



## **WITNESS PROTECTION MEASURES AND THE ADMISSIBILITY OF EVIDENCE IN CRIMINAL PROCEEDINGS: A COMMON LAW APPROACH**

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### **Abstract**

This article examines the admissibility of evidence obtained in criminal proceedings where special measures are used to ensure witness protection in Common Law jurisdictions. It focuses on the United Kingdom, the United States, Canada, Australia and the jurisprudence of the European Court of Human Rights, and argues that admissibility must be assessed through a principled evaluation of overall fairness rather than formal procedural compliance alone.

**Keywords:** Witness protection; admissibility of evidence; criminal proceedings; fair trial; confrontation rights; protected witnesses; common law; evidentiary safeguards; Article 6 ECHR; cross-examination.

### **Introduction**

In contemporary criminal justice systems, witness intimidation has become a persistent and systemic problem, particularly in cases involving organised crime, terrorism, and serious violent offences. The willingness of witnesses to testify often depends on the existence of effective protective measures. As a result, Common Law jurisdictions have developed a range of mechanisms, including anonymity orders, screens, voice distortion, and video-link testimony, designed to reduce fear and psychological pressure on witnesses<sup>1</sup>. These measures, however, inevitably raise difficult questions concerning the admissibility and reliability of the evidence obtained under such conditions.

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<sup>1</sup> Youth Justice and Criminal Evidence Act 1999, ss 16–30.



The central legal tension lies between two competing values. On the one hand, the state has a legitimate interest in ensuring that witnesses can give evidence without fear of retaliation. On the other hand, the accused is entitled to a fair trial, which includes the right to challenge the prosecution's evidence effectively and to test the credibility of adverse witnesses<sup>2</sup>. This tension is particularly acute in adversarial systems, where cross-examination is traditionally regarded as one of the most important safeguards against unreliable or fabricated testimony<sup>3</sup>. Against this background, this article explores how Common Law systems attempt to reconcile witness protection with the requirements of evidentiary fairness. It focuses on the admissibility of evidence obtained from protected witnesses and argues that the decisive criterion should be the overall integrity of the trial rather than mere procedural compliance.

The law of evidence in Common Law jurisdictions is traditionally structured around a combination of relevance, reliability, and fairness<sup>4</sup>. While relevance determines whether evidence is capable of assisting the fact-finder, admissibility rules serve a broader normative function: they protect the integrity of the trial process and the rights of the parties. As Ashworth has famously argued, exclusionary rules are not merely technical devices but instruments for safeguarding fundamental procedural values<sup>5</sup>. One of the most important of these values is the right of the accused to confront adverse witnesses. In adversarial proceedings, confrontation is closely linked to cross-examination, which is widely regarded as the primary mechanism for testing the credibility and reliability of testimony<sup>6</sup>. From this perspective, any restriction on the ability of the defence to question a witness directly raises concerns about the quality of fact-finding and the risk of wrongful conviction. At the same time, the Common Law has never treated confrontation as an absolute or ritualistic requirement. Courts have long recognised that certain categories of witnesses, including children, victims of sexual offences, and intimidated witnesses, may require special procedural arrangements. The challenge is therefore not to choose between security and fairness, but to determine the conditions under which protective measures remain compatible with the core requirements of a fair trial.

<sup>2</sup> European Convention on Human Rights, art 6.

<sup>3</sup> Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (3rd edn, OUP 2010) 412.

<sup>4</sup> Kenneth S Broun (ed), *McCormick on Evidence* (7th edn, West 2013) 50.

<sup>5</sup> Andrew Ashworth, 'Excluding Evidence as Protecting Rights' (1977) 93 *Law Quarterly Review* 722, 730.

<sup>6</sup> Roberts and Zuckerman (n 3) 420.



In English law, the modern framework for witness protection is primarily based on the Youth Justice and Criminal Evidence Act 1999, which introduced a range of ‘special measures’ for vulnerable and intimidated witnesses, including screens, live video links, and pre-recorded evidence<sup>7</sup>. The explicit aim of these provisions is to improve the quality of evidence by reducing fear and distress. At the same time, Parliament deliberately preserved the trial judge’s discretion to exclude evidence where its admission would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted<sup>8</sup>. This discretionary power reflects a broader Common Law commitment to balancing probative value against prejudicial effect. As Roberts and Zuckerman observe, the admissibility of evidence is not a purely mechanical question but a matter of principled judicial evaluation<sup>9</sup>. In the context of protected witnesses, this means that courts must consider not only the necessity of the protective measures but also their impact on the defence’s ability to challenge the evidence effectively.

The importance of this balancing exercise is further underscored by the European human rights dimension. Although the United Kingdom is no longer a member of the European Union, it remains bound by the European Convention on Human Rights, and domestic courts continue to engage closely with the jurisprudence of the European Court of Human Rights on fair trial standards.

The European Court of Human Rights has developed a nuanced approach to the use of anonymous and protected witnesses under Article 6 of the Convention. The Court has consistently held that such measures are not in themselves incompatible with the right to a fair trial. However, it has also insisted that a conviction should not be based solely or decisively on testimony that the defence has been unable to challenge effectively<sup>10</sup>. In *Al-Khawaja and Tahery v United Kingdom*, the Grand Chamber clarified that the absence of cross-examination must be compensated by sufficient counterbalancing safeguards capable of ensuring the overall fairness of the proceedings<sup>11</sup>. This may include strong judicial directions, corroborative evidence, or procedural opportunities to challenge the reliability of the testimony in other ways. A

<sup>7</sup> Youth Justice and Criminal Evidence Act 1999, ss 16–30.

<sup>8</sup> Police and Criminal Evidence Act 1984, s 78.

<sup>9</sup> Roberts and Zuckerman (n 3) 401.

<sup>10</sup> *Schatschaschwili v Germany* (2016) 63 EHRR 31 [100]–[131].

<sup>11</sup> *Al-Khawaja and Tahery v United Kingdom* (2012) 54 EHRR 23 [118]–[147].



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similar approach was reaffirmed in *Schatschaschwili v Germany*, where the Court emphasised that the decisive question is whether the proceedings as a whole were fair. These cases illustrate a functional and contextual understanding of admissibility. Rather than imposing rigid prohibitions, the Court focuses on the cumulative effect of procedural safeguards and their capacity to preserve the integrity of the trial.

In the United States, the tension between witness protection and evidentiary fairness is primarily analysed through the lens of the Sixth Amendment, which guarantees the accused the right ‘to be confronted with the witnesses against him’. The Supreme Court’s decision in *Crawford v Washington* marked a significant shift in confrontation jurisprudence by holding that testimonial statements of absent witnesses are, in principle, inadmissible unless the defendant has had a prior opportunity for cross-examination.

At the same time, American law has developed extensive witness protection programmes, particularly in cases involving organised crime. The federal Witness Security Program, established under 18 USC § 3521, reflects a recognition that without robust protective measures, many witnesses would simply refuse to testify<sup>12</sup>. This institutional reality has forced courts to confront the practical limits of confrontation in situations where security risks are genuine and substantial.

The resulting jurisprudence suggests that the confrontation right is best understood as a functional guarantee aimed at promoting reliability rather than as an inflexible procedural ritual. As McCormick notes, the core purpose of confrontation is to enable effective testing of evidence, not to insist on a particular physical arrangement of the courtroom<sup>13</sup>.

Canadian and Australian approaches further illustrate the Common Law commitment to balancing witness security with trial fairness. In Canada, the Criminal Code permits a range of protective measures for witnesses, particularly those who are vulnerable or intimidated<sup>14</sup>. In *R v Levogiannis*, the Supreme Court of Canada upheld the use of a screen shielding the witness from the accused, emphasising that the essential question is whether the defence retains a fair opportunity to challenge the evidence.

Australian evidence law adopts a similarly pragmatic stance. The Evidence Act 1995 allows for various protective arrangements while preserving judicial control over

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<sup>12</sup> *Schatschaschwili v Germany* (2016) 63 EHRR 31.

<sup>13</sup> Broun (n 4) 252.

<sup>14</sup> Criminal Code (RSC 1985, c C-46), ss 486.1–486.4.



admissibility<sup>15</sup>. The Australian Law Reform Commission has stressed that such measures should be understood as instruments for enhancing, rather than diminishing, the quality of evidence, provided that they do not undermine the fairness of the proceedings<sup>16</sup>.

These comparative perspectives reinforce the view that admissibility in the context of witness protection is best approached as a matter of principled judicial evaluation rather than rigid rule application.

From a theoretical standpoint, the admissibility of evidence obtained under witness protection measures cannot be reduced to a simple checklist of procedural compliance. As Roberts and Zuckerman argue, evidentiary rules are ultimately justified by their contribution to accurate and fair adjudication<sup>17</sup>. In cases involving protected witnesses, the risk of distortion in the fact-finding process is real, particularly where fear, stress, or procedural restrictions affect the manner in which testimony is given and tested. In such circumstances, courts must adopt a cautious and principled approach, ensuring that protective measures do not transform the criminal trial into a procedurally imbalanced process. The ultimate aim is not merely to secure convictions, but to preserve the legitimacy of criminal adjudication by maintaining public confidence in its fairness and reliability.

The admissibility of evidence obtained in the course of ensuring witness protection represents one of the most sensitive and complex issues in modern criminal procedure. Common Law jurisdictions have responded to this challenge through a combination of statutory safeguards, judicial discretion, and human rights standards. The analysis undertaken in this article demonstrates that witness protection and fair trial rights are not mutually exclusive. However, their reconciliation requires careful, case-by-case evaluation focused on the overall integrity of the proceedings and the effective protection of the accused's right to challenge the evidence against them.

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<sup>16</sup> Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2005) [11.38].

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