed;
- (c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant;
- (d) whether the witness's evidence could be properly tested, whether on grounds of credibility or otherwise, without his identity being disclosed;
- (e) whether there is any reason to believe that the witness -
 - (i) has a tendency to be dishonest; or
 - (ii) has any motive to be dishonest in the circumstances of the case,having regard, in particular, to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant; and
- (f) whether it would be reasonably practicable to protect the witness's identity by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court.

Warning to jury

15. The judge shall, where on a trial on indictment with a jury any evidence has been given by a witness at a time when a witness anonymity order applied to that witness, give the jury such warning as the judge considers appropriate to ensure that the fact that the order was made in relation to that witness does not prejudice the defendant.

Discharge or variation of order

16. (1) A court that has made a witness anonymity order in relation to any criminal proceedings may in those proceedings subsequently discharge, vary or further vary the order if it appears to the court to be appropriate to do so in view of sections 13 and 14 that applied to the making of the order.

(2) The court may, discharge, vary or further vary a witness anonymity order -

- (a) on an application made by a party to the proceedings if there has been a material change of circumstances since the relevant time; or
- (b) on its own initiative.

(3) The court shall give every party to the proceedings the opportunity to be heard -

- (a) before determining an application made to it under subsection (2); or
- (b) before discharging, varying or further varying the order on its own initiative.

(4) The court may, notwithstanding subsection (3), hear one or more of the parties to the proceedings in the absence of a defendant in the proceedings and his legal representative, if it appears to the court to be appropriate to do so in the circumstances of the case.

(5) In this section “the relevant time” means -

- (a) the time when the order was made; or
- (b) if a previous application has been made under subsection (2), the time when the application, or the last application, was made.

17. (1) Where a court has made a witness anonymity order in relation to a witness in criminal proceedings and those proceedings have come to an end the court that made the order may discharge, vary or further vary, the order if it appears to the court to be appropriate to do so in view of -

Discharge or variation of order after criminal proceedings have come to an end

- (a) sections 13 and 14 that apply to the making of a witness anonymity order; and
- (b) such other matters as the court considers relevant.

(2) On an application made either by a party to the original criminal proceedings or by the witness, the court may discharge, vary or further vary a witness anonymity order if there has been a material change of circumstances since the relevant time.

(3) The court may not determine an application made to it under subsection (2) unless in the case of each of the parties to the original criminal proceedings and the witness -

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

(4) The court may, notwithstanding subsection (3), hear one or more of the persons mentioned in that subsection in the absence of a person who was a

defendant in the original criminal proceedings and that person's legal representative, if it appears to the court to be appropriate to do so in the circumstances of the case.

(5) In this section, “the relevant time” means -

- (a) the time when the original criminal proceedings came to an end; or
- (b) if a previous application has been made under subsection (3), the time when the application, or the last application, was made.

Discharge or variation
by appeal court

18. (1) Where a court has made a witness anonymity order in relation to a witness in the trial proceedings and a defendant in the trial proceedings has in those proceedings -

- (a) been convicted;
- (b) been found not guilty by reason of insanity; or
- (c) been found to be under a disability and to have done the act charged in respect of an offence,

the appeal court may in proceedings on or in connection with an appeal by the defendant from the trial proceedings discharge, vary or further vary the order if it appears to the court to be appropriate to do so in view of sections 13 and 14 that apply to the making of a witness anonymity order and such other matters as the court considers relevant.

(2) The appeal court may not discharge or vary the order unless in the case of each party to the trial proceedings -

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

(3) The appeal court may, notwithstanding subsection (2), hear one or more of the parties to the trial proceedings in the absence of a person who was a defendant in the trial proceedings and that person's legal representative, if it appears to the court to be appropriate to do so in the circumstances of the case.

(4) In this section a reference to the doing of an act includes a reference to a failure to act.

(5) In this section “trial proceedings” means the criminal proceedings from which the appeal lies.

PART IV – MISCELLANEOUS

19. (1) Subject to subsection (2), the common law rules relating to the power of a court to make an order for securing that the identity of a witness in criminal proceedings is withheld from the defendant or, on a defence application, from other defendants, are abolished.

Abolition of the
common law rules

(2) Subsection (1) shall only apply in relation to criminal proceedings to which this law applies.

20. (1) This section has effect in relation to criminal proceedings in cases where -

Common law anonymity
orders

- (a) the trial or hearing has begun, but has not ended, before commencement of this Law; and
- (b) the court has made a common law anonymity order in relation to a witness at the trial or hearing.

(2) Subsection (3) applies if the witness has not begun to give evidence under the terms of that order before commencement of this Law.

(3) In a case where the witness has not begun to give evidence, the court -

- (a) shall consider whether that order was one that the court could have made if this Law had been in force at the material time; and
- (b) may, if it considers that that order was one that it could have made in those circumstances, direct that the order is to remain in place; or
- (c) shall, if it believes that that order was not an order that could have been made if the Law was in force, discharge the order and consider whether instead it should make a witness anonymity order in relation to the witness in accordance with sections 11 to 14.

(4) A witness anonymity order made by virtue of subsection (3)(c) shall be made so as to come into effect immediately on the discharge of the common law anonymity order.

(5) Where a witness began to give evidence under the terms of the common law anonymity order before the commencement of the Law, subsections (6) and (7) shall apply whether or not he has finished doing so.

(6) In a case where a witness has begun to give evidence pursuant to a common law anonymity order, the court shall consider whether the effect of that order is such that the defendant has been prevented from receiving a fair trial, having regard, in particular to -

- (a) whether the order was one that the court could have made if this Law had been in force at the material time; and
- (b) whether the court should exercise any power to give a direction to the jury, if there is one, regarding the evidence given under the terms of the order.

(7) If the court determines that the defendant has been prevented from receiving a fair trial, it shall give such directions as it considers appropriate for and in connection with bringing the trial or hearing to a conclusion.

Common law anonymity
orders: appeals

21. Where an appeal court is considering an appeal against a conviction in criminal proceedings in a case where the trial ended before the commencement of this Law and the court from which the appeal lies made a common law anonymity order in relation to a witness at the trial, the appeal court -

- (a) may not treat the conviction as unsafe solely on the ground that the trial court had no power at common law to make the order; and
- (b) shall treat the conviction as unsafe if it considers -
 - (i) that the order was not one that the trial court could have made if this Law had been in force at the material time; and
 - (ii) that, as a result of the order, the defendant did not receive a fair trial.

Withholding of
information on the
grounds of public
interest immunity

22. Nothing in this Law affects the common law rules as to the withholding of information on the grounds of public interest immunity.

Review

23. (1) The Attorney General shall review the operation of this Law and prepare a report of that review.

(2) The Attorney General shall lay a copy of the report before the Legislative Assembly before the end of the period of two years from the commencement of this Law.

Regulations

24. The Governor in Cabinet may make regulations prescribing all matters which are required or permitted to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the provisions of this Law.

Passed by the Legislative Assembly the day of , 2010.

Speaker.

Clerk of the Legislative Assembly.