The Kenyan Section of the International Commission of Jurists

Critique of the Witness Protection Act and Amendment Bill

I. BACKGROUND

Fundamentally, the object of a witness protection law is to ensure that the due administration of justice in criminal and related proceedings is not prejudiced by witnesses not being prepared to give evidence without protection from violent or other criminal recrimination.[1] Prior to amendments being made to the the Witness Protection Act Number 16 of 2006 , the Civil Society in Kenya had several concerns about the Act. This legislation had numerous flaws which were summarised as follows

1.Lack statutory autonomy

The programme was established under the office of the Attorney General.[2] The independence of this programme was therefore severely compromised as evidence against 'powerful' state officials was not assured. Witnesses could not hope therefore to give evidence against state officials and be protected by the same officials.

[1] UNDCP Witness protection Bill
[2] Section 4 WPA 2006

This independence was further compromised by the power given to the Attorney General to decide whether to include a witness in the programme or not.[3]Credibility was thus questionable as there were no checks or balances to ensure persons deserving of the protection actually got it as opposed to the discretion of the Attorney General being the determining factor. This provision could therefore be the subject of abuse.

Falling under the Attorney General's office also meant this programme was part of the government process. Recruitment of government personnel therefore could be compromised. Further mobilization of resources would prove extremely difficult thereby slowing down operations due to bureaucracy or lack of funds.

The definition of a witness was very limited thereby leaving deserving witnesses from the loop of protection.

2. Lack structural integrity.

The multi agency task team on the operationalization of the Act and subsequently the Witness Protection Programme (WPP) recommended agencies and institutions to be partners in the programme. This paused two problems. First some of these agencies , Ministries and institutions were/are the subject of investigation for human rights violations. These include the Police force and officials of the Ministry of Provincial Administration. The Police are accused of having used excessive force in the post election violence and therefore cannot be expected to offer protection to victims giving evidence against them. This scenario leaves witnesses completely exposed.

Secondly, inclusion of such a large group of people/agencies in the programme increases the chances of confidentiality and security 'lapses'. The team included the Ministry of Housing,

[3] Section 5(1) WPA 2006

Ministry of Health, Ministry of Immigration *et al*[4] thereby increasing the chances of a confidentiality breach as information about the witness would be communicated too widely.

The Advisory Board established under section 3P of the Act was also problematic. It included the National Security Intelligence Service , the Minister for Justice, Minister for Finance, the Police Commissioner, The Director of Public Prosecutions and the Chairperson of the Kenya National Commission on Human Rights. Just like the operationalisation team, this board not only was big but also contained parties that were considered partisan.

3.Sustainability

Though technical, the Act did not envisage external funding of the witness protection programme. Witness protection programmes are very expensive, and must be funded from the consolidated fund. It is a programme of last resort. This too creates room for breach of confidentiality as there is increased number of persons who have access to the witnesses information.

II. CRITIQUE OF THE AMMENDED DRAFT OF THE WITNESS PROTECTION ACT

1. Definitions

The amended Witness Protection Act has expanded the meaning of 'Witness' to include a person who requires protection from a threat or risk that exists on account of being a crucial witness. This definition however does not provide for the clear protection of a defence witness

[4] Report of the Retreat of the Multi Agency Task Team on the Operationalization of the Witness Protection Act Number 16 of 2006

who may also be at risk. The definition of witness under the UNODC Guidelines is to include but is not limited to either simple observers of a crime or victims of the crime. Witnesses can also be individuals who belonged to an organized criminal group or who committed a crime and then decided to collaborate with the justice system. Best practice provides a wide discretion to allow the end result to be justice, all relevant witnesses having given evidence without fear.

2. Inclusion of a witness in the witness protection programme

The amended Act bestows on the director of the Witness Protection Agency the responsibility/power to admit or include any person into the programme.
International best practice provides that Officials might be given discretion to assess the threat or risks in each case and only extend protection where justified by the assessment. In this instance however, an individual being given power to unilaterally make this decision provides room for abuse.

3. Witness protection arrangements

The Witness Protection Agency shall determine the type of measure to be applied to the Witness as well as a criteria for admission to and removal from the witness protection programme. In this regard, the Act differs from UNODC guidelines as admittance into the programme is determined by officials upon analysis of a case/witness depending on the risk of the threat.

4. Functions of the Agency

The Agency has power to control and supervise its staff , administer its funds and assets, receive any grants gifts donations or endowments and make legitimate disbursements, form associations, enter agreements, open bank accounts, collect analyze store and disseminate information.

In establishing a corporate body to run the Witness Protection Programme, there is an attempt towards creating an independent body to run the programme. Further , a corporate body allows receipt of funds from sources other than the state since the programme is expensive to run. Further, the programme is established to draw funding from the consolidated fund.

5. The establishment of the office of the Director.

The Director as the head of the Agency replaces the Attorney General as the head of the programme. This office takes away the entire programme from the Government control as the Director determines who gets into the programme and not the Attorney General. He/she runs the programme. Sole decision making is not the norm in International Best practice as it leaves room for manipulation. The provision that the Agency "shall run without interference from any authority" is not only ambiguous but also has no backing in law. The law merely provides punishment for 'individuals' who interfere thereby leaving loopholes for officers to use their official capacities.

6. Funds

The Act is amended to provide funding for the programme through the consolidated fund. This is commendable as it provides direct funding from the state budget. Being a corporate, the Agency can also receive donations as well as gifts and grants. Questions of accountability as

well as auditing will undoubtedly arise. Without breaching the confidentiality or security of witnesses, proper record keeping must be ensured to avoid graft. Mismanagement /mishandling of funds can easily take place if proper structures are not put in place

7. The Witness Protection Advisory Board

This Board comprises of the Minister for Finance, the Minister for Justice, the Director General of the National Security Intelligence Service, the Commissioner of Police, the Commissioner of Prisons and the Director of Public Prosecutions.

Not only is the Board bloated, but integrity gaps are certain to plague some of its members. The Police and NSIS being part of government cannot be on the advisory board of a body seeking autonomy from the government. Further, members of the police force have been accused of committing crimes during the post election violence. They therefore should not be the ones advising on the safety of witnesses who possibly have evidence against them.

Further, the Director of Public Prosecutions, under the current constitution, does not even have power to prosecute save by the permission of the Attorney General. Subsequently, his inclusion on the board is superfluous. The size and content of the board by its very nature compromises the security of the Witnesses in the programme

8. Victim Trust Fund

This is commendable. It is financed from the consolidated fund, gifts, grants, donations and even money arising out of investments of the fund. It is payable as restitution to victims or families of victims of crime or even compensation for death of a victim.

III. ISSUES ARISING

1. The Definition of a witness is still quite narrow and does not envision persons giving evidence in defence of an accused person. The definition further does not specifically provide for persons who have evidence against the state. The programme was established to ensure justice is done through holistic evidence being taken and not one side of the facts being narrated.

2. Although under an agency, the Programme still lacks structural and statutorial autonomy. This is because the Director still unilaterally determines whether or not an individual should be admitted to the programme leaving room for abuse of this provision or manipulation of the Director.

   The criteria for admittance to the programme is not strictly provided in the statute but is instead left up to the Agency to determine. This also allows for manipulation of the criteria .

   The Act merely states that the Agency will be independent and not influenced by any authority[5]. No structural measures are put in place to support the statutory provision. Interference especially by the Executive arm of government has been a past experience and is a real and present danger. Even further, the Act merely punishes interference by individuals and not authorities.

3. The composition of Advisory Board has the potential of weakening the Agency. The Advisory board comprises of among others the NSIS and the Police Commissioner. The Police force was suspected of atrocities in the Post election violence. Subsequently their acting in advisory capacity on a panel that determines the security of witnesses that could potentially speak against them is not in order.

[5] WPA Amended section 3G (1)

The NSIS too is a government unit. Subsequently, confidentiality of the location and general security of the witnesses protected in the programme could be easily compromised as NSIS is represented in the Advisory Board to the Agency. Where witnesses have evidence against state officials, incumbent or otherwise, such information could easily be found out and witness security compromised.

The number of persons on the board are far too many. The larger the number of persons/organisations involved in the running of the Agency, the larger the risk of such information being leaked to persons wishing to recriminate the Witnesses. Experience from South Africa shows that a centralized single protection agency can offer a greater guarantee of effective witness protection and help prevent failures resulting from incompetence and corruption.[6]

4. In discharging its functions, particularly that of providing security to the witnesses in the programme, the Agency is allowed to employ persons onto its staff as it may determine. Specific criteria with regard to their history, particularly past employment in National Security Forces is not specified in the Act. This provides a loophole that may allow such persons proximity to the Witnesses in protection, severely compromising their security.

5. Although funding is through a consolidated fund, the advisory Board has been granted an oversight role over the Agency. Subsequently the Agency reports to the Board concerning funds. This opens a loophole for security breach especially where members of the board are partisan. Security of witnesses in this regard can be severely compromised.

[6] www.unodc.org/unodc/en/legal-tools/Models.html

IV. RECOMMENDATIONS

1. The definition of 'witness' should be expanded further so as to be able to incorporate different individuals who may have evidence concerning specific criminal activities and are the object of possible threats/danger but who do not fall into the strict definition of witness as provided for in the Act.

2. Admittance into the programme should not be the prerogative of an individual but should be based on the witness meeting a set criteria. This way such admission into the Witness Protection Programme is objective and not subjective.

3. The criteria for admittance to the programme should be provided for in the Act and not be made the subject of deliberation of any panel/body or board. This ensures no manipulation of the criteria .

4. Structural measures should be put in place both in the Agency itself as well as in the Act to ensure the Agency will be independent and not influenced by any authority including the executive arm of government. Interference by institutions/organisations/authorities should be expressly penalised in the Act so as to ensure individuals do not to hide behind corporate identities, groups or office(official capacity).

5. The Advisory Board to the Witness Protection Agency should be reduced in size and the composition duly vetted . The institutions and the bodies represented in the Board should not be partial to the process and should be of absolute necessity. Security services and Intelligence services can be privately procured without the need of the state organs being members of the board. With adequate funding, ministries of housing etc would not only be superfluous but an added risk to the integrity of the process.

6. In discharging its functions, particularly that of providing security to the witnesses in the programme, the Agency should ensure its staff meets a strict criteria which should include not having worked for the police of Kenya, NSIS, Criminal Investigation Department or any other state security outfit.

7. The Agency's books of account should be reviewed regularly by an independent auditing firm and not the Advisory Board