

Upper House of the States General

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29 743

Amendment to the Code of Criminal Procedure with regard to a regulation pertaining to the hearing of protected witnesses and a number of other subjects (protected witnesses)

A

AMENDED LEGISLATIVE PROPOSAL 28 June 2005

We Beatrix, by the grace of God, Queen of the Netherlands, Princess of Orange-Nassau, etc. etc. etc

Greetings to all who shall see or hear these presents! Be it known:

Whereas We have considered that, also with a view to combating terrorism, it is desirable to come to additional rules and regulations with regard to the hearing of protected witnesses, and that a number of amendments are made in that respect as well;

We, therefore, having heard the Council of State, and in consultation with the States General, have approved and decreed as We hereby approve and decree:

ARTICLE I

The Code of Criminal Procedure is amended as follows:

A

In Article 136c, the following shall be inserted after «judge»: **by virtue of Article 226a.**

B

After Article 136c, an Article shall be inserted which reads:

Article 136d

Protected witness is taken to mean a witness who is regarded as such by the judge by virtue of Article 226g.

B a

Article 178a is amended as follows:

1. A new paragraph shall be inserted, followed by renumbering of the third to fourth paragraphs, this new paragraph reading:

3. The examining magistrate of the District Court of Rotterdam has exclusive jurisdiction to issue orders and to carry out or have carried out examinations as described in Articles 226g to 226m; this shall also apply to the territorial jurisdiction of another District Court.

2. In the fourth paragraph, «the second paragraph» shall be replaced by: **the second and third paragraphs.**

C

In Article 187d, first paragraph, section a, the word «or» at the end shall be deleted. The full stop at the end of section b of that paragraph shall be replaced by «, or », thereby adding a section which shall read:

c. the interest of state security is harmed.

D

A paragraph shall be added to Article 190, which paragraph reads:

5. In the event of hearing a protected witness whose identity is being concealed, the first paragraph shall not apply.

E

Article 210 is amended as follows:

1. The second paragraph shall read:

2. If the public prosecutor has promised the witness that the latter shall be heard in no manner other than as a threatened witness or as a protected witness whose identity shall be concealed, the public prosecutor can, giving a reasoned decision, refuse to enforce a writ of summons from the examining magistrate as referred to in the first paragraph. After the examining magistrate and the suspect have been notified of the refusal without delay and in writing, the public prosecutor shall present the claim referred to in Article 226a, first paragraph, or Article 226g, first paragraph, if he has not already done so.

2. In the third paragraph, «a writ of summons regarding a threatened witness» shall be replaced by: **writ of summons regarding the witness as a threatened witness or as a protected witness whose identity shall remain concealed.**

F

After Article 219a, an Article shall be inserted which

reads: **Article 219b**

The witness who is involved in the hearing of a protected witness by virtue of his office or profession, shall be exempted from answering a question in that respect.

G

In the Second Book, title III, a section shall be added after the Fourth Section A, which new section shall read:

FOURTH SECTION B

Protected witnesses

Article 226g

1. The examining magistrate shall order, either *ex officio* or by order of the public prosecutor or at the request of the suspect or the witness, that a witness shall be heard as a protected witness if it can be reasonably established that the interest of state security so requires.

2. The public prosecutor, the suspect and the witness shall be given the opportunity to be heard in that respect.

3. In his report, the examining magistrate shall state the reasons for applicability of the first paragraph.

4. An appeal or an appeal to the Supreme Court against a decision made by virtue of the first paragraph shall not be allowed.

Article 226h

1. The examining magistrate shall order, either *ex officio* or by order of the public prosecutor or at the request of the suspect or the witness, that the identity of the protected witness shall be concealed during the hearing, if a substantial interest of the witness or another party or the interest of state security so requires. In that case, he shall enquire after the identity of the protected witness prior to the hearing and he shall state in his official report to have done so.

2. The witness shall be put under oath or summoned in accordance with Article 216.

3. If the examining magistrate issues the order as referred to in the first paragraph, he shall hear the protected witness in such a way that his identity remains concealed.

Article 226i

The examining magistrate may grant special access to the hearing of a protected witness.

Article 226j

1. If an interest as referred to in Article 226h, first paragraph, so requires, the examining magistrate may stipulate that the suspect or his counsel, or both, cannot be present when the protected witness is heard. In the latter case, the public prosecutor as well shall not be authorised to be present at the hearing.

2. The examining magistrate shall ensure that the report of the hearing of the protected witness does not contain any statement which is in conflict with an interest as referred to in Article 226h, first paragraph.

3. If the witness agrees, the examining magistrate shall submit the report to the public prosecutor and to the suspect as well as to his counsel. The witness can only withhold his approval if the interest of state security so requires. If the witness withholds his approval, the examining magistrate shall ensure that the report of the hearing and all other details relating to the hearing are destroyed without delay. The examining magistrate shall draw up a report of this.

4. The examining magistrate shall offer the public prosecutor, the suspect or his counsel, if [one or more of these parties/ the latter was/were] not present when the witness was heard, the opportunity to state the questions [they/he wish(es)] to be asked, by means of telecommunication or, if this is not compatible with an interest as referred to in the first paragraph, in writing.

Questions can be stated prior to the start of the hearing, unless the hearing cannot be postponed due to the interest of the investigation.

5. Article 226d, third paragraph, applies *mutatis mutandis*.

Article 226k

During the interrogation of the protected witness, the examining magistrate shall study the reliability of the statement made by the protected witness, and he shall give account of this in the official report of the hearing.

Article 226l

1. If the examining magistrate issues the order referred to in Article 226h, second paragraph, either *ex officio* or by order of the public prosecutor, he shall take those measures that are reasonably required to ensure that the identity of the protected witness remains concealed, as well as the identity of another party with regard to whom a request or claim referred to in Article 226h, first paragraph, is made.

2. Article 226f, second and third paragraphs, applies *mutatis mutandis*.

Article 226m

1. If the protected witness agrees, the examining magistrate shall include the official report of the hearing in the procedural documents.

2. Article 226j, third paragraph, applies *mutatis mutandis*, with the exception of the first sentence.

H

Article 264, second paragraph, sections a and b, shall read:

a. if the witness is a threatened witness or a protected witness whose identity is being concealed, or

b. if the public prosecutor has promised the witness that he shall be heard in no manner other than as a threatened witness or as a protected witness whose identity shall be concealed.

I

Article 288, second paragraph, shall read:

2. If the public prosecutor, by virtue of Article 264, second paragraph under b, has refused to call a witness requested by the suspect or has refused to enforce an order given by the District Court to call a witness and if no decision by virtue of Article 226a, first paragraph or 226h, first paragraph is issued with regard to that witness, the District Court shall submit the documents to the examining magistrate in order to have the witness heard. If the District Court, giving a reasoned decision, remains of the opinion that the suspect will not, within reason, be harmed in his defence as a result of such witness not being heard, the previous sentence shall not apply in the event of a witness requested by the suspect. The public prosecutor shall submit the claim referred to in Article 226a, first paragraph or Article 226g, first paragraph, immediately after the documents are submitted to the examining magistrate. Article 316 applies *mutatis mutandis*.

J

In Article 344, first paragraph, section 3°, «and intended to serve as proof of any fact or any circumstance» shall be replaced by <<**as well as documents, drawn up by a person in the public service of a foreign nation or an international institution**>>.

K

Article 344a is amended as follows:

1. In the first paragraph, «are solely accepted on the basis of» shall be replaced by <<**are solely or to a definitive extent based on**>>.

2. After «is regarded» in the second paragraph, in the heading, the following shall be inserted: **or the statement made by a person who is regarded as protected witness and whose identity is being concealed.**

3. The second paragraph, section a, shall read:
a. the witness is a threatened witness or a protected witness and has been heard as such by the examining magistrate, and.

L

Article 349, third paragraph, shall read:

3. If the public prosecutor, by virtue of Article 264, second paragraph under b, refuses to enforce a writ of summons or summons of a witness issued by the District Court while that witness is not a threatened witness or protected witness whose identity is being concealed in accordance with an irrevocable court decision, the District Court shall declare the action of the public prosecutor inadmissible.

M

After «threatened» in Article 360, first paragraph, the following shall be inserted: **or protected.**

ARTICLE II

The amendment referred to in Article I, section J of this act shall not apply to criminal proceedings with regard to which the investigation at the trial is closed the moment this act takes effect.

ARTICLE III

If the legislative proposal, submitted by Royal Message of 17 November 1998, to amend the Penal Code and the Code of Criminal Procedure with regard to witness statements made in exchange for a promise by the Prosecution (promises to witnesses in criminal proceedings) (26 294) is made law, and if that act has already taken effect at the moment this act takes effect, Article I of this act shall be amended as follows:

A

In section B in Article 136d, «Article 226g» shall be replaced by: **Article 226m.**

A a

In section B a, «Article 226g to Article 226m» shall be replaced by: **226m to 226s.**

B

In section D in Article 210, second paragraph, «Article 226g» shall be replaced by: **Article 226m.**

C

Section G is amended as follows:

1. In the heading, «Fourth Section A» shall be replaced by: **Fourth Section D.**

2. The Fourth Section B shall be numbered **Fourth Section E.**

3. Articles 226g to 226m shall become **Articles 226m to 226s.**

4. In Article 226p, first and second paragraphs, and in Article 226r, first paragraph, «Article 226h» shall each time be replaced by: **Article 226n.**

5. In Article 226s, second paragraph, «Article 226j» shall be replaced by: **Article 226p.**

D

In section I, «226h» and «226g» are replaced by «**226n**» and «**226m**».

ARTICLE IV

If the legislative proposal, submitted by Royal Message of 17 November 1998, to amend the Penal Code and the Code of Criminal Procedure with regard to witness statements made in exchange for a promise by the Prosecution (promises to witnesses in criminal proceedings) (26 294) is made or shall be made law and if this present act takes effect before that other act takes effect, two sections shall be inserted after Article II, section C of that other act, which two new sections read:

Ca

The Fourth Section B of title III of the Second Book shall be numbered Fourth Section E.

C b

1. Articles 226g to 226m shall become Articles 226m to 226s.

2. In Article 226p, first and second paragraphs, and in Article 226r, first paragraph, «Article 226h» shall each time be replaced by: Article 226n.
3. In Article 226s, second paragraph, «Article 226j» shall be replaced by: Article 226p.

ARTICLE IVA

Within five years of this act taking effect, Our Minister of Justice shall send the States General a report about the practical effectiveness and effects of this act.

ARTICLE V

This act shall enter into force on a date to be determined by Royal Decree.

We order and command that this Act shall be published in the Bulletin of Acts and Decrees, and that all ministerial departments, authorities, bodies and officials whom it may concern shall diligently implement it.

Done

The Minister of Justice,