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GOOD PRACTICE IN WITNESS PROTECTION LEGISLATION

QUERY

Could you please provide examples of good practices in witness protection legislation?

PURPOSE

We are making recommendations to the newly adopted witness protection law in Morocco.

CONTENT

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SUMMARY

Successful law enforcement and anti-corruption depend on the willingness and ability of individuals to provide information and give evidence in a court of law. As witnesses can be subjected to threats and intimidation from criminals who attempt to obstruct the course of justice, witness protection programmes can be a powerful tool complementing whistleblower protection.

While originally designed for serious crimes involving organised crime, most legislation include corruption under the offences covered by their witness protection legislation. The UNCAC also calls upon state parties to take appropriate measures for the protection of witness, experts and victims against retaliation or intimidation for their testimony. Measures may include measures for ensuring the physical and psychological protection of witnesses as well as for providing evidentiary rules allowing witness to testify in a manner that ensures his/her safety.

At minimum, legislation should specify the authority responsible for the programme's implementation, admission/termination criteria and procedures, protection measures that may be used, the rights and obligations of the parties, ensure that the programme's operations are confidential and provide adequate penalties for the disclosure of information about protection's arrangements or about the identity or location of the protected witness.

1 KEY FEATURES OF WITNESS PROTECTION LEGISLATION

Overview of key principles

There are both human rights and criminal justice incentives in providing adequate protection to whistleblowers and witness of crimes (UNODC Website). Witness can be subjected to threats and intimidation from criminals who attempt to obstruct the course of justice. In addition, successful law enforcement and anti-corruption depend on the willingness and ability of individuals to provide information and testify/give evidence in a court of law. Yet, whistle blowers and witnesses in criminal proceedings may fear retaliation, threats or intimidation from criminals or high ranking officials involved in corruption.

Therefore, article 24 of the Organised Crime Convention (UNTOC) calls state parties to provide effective protection from potential retaliation or intimidation of witnesses in criminal proceedings for crimes covered by the convention, which include money laundering, and corruption in the public sector. This is especially important when the witness testifies against organised criminal groups.

Witness in high profile corruption cases can also be exposed to risks of retaliation or intimidation by high ranking officials who are often in a position to abuse their power. The UNCAC also calls upon state parties to take appropriate measures for the protection of witness, experts and victims against retaliation or intimidation for their testimony. Protection should be granted not only to witnesses but to victims who become witness and can be extended to family members or persons close to the witness.

In national legislations, a number of countries include corruption among the crimes to be covered by witness protection programmes, using the same criteria for consideration of witnesses in cases involving organised crime and corruption. This can potentially exclude witness for corruption cases from benefiting from the programme, as, while occasionally facing threat to their lives in grand corruption cases, they are more often subject to harassment at work, demotion of intimidation to benefit from the programme. (The level of threat against the witness in organised crime that would give cause to enter a witness protection programme is likely to be much higher). Other countries have established separate programmes for witnesses in corruption cases for addressing this issue and ensure that corruption cases are tackled effectively (UNODC, 2008).

Witness protection measures may include measures for ensuring the physical and psychological protection of witnesses as well as for providing evidentiary rules allowing witness to testify in a manner that ensures his/her safety. For example, the articles 32 and 33 of UNCAC envisage three broad categories of possible measures including:

- Physical security procedures, such as relocation and non-disclosure of information about the witness's identity and whereabouts;
- Evidentiary rules to ensure the witness safety during the courtroom testimony;
- Signing agreements among state parties to facilitate international relocation of witnesses.

A set of core principles lies at the heart of a witness protection act (UNODC; 2008 and Kramer, K., 2010), including:

- Participation must be voluntary;
- Witness protection should not be granted as a reward or incentive to testify;
- There should be clear criteria for providing protection to witnesses;
- Participation should not make the witness better off than he was before entering the programme;
- All legal obligations must be kept, including protection of the rights of third parties,
- Entering a witness protection programme should be a last resort tool.
- The witness obligations upon admission into the programme should be outlined in a MOU;
- There should be procedures in case of violations of the MOU;
- Procedures should be established for the disclosure of information regarding

participants and penalties for unauthorised disclosure of information

Main components

At minimum, legislation should specify (Kramer, K., 2010):

- Protection measures that may be used;
- Application and admission criteria and procedures;
- The authority responsible for the programme's implementation;
- Criteria for removing the witness from the programme;
- The rights and obligations of the parties;
- That the programme's operations are confidential;
- Provision for penalties for the disclosure of information about protection's arrangements or about the identity or location of the protected witness.

Scope and coverage

The UN model witness protection bill refers to witness as a person who 1) has made or agreed to make a statement/give evidence in relation to the commission of a serious offence; 2) because of his/her relation to this person may require protection and 3) for any other reason may require assistance or protection under the act.

The UNCAC mandates states to take appropriate measures consistent with their legal system to protect witness, victims or experts against potential retaliation or intimidation. As a result, provisions should apply not only to witness but also to victims who become witness as well as extend to family members of persons close to the witness. States are also encouraged to extend some protections to persons reporting in good faith to competent authorities against corrupt acts (UNODC, 2006).

The concept of witness is not defined in the UNCAC. However, the scope of legislation typically applies to persons who provide testimonial evidence for the offences covered by the convention and may include experts, victims and as appropriate their relatives or persons close to them. In some countries, witness protection can extend to judges, prosecutors and police, end even journalists in some cases, may put their life in danger (judges, prosecutors, undercover agents). However, in most counties, it is only in exceptional circumstances that such categories of persons are included in witness protection schemes (UNODC, 2008).

Informants could also in principle be eligible for protective measures and the question has come up at national level (see the Australia example below). However, informants are often persons providing intelligence (as opposed to evidence) to the authorities for the purpose of investigation and their identity is not disclosed, to allow them to continue acting as covet source of information. Most of them are commonly involved or connected with illegal activities and disclose information for personal benefit for money or reduction of their liability (Kramer, K., 2010). The UNODC legislative guide for the implementation of UNCAC calls state parties to apply protection legislation to persons who have participated in the offence and cooperate with law enforcement, whether or not they are witness. Countries such as Australia, Canada, and the United Kingdom for example allow informants to be admitted into witness protection schemes.

Whistleblowers on the contrary receive no benefit for disclosing information, except in countries where the law provide for rewarding people for disclosing wrongdoing. States are also encouraged by the UNCAC to extend some protections to persons reporting in good faith to competent authorities against corrupt acts (UNODC, 2006) (see below). A whistle bower can also become a witness and be called to testify.

The UNODC legislative guide also recommends that protection be extended to persons who cooperate and assist in investigations until it is apparent that they will not be called upon to testify and persons providing relevant information that will not be required/used in court because of safety concerns.

Criteria for inclusion

In the UNCAC, protection measures are mandatory for crimes covered by the convention, but only when appropriate, necessary, without prejudice to the rights

of the defendant and within the means of the state. As a result, the obligation to provide effective protection is limited to specific cases or specified conditions and officials have some discretion in assessing the level of threat and decide on protective measures accordingly. Protection measures also need to be within the means (resources and capacity) of the state (UNODC, 2006).

Depending on the jurisdictions, a request to benefit from the protection can be made by a law enforcement agency, a prosecutor, a judge or by the witness, which is typically forwarded to the decision making authority. An assessment of the request will be made, using criteria such as the level of threat to the person's life, the fitness of the person to adjust to the requirements of the programme, the danger that the person may pose to the public in case of relocation, the critical value of the testimony for prosecution and impossibility to get this information from another source, the importance of the case and the family situation of the person (Kramer, K., 2010).

Protection measures

There are a wide range of measures that can be taken, based on an assessment of the risks, from simple and affordable security measures to more formal witness protection schemes involving relocation and changes of identity. Criminal prosecution of offenders for intimidating the witness can also be a means of protecting the witness. Protection measures foreseen by UNCAC include physical protection, domestic or foreign relocation, allowing non-disclosure of identity or whereabouts of witnesses and special arrangement for giving evidence. Protection measures fall under three categories (Kramer, K., 2010) :

1) Police protection/target hardening: At the first level, police protection includes good investigative practices such as keeping investigations confidential, minimising contacts with police and prosecutors, etc. The second level includes addressing insecurity with simple measures such as adequate security briefing, increasing home security (locks, windows), regular police patrolling, mobile phone, etc. At another level, the police can provide security measures such as close protection, regular patrolling around the witness residence, installation of security devices, relocation, etc.

2) Judicial and procedural measures refer to measures taken by the prosecutor or the court to ensure that the witness can testify free of fear and intimidation. These measures can be taken to avoid face-to-face confrontation with the defendant, to make it difficult for the defendant or organised group to trace the identity of the witness or to limit the witness exposure to public or psychological stress. There are usually no statutory restrictions with regards to the type of crimes or witness for which these measures can be allowed. These types of measures may include anonymous testimony, presence of an accompanying person, shields, disguise or voice distortion, use of pre-trial statement instead of in-court testimony, video testimony, removal of the defendant from the courtroom.

3) Covert witness protection programmes referred to by UNODC as a "*formally established covert program, subject to strict admission criteria that provide for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities*".

4) Optional requirements: Although not mandatory, states have the obligation to consider incorporating measures to provide protection against any unjustified treatment of any person reporting in good faith, on reasonable grounds and to competent authorities facts regarding offences covered by the UNCAC. This can include measures such as career protection, provision of psychological support, institutional recognition of reporting, transfer within the same organisation and relocation to a different organisation (UNODC, 2006).

Structure

In many countries such as Canada, Australia, the UK, Hong Kong, witness protection is seen as a police function, while others such as the United States, the Philippines and the Netherlands grant the Ministry of

Justice, the Ministry of Interior or the State Prosecutor a key role in this regard (Kramer, K., 2010). In a third group of countries such as Italy and Serbia, a multi-disciplinary body consisting of high level representatives of law enforcement, judiciary, prosecuting and sometimes civil society organisations is charged with the implementation of such programme.

In any case, there is a growing consensus that it is preferable to separate the agency responsible for witness protection from investigative and prosecutorial units to ensure the objectivity of witness protection measures and the rights of the witness (UNODC, 2008). There is also recommendation to establish specialised witness protection agencies with adequate operational and budgetary autonomy (Dandurand, Y., 2010).

Some authors consider that the location of the programme is a secondary issue as long as it meets three basic principles, namely: 1) separation from investigative agencies; 2) operational autonomy from the police and 3) confidentiality of operations (Kramer, K.,2010). On an operational level, vetting the staff is typically mandatory as involved parties, including administrative personnel, can relatively easily compromise the safety of operations and security of the witnesses.

Reservations/arising issues

Rights of the defendants: Measures to protect witnesses can challenge the basic rights of the defendant. For example, in some countries anonymous testimony need to be reconciled with the right of the defendant to confront his accuser, or the requirement that all information detained by the prosecutor be disclosed to the other party to enable adequate defence of the charges. In such cases, the court may tailor solutions on case-by-case basis that meet both defendant and witness protection rights. Options may include statutory limits on disclosure information applicable when some degree of risk has been established; 2) judicial discretion to review written material and edit out what does not have to be disclosed and 3) closed hearings of sensitive evidence (UNODC, 2006).

Transparency and accountability: To perform their functions, auditors must have access to all information regarding expenditures, which may not be possible within the framework of witness protection programmes where information regarding identity, location, etc, may not be disclosed. These programmes are subsequently typically subject to special procedures for auditing and reporting. In New Zealand for example, two special police auditors that have been security cleared are authorised to check accounts, after receipts and operational names have been “sanitised”

Legislative structure, operation and review

Some principles applicable to whistle blowing legislation can also be relevant

2 COUNTRY EXAMPLES

Canada

Canada’s Witness Protection Programme Act (WPPA) was enacted in June 1996. The Commissioner of the Force or the Royal Canadian Mounted Police have the responsibility to implement the act.

The Act is designed to solely protect witness even if other agents in the justice process may also be threatened or at risk. The concept of “witness” is defined as a person and/or their families who are at risk and need protection as a result to his/her testimonies or participation to an inquiry, investigation or prosecution of an offence. Protection measures can include relocation, accommodation and change of identity as well as counselling and financial support in order to ensure the security of the protected witness or facilitate his/her re-establishment.

Witnesses need to be recommended for admission by a law enforcement agency or an international criminal court or tribunal and agree to enter the protection program. The Commissioner has responsibility to determine whether a witness is qualified for the program and the protection measures deemed necessary. This decision is based on criteria such as the nature of the risk , the danger to the community if the witness is admitted to the Program, the nature of

the inquiry, investigation or prosecution and the importance of the witness in the matter, the value of the information or evidence given, the likelihood of the witness being able to adjust to the Program, the cost of maintaining the witness in the Program, alternate methods of protecting the witness without admitting the witness to the Program; and other factors as the Commissioner deems relevant.

An agreement between the program and the witness stipulates the terms and condition with corresponding obligation on the part of the Commissioner and of the witness requesting protection. There are grounds for termination of the witness protection agreement may be terminated on solid evidence, such as misrepresentation or failure to testify/disclose information relevant to the admission of the witness to the Program or a breach of the obligations of the witness under the protection agreement.

There is a general prohibition to disclose, directly or indirectly, information about the location or a change of identity of a protected witness or former witness, except if disclosure does not endanger the safety of the witness or the protection programme.

The Witness Protection Act 1996 can be accessed at: http://laws-lois.justice.gc.ca/eng/acts/W-11.2/FullText.html

Australia

The Witness protection act 1994 (UNODC, 2008):

- Sets threshold criteria for inclusion of the witness (referred to as “participants”) into the protection scheme
- Vests the Australian Police with the authority to govern the placement of the witness and their removal from the programme;
- Mandates the establishment of a register of “participants” currently or previously under the protection scheme.
- Subjects the inclusion of a person to the signing of a memorandum of understanding that setsout the basis of his or her participation.
- Provides safeguards to ensure that participants do not use their new identity to evade civil or criminal liability and stipulates that witness may not be included in the programme as a means of encouraging them for giving evidence or making a statement;
- Creates an offence for unlawful divulgation of information about participants and for participants disclosing information about the programme.

The act was later amended to allow participants to make disclosure for the purpose of filing a complaint or providing information to the Ombudsman, as well as to allow the inclusion of person into the programme at the request of the International Criminal Court.

The key elements of the Australian witness protection scheme include (Fenley, J., 1997):

- Officers involved in the assessment and placement of the witness are an operationally discrete unit distinct from the operational police dealing with the witness;
- Delegation of key functions such as the removal and placement onto the programme can not be delegated below specific senior level;
- Protected witness can be removed from the programme for a number of reasons provided by law:
- Any removal from the program or refusal to include a witness on the programme is subject to external review.

Safeguards in the Act ensure the integrity and accountability of the witness protection program is maintained. Members and staff members deployed to the NWPP hold or occupy designated positions which have national security clearance to the level of Top Secret. They can be subject to anti-corruption strategies, including drug testing.

There have been some concerns on how to deal with informants under the Australian legislation. As they are vital to prosecution, informants can be placed on the witness protection only after they have ceased to be active informants. When informants are at risk of injury, they can be placed on the programme, but there is no compelling need for the operational police to place the person on witness protection as there is

in court related matters, which may raise some ethical concerns. Recommendations in this regard could involve (Fenley, J., 1997):

- Registration of informants within the law enforcement agency
- Supervision of the relationship between informant and law enforcement officer
- Regular review of the informants' activities and need for protection.
- Definition

More information on the Witness protection Act 1994 can be accessed at: http://www.afp.gov.au/~/media/afp/pdf/w/witness-protection-annual-report-2009-2010.ashx

South Africa

South Africa's Witness Protection Act 112 of 1998 was promulgated in 2000 (UNODC, 2008):

The Office of Witness Protection is placed under the authority of the Minister of Justice and Constitutional Development. It is headed by a national director appointed by the Minister of Justice and has branches in the provinces. The director makes decision for inclusion or termination of protection based on criteria similar than those outlined in the Canadian examples and recommendations of the provincial branch and relevant law enforcement officials. Refusals or termination may be reviewed by the Minister of Justice.

The act covers any witness who has reason to believe that his/her safety or that of other related persons' is threatened by reason of being a witness to a crime under investigation can benefit from protection measures. The act provides a list of crime for which witness may require, including corruption, extortion, fraud, forgery. This list is not exclusive and the director has the discretion to approve inclusion of witness in respect to any other proceedings.

A written agreement is signed between the director and the witness or the parents or guardian in case of minor, defining their respective obligations.

The law defines offences and severe penalties for disclosure of information about witness or officials of the witness protection office. Violators found guilty of the offence and on conviction be liable to a fine or to imprisonment for a period not exceeding 30 years.

South Africa's Witness Protection Act can be accessed at: http://www.justice.gov.za/legislation/acts/1998-112.pdf

Hong Kong

In 1994, a witness protection programme was set up by the Hong Kong Police Force. In 1998, a similar programme was established under the Independent Commission Against Corruption. In 2000, the Witness Protection Ordinance was enacted as a single piece of legislation providing uniform criteria for both programmes.

The act covers persons who have given, (or agreed) to give, evidence , who have provided a statement or other assistance to a public officer in relation to an offence, who, for any other reason, may require protection or who, because of their relationship to or association with such persons may require protection.

As other acts, the ordinance defines criteria and procedures for admission and grounds for termination, outlining the obligations of the witness. The ordinance also establishes an appeals procedure against refusal or termination decisions as well as refusal to change identity as part of the applicable measures.

Officer with approval authority can take necessary and reasonable action to protect the safety and welfare of witnesses that have been admitted or are being assessed for admission into the programme, including changing their identity. Some provisions also provide some protection of witness giving evidence in court, including identification and search of all members of the public wishing to enter the court room. Officers working with the approving authority are protected from suit or proceedings (including criminal proceedings) in respect of actions done in good faith in the exercise of a power conferred by this Ordinance.

Hong Kong's Witness Protection Ordinance can be accessed at: http://www.humanrights.asia/resources/journals-

magazines/article2/0503/appendix-ii-hong-kong-witness-protection-ordinance-2000

The Organisation of the American States model law

The OAS model law was developed as a tool to facilitate and encourage the reporting of acts of corruption and to protect whistleblowers and witnesses. As it covers both whistleblowers and witnesses of corruption, it could be particularly relevant to countries such as Morocco, which also cover witness, experts as well as whistleblowers.

In particular, Chapter 5 specifically deals with the protection of witnesses of corruption. The model law specifically extend protection to the working conditions of witness and whistleblowers, stating in its article 20 that : access to protection for witnesses of acts of corruption is a right that guarantees the exercise and full enjoyment of the integrity of their persons and property and the conservation of their working conditions, which could possibly be threatened as a result of their involvement in the proceedings of a corruption investigation."

Protections measures envisaged include: 1)Legal assistance for their participation in the criminal or administrative proceedings 2) the confidentiality of their identities and 3) protection of the working conditions.

With regard to the latter, if the witness is a public official he may be protected against termination, firing or removal from his/her position as a consequence of his/her involvement in the investigation proceedings. If the witness is a citizen with no public duties and suffers workplace hostility, he/she shall receive legal assistance in filing the remedies necessary to assert his/her rights in accordance with the labor standards of the private sector.

In addition and at the discretion of the competent authorities and exceptionally, additional protective measures may be granted to witnesses of corruption. In addition to personal protective measures similar than those discussed above, additional measure may protective measures in the workplace such as:

1. Transfer of administrative unit within the agency.
2. Suspension with pay and without prejudice.
3. Change of workplace, if applicable.
4. Others established by the authority.

The full text of this model law can be accessed at: http://www.oas.org/juridico/english/draft_model_reporting.pdf

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