Protecting Witnesses and Whistleblowers: Possibilities for Mauritius and Other Small Island States

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Contents

I. OBJECTIVE

The goals of this study are dual in nature. The first is to determine what type of protective measures for witnesses, whistleblowers, and other reporting persons would be the most effective when implemented in small island States. The second involves determining how to encourage a person to report in the first place, whether that means providing testimony in court or reporting corruption in a public office. Both sides are intrinsically linked; protection policies are meaningless without people willing to report, but most people are not willing to report unless they know they will be protected from danger. In looking for solutions, it is not enough to scale down witness protection programmes or whistleblower laws from larger countries. It could be argued that many of these programmes were designed for a specific type of crime during a specific era and benefit from a large population base, which affords more anonymity.

This research focused on the needs and problems faced by island States in an attempt to suggest more holistic solutions. To work in small island States, these programmes and laws must be designed for a small community. The purpose of this study was not to suggest the existence of one absolute answer, but rather to find many strategies that are adaptable to the diversity of island States.

II. METHODOLOGY

This study was carried out with the resources and support of the Independent Commission against Corruption (ICAC) in Mauritius, and Washington and Lee University School of Law. Furthermore, through the UNODC, correspondence with various States was facilitated, including Kenya and Palau. Through ICAC, discussions were held with Director of Public Prosecutions Satyajit Boolell and his staff, as well as the Commissioner of Police and the Procurement Policy Office. Correspondence via email was also held with the Director of Public Prosecutions of St. Vincent and the Grenadines,

Colin Williams. Their insight and experience helped to guide the research and to reveal what this type of legislation actually looked like in practice. Resources utilised included ICAC's legal library and Washington and Lee University's online research databases.

When assessing the probability of success with a particular policy, many factors were weighed. Legislation from the States in question was analysed, such as both the Prevention of Corruption Act and the Good Governance and Integrity Reporting Act in Mauritius and the Witness (Special Measures) Act from St. Vincent and the Grenadines. Other relevant legislation included the Justice Protection Acts from Anguilla, the Bahamas, Bermuda, and Jamaica; Ireland's Protected Disclosures Act; Kenya's Witness Protection Act and its amendments; Kosovo's Law No. 04/L-015 on Witness Protection; the Evidence Act and the Whistleblowers Protection Bill from the Solomon Islands; Timor-Leste's Law No. 2/2009 on Protection of Witnesses; and Zambia's Public Interest Disclosure (Protection of Whistleblowers) Act. Available statistics, whether self-reported or attained through an outside organisation, were also considered. Other factors included cost of the practice, population of the State involved, geographical size of the State, cultural perspectives of the population, and other resources required.

III. INTRODUCTION

In terms of developing effective systems and strategies, combatting organised crime and corruption is challenging to all States. Throughout the past decades, criminal groups have begun to operate on an international level in an increasingly sophisticated manner.[1] Whether the offence is drug trafficking, money laundering, or organised crime, no State is immune to the vast economic and social effects of criminal enterprise. However, while all States may face a similar problem, they do not all have the same resources to fight it. Island States in particular, because of inherent characteristics such as small size and budgets, often have difficulties addressing organised crime. This is especially true in

legal systems that hinge on the participation of witnesses, such as those of inquisitorial nature in many common law jurisdictions.

In such systems, the testimony of witnesses is often the most vital element in ensuring a conviction.[2] [3] In the same fashion, the reports of whistleblowers are usually necessary to even begin an investigation. Yet, knowing the power and reach of these organizations, many potential witnesses and whistleblowers fear that testifying or reporting will endanger their employment, safety, or even their lives. This fear is amplified in small island States, where the possibility of the local community discovering the disclosure is very real. Other potential reporting persons simply might not want to be involved in the tedious and time-consuming ordeal that such cases often become.

Over the years, large States across the world have pioneered various solutions.[4] [5] [6] One of the most well-known methods of addressing this problem was the Witness Security Program of the United States.[7] Created in 1970 in response to organised crime (the American Mafia, commonly referred to as the "Mob")[8] the programme was designed both to protect witnesses and to infiltrate the criminal group.[9] Typically, defectors from the "Mob" were given lightened sentences and an entirely new identity in exchange for their testimony.[10] The programme was successful when witnesses followed the guidelines, but it was, and still is, extremely expensive.[11] Moving witnesses to a new location and providing accommodations for extended periods of time is a large financial burden for any country. It also has done little to encourage the witnesses without a criminal history to testify. While this model worked in the United States and has been adopted in Canada and Australia,[12] it can fully function only in States with similar large populations, geographic expanse, and resources. For whistleblowers, larger States have also had difficulties developing successful legislation. In Europe, where memories of World War II are never far beneath the surface, the concept of whistleblowing reminds many people of citizens who betrayed their neighbours to the Nazis during the war.[13]

Therefore, small island States face an immense challenge in attempting to protect witnesses and whistleblowers. They must address the same types of criminal activity as larger States, but without the same advantages and financial resources. They will not be able to easily use the now standard model of witness protection, not only because of monetary restrictions, but also because attempting to give a new identity in any small location is not realistic. Even with the possibility of international agreements in place to send endangered witnesses abroad, for some island States, "abroad" is thousands of kilometres away. The must also fight many of the same cultural stigmas against reporting that exist in Europe because of their close communities.

In spite of these difficulties, small island States do have several advantages. Studies show that States with a smaller population have more effective democracy and governance than larger States, as the government is inevitably closer to its citizens.[14] Small States will be able to make needed modifications more quickly. Because many of these States do not already have a programme in place, they will also be able to develop an individualized solution with awareness of the mistakes of older programmes and the assistance of up-to-date research. For these programmes to ultimately succeed, they will have to be flexible and multi-faceted, involving not only law enforcement, but also the legislature, the judiciary, the private sector, and civil society. The most successful policies will not only protect witnesses and reporting persons, but they will also foster a culture of integrity in the community and create an expectation of reporting illegal acts.

IV. THE ISLAND FACTOR

Before discussing the potential strategies to take in creating a programme to protect witnesses and whistle blowers in small island States, it is important to analyse the relevant cultures, constraints, and public perceptions involved. While the diversity of cultures and societies in island States does not easily lend itself to generalisation, there are several characteristics common to most small communities. In any area with limited

space and a small population, it is inevitable that "everyone knows everyone," so to speak.[15] One writer described his experience by saying that "privacy is a mainlander's luxury."[16] Family ties often run deep, and many people see friends and acquaintances daily. Agreeing to testify or reporting corruption could potentially have huge social consequences, especially in places where cooperation with law enforcement is viewed as a betrayal to the community.

Sending witnesses abroad is also problematic for small island States. This would create a huge financial burden, even more so if a witness's family were also under protection. For example, one study estimated that the costs of relocation for one person in Serbia could cost over 1000 EUR per month, not including any kind of personnel costs.[17] Another study estimated that for protected witnesses in European States, costs could range anywhere from 8000 USD to 160,000 USD per year.[18] Costs for this type of protection in the United States may be even higher, though data is scarce due to the covert nature of the programme.[19] Experts also suggest that programmes should be able to fund relocated witnesses for at least five years.[20] Island States already have substantial economic burdens without taking on more. Still, it should be noted that this type of protection is only used in last resort cases. Witness protection expert Karen Kramer suggested that island States (and other small States) start this type of programme with only a few witnesses. After that, the programme can be incrementally built.

Public perceptions of a witness protection programme will likely also be an important factor in its success. News travels quickly in smaller locations, so people will know if anything goes wrong. Unless the public understands and supports the programme, no measures taken will convince witnesses to come forward. However, public support will not exist without public trust in the legal system and law enforcement. Police or judiciary corruption can derail any law or policy adopted, as citizens may fear

government officials being bribed for information. Citizens may also see no point in testifying if they believe a judge will not rule fairly or has already been corrupted.

The protection of witnesses, whistleblowers, and other reporting persons is a significant concern for Mauritius and other island States for several reasons. First, as countries with economies that largely depend on tourism, island States have a vital interest in preventing the violence often accompanying organised crime and corruption. News of crime or cartel-related violence can cost millions in lost profits from tourists, and a reputation for such dangers can be devastating.[21] [22] In 2009, newspapers in Jamaica reported that news of increasing crime was prompting more tourists to stay on cruise ships rather than actually visiting the island.[23] Witnesses may seem like a side note in this scenario, but getting inside information is often the key to dismantling organized criminal groups. Anything less than ending these groups will only provide temporary relief from the crime.

The second reason for small island States to be concerned with protecting reporting persons is that these States also have a huge interest in preventing corruption from syphoning away limited and valuable resources. Studies worldwide continuously show that tip-offs from employee whistleblowers and other reporting persons in the community are the most common way that corruption and fraud are discovered in both the public and private sectors.[24] Without people willing to report or testify, there is no evidence to build a case. The results of this can be seen in the Maldives: Transparency Maldives estimates that there, 73.8 percent of corruption cases are dismissed due to lack of evidence. Various studies have tried to explain why many people choose not to report when they see this corruption taking place or to inform law enforcement upon witnessing a crime. In Mauritius, a survey by the Independent Commission against Corruption showed that the most common reason that Mauritian citizens gave for not reporting corruption offences was fear of intimidation.[25] That same answer is consistently given by Mauritian citizens

not only by potential reporting persons, but also by potential witnesses and even by those considering reporting non-criminal misconduct at work. Additionally, in environments where reporting is not protected, the likelihood of corruption is substantially increased.[26] Left unreported and unaddressed, corruption fosters a host of societal and economic ills.[27]

The third reason that island States should be concerned with protecting reporting persons is that the fears of reporting citizens have often been substantiated. In the early months of 2016, in Mauritius, the body of missing witness Andy Penelope from the infamous "Gros Derek" drug trafficking case was discovered.[28] While it has not yet been confirmed that his murder was related to the case, he disappeared only one day after testifying, invoking much public suspicion and fear.[29] As citizens have continued hearing similar news of witnesses disappearing or being murdered, that fear has spread. This has had a profound impact on the justice systems of island States. Bahamas Commissioner of Police Ellison Greenslade stated that the detection rate for murders was low in 2015 due to witness intimidation.[30] That same year was record-setting for its number of homicides,[31] of which 23 percent were motivated by retaliation.[32] Not long ago in Barbados, a murder case had to be dropped because a key witness changed his testimony at the High Court level.[33] The sitting judge said that witnesses either claiming they had previously lied or fleeing altogether was becoming a trend.[34] In Trinidad and Tobago, "a murder witness went into hiding, and charges against the defendant were dropped 'despite the fact that the defendant was charged with shooting the victim during a proceeding in the Magistrates Court.'"[35] In Jamaica, from 2012 to 2013, less than 15 percent of witnesses to violent crime reported to the police, partially due to fear of intimidation.[36] Sources also report that the conviction rate for homicides in Jamaica is as low as five percent.[37] St. Lucia has seen an increase in homicides and kidnappings during the past decade, but police there have also said witnesses are afraid to come forward

because of possible retaliation.[38] A recent media report expressed the thoughts of many there:

> Most witnesses will tell you what they saw—only if you're not a policeman. They'll put it on Facebook and [Blackberry] and spread it through the New Media. But not for all the money in the world would they go to the local Police. Why? Because most feel they could be killed—shot dead by those they will finger—or by someone else they don't even know….A local Witness Protection Programme, well thought out, with sufficient internal and external cooperation and assistance, can certainly work.[39]

At the same time, violent crime has also increased in many island States. These circumstances and facts demonstrate that island States have a substantial interest in protecting witnesses and lose much of their safety, social and economic well-being if they do not.

V. DEFINING THE TYPES OF WITNESSES

Of those who do choose to testify or to report, these people can be divided into several categories. First are the witnesses of crime that had no involvement (including victims). This person might have been an innocent bystander who was at the "wrong place at the wrong time." The second category consists of collaborative witnesses. These are witnesses who formerly were involved with a criminal organization but have decided to end their involvement and to cooperate with law enforcement.[40] The third category is made up of witnesses who are also the victims of the crime in question. Each type originates under different circumstances and requires different considerations and measures to ensure they feel comfortable reporting or giving testimony.

i. THE INNOCENT BYSTANDER AS WITNESS

a. Uninvolved parties are possibly the most difficult out of these categories to retain as a witness. These people have nothing to gain from becoming involved, but much to lose. Additionally, if several bystanders are present during the commission of a crime, each individual is less likely to call the police or to

report.[41] This is known as diffusion of responsibility, as each person assumes that someone else will take action and get involved.[42] If cooperating with law enforcement violates any kind of social norm, these witnesses are even less likely to come forward, in fear of being labelled as an informer or "snitch."[43]

b. In all States, but especially island States, for these parties to report, they need to be assured of their safety. They also need to know that by reporting, they are helping their community rather than betraying it.

ii. COLLABORATIVE WITNESSES

a. The safety and participation of collaborative witnesses was the original intent of the earliest witness protection programmes. Working with collaborative witnesses is one of the only ways for law enforcement to get inside a criminal organization. However, protecting these witnesses can be challenging, especially in small island States, because their identity is already known to the criminal group or maybe even to the community as a whole. There is also the difficulty of locating places to hide.

b. In many States, courts may exchange a lighter sentence for their criminal acts in exchange for their cooperation in providing details about their former affiliation with the criminal group. Under these circumstances, the safety of collaborative witnesses, and often their family, must also be ensured while they are incarcerated. Some States have achieved this by placing them in a more isolated location in the prison or by transferring them to another facility altogether.

c. In a situation involving testifying in court, victimization is most likely to occur before a witness testifies, in efforts to prevent that from happening.[44] However, retaliation after the trial may also be a problem.[45] This is most often

seen in cases involving drug trafficking and gang-related crime as an attempt to dissuade anyone else from working with police.

iii. VICTIM AS WITNESS

a. Often, the only parties who have any information about a crime are the victim and the perpetrator. Victims have been labelled the "gatekeeper[s] of the criminal justice system" because if victims do not report, "the deterrent capability of the criminal justice system is severely limited, as certain classes of perpetrators, including those who abuse relatives and family members who are reluctant to involve the police, are safeguarded from official view."[46] Yet, most of the time, victims do not report.[47] In the United States, an estimated 52 percent of violent victimizations went unreported between 2006 and 2010.[48] Depending on the nature of the crime, many victims do not want to relive their traumatic experience throughout the trial process or to be picked apart during cross-examination. In smaller communities, victims often do not want others to know. Increasingly, other reasons given for not reporting were related to the police.[49] These included beliefs that the police would be biased or that police would not think the crime was important enough to do anything.[50]

VI. WHISTLEBLOWERS AND OTHER REPORTING PERSONS

The category of whistleblowers is different than that of witnesses. Whether in the public or private sector, whistleblowers are the reporting persons who expose illegal acts, corruption, and unethical behaviour inside organisations. Typically, whistleblowers are employees of the organisation, but they can also be contractors, consultants, interns, or any other person that notices something wrong, has reasonable suspicion or sees a risk and decides to report internally within, to a regulator or otherwise. While witnesses already receive certain legal protections because of their role in the investigation and

court proceeding, whistleblowers often have none. Though their role is vital, because they are not yet participants in formal court processes, in many States, they make disclosures at a very high risk to their own safety and well-being and have little in the form of legal recourse against victimisation.

Victimization of whistleblowers often comes in the form of employment retaliation and it typically occurs after a disclosure is made.[51] This can range from more subtle measures such as withholding promotions to blatant tactics such as termination of contract. It can also include strategic lawsuits against public participation, known as SLAPP suits, which are "intended to intimidate those who disagree with them or their activities by draining the target's financial resources."[52] Other methods intimidation include damage to reputation and character through smear campaigns and even the filing of criminal charges against the whistleblower in some circumstances. It is important to note, however, that even though workplace victimization is the most common form of retaliation, whistleblowers and reporting persons may still face the same physical dangers that are often associated more with witnesses. For example, a newspaper wrote less than two months ago that a Vietnamese priest on his way to a service was attacked by police with sticks and metal bars after they learned the priest previously reported the corruption of local authorities.[53]

VII. LEGISLATIVE FRAMEWORK IN OTHER STATES: PROTECTION OF WITNESSES

Small island States are not alone in facing a need for protective legislation for witnesses and whistleblowers. States worldwide are in the process of either revising existing legislation or creating entirely new programmes. The States discussed below, in particular, have either drafted bills or have passed into law various measures pertaining to the protection of witnesses.

For every type of witness, developing methods of protection starts with the law. Any programme or policy needs to be passed into law, for several reasons. Having policies

supported by law helps to prevent the idea that the State and its prosecutors are paying for witnesses to testify. When prosecutors and police have no choice but to implement protective measures on an ad hoc basis for each case, questions will inevitably arise. A law that clearly defines the scope of the programme or policies will help ensure that the rights of the defendant are protected and that the possibility of corruption is reduced. Having clear procedural guidelines will also help ensure that different courts and judges do not make conflicting decisions.[54]

For any new law, a consensus on the definitions of terms within the act is needed. It may seem simplistic, but States must decide who is considered a "witness." While some States only include witnesses for the prosecution in this category, the International Commission of Jurists chapter in Kenya recommends the inclusion of defence witnesses.[55].The United Nations Convention against Corruption and the United Nations Convention against Transnational Organised Crime both include expert witness in their requirements for providing protection.[56]

Below are examples of different witness protection practices that are currently in place in various States worldwide.

i. ESTABLISHING A WITNESS PROTECTION ORGANIZATION

a. JAMAICA: The Justice Protection Act, created in 2008 in Jamaica, legislates the establishment of an organization to execute the functions of the Witness Protection Administration. In this case, that body is named the Administrative Centre and it is managed by the Ministry of National Security. The Act requires that the Administrative Centre keep records of all of its operations. This must include the number of participants in the programme and the nature of legal proceedings involved. The law states that the Centre shall submit an operational report once a year to Jamaica's Minister.[57] Still, the Act notes that no information that would compromise the security of a participant

is to be included. A register of participants is to be kept at the Centre, but no one below a "Top Secret" level security clearance is allowed access.

b. KENYA: The Act begins by establishing a Witness Protection Agency, which is an independent corporate body with the legal capabilities entailed therein.[58] The functions of the WPA are to maintain the protection programme, to determine criteria for admission and removal, to determine the necessary protective measures for each case, to advise other government entities in matters pertaining to witness protection, and to perform any other functions necessary to carrying out the purpose of the Act.[59] Next, the legislation details the powers of the WPA and the criteria required of its Director and other staff.[60] The Act also describes how the WPA will be funded and how it will maintain its independence. The Act also establishes a Witness Protection Advisory Board, whose members included government officials such as the Minister of Finance, the Minister of Justice, the Commissioner of Police, the Commissioner of Prisons, and the Director of Public Prosecutions.[61] The primary functions of the Board are to provide oversight and to advise in the formulation of witness protection policies "in accordance with the current law and international best practices. . . ." However, the International Commission of Jurists chapter of Kenya critiqued this part of the Act, noting that having this many departments involved provided too many opportunities to lose confidentiality.[62] Additionally, it would present potential conflicts of interest in any case involving a government figure.

c. TRINIDAD AND TOBAGO: Legislation from Trinidad and Tobago's Justice Protection Act is very similar to that of Jamaica. One key difference is that the Act in Trinidad and Tobago establishes an Investigation Agency as well as a Protective Agency.

ii. DEFINING THE ROLES OF INVOLVED PARTIES

a. BERMUDA: The Justice Protection Act of 2010 from Bermuda adheres the same essential structure as that of Jamaica and Trinidad and Tobago. However, the Bermudan law gives more guidance as to the officers of the Administrative Centre. In Bermuda, the Director and other officers are all to be appointed by the Minister of Justice.[63]

b. JAMAICA: The Jamaican legislation clearly states which parties will play a role in providing protection and what exactly that role will entail. The three major parties are the Centre and its personnel, the Commissioner of Police, and the Director of Public Prosecutions.

c. KENYA: The Kenyan legislation creates the role of the Director to head the Witness Protection Agency. The Director is responsible for making admissions decisions.[64]

iii. WHO IS PROTECTED?

a. CARIBBEAN: To be accepted into one of the Justice Protection models, a person must be providing evidence in a case regarding a specific offence. Though there is minor variance in each State's list of scheduled offences, they generally all include murder, drug trafficking, kidnapping, and armed robbery. In Caribbean States that are parties to the United Nations Convention against Corruption, corruption offences and money laundering are usually on this list as well. Additionally, for a person to be considered, each State's legislation requires that potential participants submit to the Administrative Centre details such as income, medical history, criminal background, and details of involvement in any civil proceedings.

b. KENYA: According to Kenya's law, witnesses are those who have agreed to testify "on behalf of the State." Those endangered by virtue of being related to

a threatened witness may qualify for protection as well. The law does not state whether expert witnesses are included. Under this Act, there is no objective list of requirements for admittance into the programme. Considerations include the seriousness of the offence to which witness testimony relates, the nature and importance of the witness's testimony, the perceived danger, and whether alternative protection options exist.

c. MALAYSIA: Malaysia's law, like most, defines "witness" as someone who has agreed to give evidence on behalf of the government. There is no provision for defence witnesses.

d. TIMOR-LESTE: The Protection of Witnesses Law passed in Timor-Leste in 2009 holds one of the more expansive definitions of "witness." The law considers any person to be a witness who possesses information necessary for the evaluation of facts in criminal or civil proceedings. The measures of the law are not only applicable to spouses, children, and relatives, but also to "any other persons close to [the witness]."[65]

iv. PROTECTION PROVISIONS

a. CARIBBEAN: In their current forms, most of the "Justice Protection Act" models from the Caribbean are designed to protect through relocation, financial assistance, and change of identity. All include provisions to provide monetary aid and documentation to support this process.

b. KENYA: In addition to offering relocation and change of identity, the Kenyan legislation lists physical and armed protection as a security option. The law also states that the Witness Protection Agency may request courts implement protective measures such as holding in camera sessions, using video link technology, or using pseudonyms. However, the law does not say whether courts are legally required to comply.

v. INTERNATIONAL COOPERATION THROUGH RECIPROCAL PROTECTION ARRANGEMENTS

a. CARIBBEAN: In the Caribbean, several agreements exist between different groups of States. Under Bermuda's Act, a witness may be relocated to any of the following States: Anguilla, British Virgin Islands, Cayman Islands, Montserrat, or Turks and Caicos Islands.[66]

b. KENYA: The pending amendment to the Witness Protection Act would allow admission of witnesses from other States into Kenya's programme, and vice versa, on a reciprocal basis.[67]

VIII. OTHER LEGISLATIVE PROTECTIONS

Along with putting witness protection policy into law, another equally necessary legislative measure is criminalizing the victimization and intimidation of witnesses. This step is important not only because it acts as a deterrent, but it also gives witnesses a way to act before a threat is actually carried out. Additionally, in order to make use of many protective practices that require diverging from the normal rules of procedure, new legislation is often required.

i. CRIMINALISING THE VICTIMIZATION OF WITNESSES

a. While most States have some type of law against certain type of threats or obstruction of justice, very few currently have provisions explicitly condemning threatening a witness.

b. UNITED STATES: Victimizing or intimidating a witness is typically known as "witness tampering." At the federal level, if physical force was used, the penalty can be up to twenty years in prison. If force was only threatened, the maximum sentence is ten years.

c. MAURITIUS: The penal code has a provision that says an outrage against a witness "on account of his evidence" is punishable by up to five years of

imprisonment. However, the current Director of Public Prosecutions has said, « Cette prévision législative est insuffisante pour garantir le bon fonctionnement du procès penal »[68] In Mauritius, witnesses involved in corruption proceedings are protected under the Prevention of Corruption Act.

ii. IN-COURT PROTECTIONS PROVIDED BY LAW

a. CAYMAN ISLANDS: The Criminal Evidence (Witness Anonymity) Law allows courts to make what is called a Witness Anonymity Order to "ensure that the identity of the witness is not disclosed in or in connection with the criminal proceedings."[69] This law allows various measures to be taken, such as withholding the name and other identifying details from documents disclosed to "any party to the proceedings." The order may also allow the witness to use a pseudonym, require that the witness be screened from the sight of the defendant, or call for the use of voice distortion technology. Additionally, a Witness Anonymity Order can allow the court to prohibit any questions to the witness that would reveal her identity. The legislation does note, however, that the court is not authorized to require that the witness be hidden from the judge and jury.

b. SOLOMON ISLANDS: Under the Evidence Act passed in 2009 in the Solomon Islands, certain types of witnesses may request for arrangements to be made in the courtroom so as to reduce the possibility of intimidation while giving testimony.[70] Protected categories of witnesses include victims of sexual assault, victims of domestic violence, persons under the age of eighteen, and persons with a physical or mental disability.[71] Some of the possible arrangements include having an in camera hearing, obscuring the witness from the view of the accused during trial, restrictions on publication of

evidence, and allowing a support person to accompany the witness as he or she gives testimony.[72]

c. ST. VINCENT AND THE GRENADINES: The law allowing for witness anonymity orders in St. Vincent and the Grenadines falls under the Witness (Special Measures) Act, passed in 2013.[73] While this law allows for similar measures to be taken as to those in the Cayman Islands, there is one notable difference. Here, the witness may be screened "to any specified extent."[74] This is also true for voice modulation. There is no stipulation about being hidden from the judge or jury.[75]

d. UNITED KINGDOM: The United Kingdom has some of the most comprehensive legislation in the world regarding the testimony of vulnerable and intimidated witnesses.[76] The Youth and Criminal Justice Act gives optional measures to take in court, including the use of screens, the use of live TV link, disguising the appearance of the witness, and the use of a recorded interview as evidence rather than questioning the witness in court. Additionally, UK courts are allowed to protect these witnesses from being cross-examined directly by the accused.

IX. LEGISLATIVE PROPOSALS FOR THE PROTECTION OF WITNESSES

The multiple law just discussed demonstrate many similarities. However, they also all have a significant problem in common. The common truth, not only to small islands, but to all States crafting a programme, is the fact that even the most well-written legislation in the world is useless if it is not implemented and enforced. Unfortunately, many of the States from the previous examples have also reported that the passed witness protection legislation has yet to be utilized or is severely underutilized. Commonly, restrictive costs and lack of funding are the reasons cited. Therefore, it might be more effective for island States to start slowly and implement measures that are feasible,

starting with the law and procedural rules of court. States often attempt to create extensive witness protection programmes without addressing any preventative measures. With enough adjustment to secure confidentiality at the investigative and court level, drastic relocation and identity change procedures may never be needed. In the long term, this will be more sustainable and effective at encouraging witnesses to come forward. However, States should also have a plan in place in case those measures are ever needed.

The following proposals start with the lowest level of legislation for the protection of witnesses that a State should have. Ideally, witness protection legislation should be comprehensive and contain elements from each section. In order for the law to be efficient and easy to access, all of these components should be drafted into one overarching witness protection act.

i. DRAFT A WITNESS PROTECTION BILL THAT CRIMINALISES VICTIMISATION AND INTIMIDATION

   a. For any State, criminalizing the victimization and intimidation of witnesses would be a good place to start if this type of law is not already enacted. For States such as Mauritius where different legislative acts contain rules that criminalize a certain type of threat, consolidating these sections into one act would make enforcement much easier. Otherwise, prosecutors and police are left to sift through legislation, reducing the likelihood that those laws will ever be used.

   b. For purposes of criminalising victimisation, "witness" should be defined broadly, so as to include defence and expert witnesses.

   c. Next, "victimisation" must be defined as well. The definition created by Mauritius in the Prevention of Corruption Act is applicable here. Under that legislation, victimisation is an act which causes injury, damage or loss; an act of intimidation or harassment; an act of discrimination, disadvantage or

adverse treatment in relation to a person's employment; or an act amounting to threats of reprisals.[77]

d. The law should specify that victimisation is a crime whether it is against the actual witness or another party. It should be noted that it would hinder any positive effect of this prohibition if threats against family and friends of witnesses were not also criminalized. Threats to the lives of family or friends of a potential witness may be equally intimidating as a threat to his or her own life. A *Seychellois* statute against threatening public service employees uses a phrase that would be applicable to drafting such a rule.[78] The statute prohibits not only threats to the public servant, but also threats "to any person in whom he believes that person employed in the public service to be interested."[79] Using similar language would eliminate any potential issue that might arise from having to decide who is included as a family member, and it would also cover friends and co-workers. The offence should not lie in who is being threatened, but rather in the leveraging of another party's safety to dissuade a witness.

e. The law must also provide a penalty for the offence of victimisation. This is highly dependent on the legal system in place in each State. However, victimisation is a serious matter and should not be a misdemeanour or any type of offence punishable solely by a fine. The law needs to have a deterring effect.

Next, even if no other additional measures are taken, there are several provisions that should be adopted into law. For many States, the balance between ensuring witness safety and upholding the accused's right of confrontation is a legal grey area. A law that explicitly states which measures can be utilised at trial would be extremely helpful in

avoiding controversy and confusion. It would also promote fairness by ensuring that courts use the same procedures.

ii. INCLUDE PROVISIONS ENABLING THE USE OF PROTECTIVE MEASURES

a. Excellent examples to consider adopting are provisions similar to those contained within the Witness (Special Measures) Act of St. Vincent and the Grenadines and the witness anonymity order of the Cayman Islands. Those provisions should include allowing for the use of screens, pseudonyms, video technology, and voice and face distortion technology, even if some of these are not currently available.

b. Allow procedural rules requiring the disclosure of a witness's address to be put aside in light of possible victimisation. Under those circumstances, allow for the use of the courthouse address instead on any documentation. In terms of what the police can do, ensure that they are legally allowed to escort witnesses to court or provide protection if needed. Additionally, legislation to provide for protective or restraining orders, if it does not already exist, could enhance the capacity of law enforcement to protect.

c. Consider allowing pre-recorded videos of cross examination under certain circumstances. Under the UK's law, fear of death or injury is an acceptable circumstance.[80] A UK guide for interviewing victims and witnesses' states, "Fear is to be construed widely and includes fear of the death or injury of another person or of financial loss."[81] The guide also says that the UK law preserves the right of a defendant to "challenge the credibility of the maker of a statement who does not give oral evidence in the proceedings."[82]

iii. DEVELOP FRAMEWORK FOR A WITNESS PROTECTION UNIT

a. First, the law should emphasize that any measure described within the legislation is voluntary for the witness.[83]

b. Second put into law the authority responsible for the programme's implementation.[84] Deciding which authority should handle the unit is a decision highly dependent on the individual government structure of each State. Wherever it is located within the government, it should be as independent as possible. For some States, that means within the police, and for others, that might be within some part of the court system. Other States have created a new agency entirely. However, many of those new agencies had difficulty securing the funding necessary to implement the programme.[85] In Mauritius, even though no programme is currently in place, the Office of the Director of Public Prosecutions has worked with the police in past cases to implement security measures for witnesses as needed. In Mauritius, the DPP's office is an independent organisation and has the power to prosecute government figures.[86] For island States with a similar government structure, this might be a practical approach. For many States in the Caribbean, the programme is located under the Ministry of Justice.[87] With either location, care must be taken to avoid the appearance of incentivising witnesses to testify.

c. In her publication, "Protection of Witnesses and Whistleblowers: How to Encourage People to Come Forward to Provide Testimony and Important Information," UNODC witness protection expert Karen Kramer suggests including in the legislation admission criteria, criteria for termination, a requirement to report yearly on the programme's effectiveness, and an allowance for international cooperation.[88] Each State creating a programme must consider how these requirements fit into its legal system.

d. If the Witness Protection Unit is going to facilitate measures such as relocation and identity change, the admission criteria for that part of the

programme should be different from that for those requesting ordinary security measures. For witnesses seeking the latter, a reasonable fear standard should suffice. For example, in St. Vincent and the Grenadines, a witness may be provided evidentiary and anonymity provisions in court if the court is satisfied the witness has a reasonable fear of the following:

> (a) the witness or another person would suffer death or injury;
> (b) there would be retaliation, recrimination or oppression; or
> (c) there would be serious damage to property, if the witness were to be identified.[89]

e. For the admission criteria to the most extreme protections, consider the following questions:

1. Is the case vital to the State's interests?
2. Is the testimony of the witness in question absolutely necessary to the case?
3. Is there no other way to keep the witness safe?

f. Seek to establish bilateral agreements for relocation of witnesses in order to reduce some of the costs. States in the Caribbean have successfully implemented such relocation agreements. Island States in the Indian Ocean and the Pacific could adopt a similar system. The agreement might include provisions such as healthcare and assistance finding housing.

X. OPERATIONAL AND PROCEDURAL APPROACHES IN WITNESS PROTECTION

After a witness protection bill is passed into law, the success or failure of the programme depends on its implementation. Regardless of whether the programme is operated by the police, the judiciary, or a body created by the organic statute, there are many rules and methods of procedure that will still have to be determined. No statute can possibly account for every single scenario, and if it tried, it would be too restrictive. Instead, a successful law will give direction while giving the involved parties enough flexibility to adjust to specific needs on a case-by-case basis. The parties operating the

programme must also be able to adapt their approach if necessary. However, there must be a balance. A lack of legislative direction may be detrimental.

Below, approaches from several States are assessed in addition to methods of operating recommended by various organisations.

i. RISK AND THREAT ASSESSMENTS

a. According to the UNODC's *Good Practices for the Protection of Witnesses*, it is important to note the difference between risk and threat assessments. A threat assessment analyses the level of danger to the life of the witness. It looks at factors such as the person or group behind the threat. A risk assessment analyses the likelihood that the threat will materialize and then seeks to mitigate that probability. The UNODC describes the threat assessment in cases of organised crime as "the investigative and operational techniques used by law enforcement authorities to identify, assess and manage the risk and potential perpetrators of targeted violence against a witness."[90] Factors analysed include the origin of the threat, patterns of violence, the organisation and culture of the threatening group, and the capacity of the group to carry out threats. The UNODC notes that in most programmes, the assessment is performed by the witness protection unit or organisation, but in some, it is performed by the police or an investigative agency.

b. Developing threat and risk assessment criteria is one of the most important steps upon passing witness protection legislation. By doing so, the witness protection authority will have a framework in every case showing how to best provide protection. Yet, this aspect of witness protection is rarely discussed in witness protection legislation. Most statutes have provisions requiring that a threat assessment be performed, but often, there is no guidance as to what this assessment should include.

c. JAMAICA: When an individual requests protection from the programme, the law requires that a threat assessment be conducted by the Commissioner of Police. The threat assessment is "based on but not limited to information on" the persons who are the subjects of the proceedings where the prospective participant is to give evidence. The assessment also looks at any criminal organisations interest in the results of the proceedings, the nature of the threat, the immediacy of the threat, and all data on anyone else likely to pose a threat.[91] If the prospective participant is currently incarcerated, then the Commissioner of Corrections must submit a report as well.

d. Protection International (PI), an NGO that focuses on protecting human rights defenders, developed a formula for assessing risk. Even though the formula was created with human rights defenders in mind, it is applicable to the protection of any type of witness. The formula states that the overall risk can be determined by multiplying threats with vulnerabilities, then dividing by capacity. Here, "threat" is used as a variable for the likelihood that someone will try to hinder a witness giving testimony, behaviour that is termed "targeting." PI states that "whether a defender becomes targeted or not depends on the impact of their work on the armed actors."[92] This is equally true when applied to a witness and accused party. PI defines "vulnerability" as the "degree to which defenders are susceptible to loss, damage, suffering and death, in the event of an attack," and "capacities" as "are the strengths and resources available for a group or individual to achieve a reasonable degree of security."[93]

e. The Council of Europe recommends, the process of assessing a threat is described as "gathering and analysing all data concerning" factors such as the threatened party, the perpetrator, the manner of threat, and the community

where the witness lives.[94] The training manual states that threat assessment and analysis is an ongoing task, for as long as the witness needs protection.

f. Other experts use factors in the analysis such as the vulnerability of the witness (age, gender, physical and mental condition), the proximity of the witness to the offender, and the nature of the crime.[95] Characteristics of the accused, such as whether he or she has access to weapons or is part of an organised criminal group, should also be considered.

g. UNITED KINGDOM: Using the various threat assessment criteria, a rubric with broad levels of threat can be developed to use as a guide for each new case. For example, the College of Policing in the UK created a rubric with three levels, with the first level indicating life threatening danger. The second level indicates non-life threatening intimidation, and the third level indicates a low level of harassment, if any. Different protective measures are taken for each level of threat.

ii. ENSURING CONFIDENTIALITY

a. The UNODC suggests for the authority in charge of protecting witnesses that no document filed or submitted regarding a witness "should be released except upon order of the protection authority or, in exceptional circumstances, of the competent court."[96] Additionally, it is suggested, "The unit should have a stand-alone database for its operations in order to provide the highest levels of security and confidentiality. An important aspect of such a system is the ability to track and identify any unauthorized attempt to extract information from the system." However, the UNODC notes that greatest risk for breach of security comes from the "human element" in the process.[97]

b. HONG KONG: Even when undergoing an audit, receipts are cross-referenced to secret file numbers.[98]

c. NEW ZEALAND: Auditors must receive special security clearance in order to review any information pertaining to the protection of a witness.[99]

iii. PHYSICAL PROTECTION

a. MAURITIUS: In cases requiring enhanced security, one of the most common practices worldwide is the use of a "safe house." This can range from providing witnesses with an entirely new living arrangement for an extended period of time to simply putting them in a hotel for a few nights.[100] Both of these scenarios have been enacted in Mauritius, in addition to allowing a threatened witness to stay at a facility within police headquarters. Mauritian police have also escorted witnesses to and from required court appearances.

b. UNITED KINGDOM: In the UK, the College of Policing suggests installing a security system at the home of the witness as a possible measure.[101] Other methods of "target hardening" may include fencing, securing windows, or installing a security door.[102]

iv. TECHNOLOGICAL MEASURES

a. ICTY: The use of video conferencing technology is one of the measures recommended by the UNODC for ensuring witness safety. Video technology was also one of the primary methods of witness protection utilized in the International Criminal Tribunal for the Former Yugoslavia. Over the past decade, this technology has been increasingly adopted in States worldwide, perhaps due to the many other uses it has. Live video-conferencing is also allowed in the UK.[103]

b. MAURITIUS: Currently in Mauritius, the use of video-conferencing has been approved for victims in sexual offence cases.[104]

c. TURKEY: Courts have used voice and image altering technology. Turkish law says that if needed, the voices and appearances of witnesses can be altered

using a method "to be determined by the court."[105] When these witnesses are questioned, Turkish judges may prevent any questions that might even indirectly reveal the identity of the witness.[106]

d. Some States have provided witnesses with disposable phones, while others have wire-tapped witnesses' own phones, with permission, to monitor calls.[107]

e. UNITED STATES: Phone calls made from jail or prison are recorded. Prosecutors in Wisconsin started using this to their advantage in cases where they suspected witness tampering and intimidation. They discovered that when defendants were being held awaiting trial, it was not uncommon for the defendant to attempt to dissuade witnesses from testifying through others. For instance, one man offered three friends money to kill a key witness in his case, all from jail.[108] With a warrant from a judge, this would also be legal in Mauritius under a provision in the Information and Communication Technologies Act.

v. PROTECTION IN COURT

a. KOSOVO: In 2007, the Organization for Security and Co-operation in Europe assessed the state of witness protection in Kosovo. One recommendation was the creation of a "court security committee" in each district, consisting of the chief judge, the chief prosecutor, the chief law enforcement official, and the building engineer or superintendent.[109] The OSCE said this committee would be in charge of assessing court security and looking for gaps, then devising solutions. Additionally, the OSCE recommended conducting an initiative to train court staff on security measures and to familiarize them with the witness protection unit.

b. JAPAN: Japanese courts allow the use of screens to block witnesses from the view of the defendant while giving testimony.[110] Japanese courts also allow

positioning the defendant and witness in such a way that they do not see each other.[111]

c. NIGERIA: A Federal High Court allowed for witnesses to be masked throughout a trial.[112]

d. UNITED STATES: Commonly used measures in court houses are metal detectors and bag checks, either manually by a security guard or through an x-ray machine. Police are almost always stationed in each courtroom as well.

vi. ADDITIONAL FUNDING

a. Because of the typical high costs involved in implementing witness protection, the UNODC in its manual on good practices in the protection of witnesses gave a suggestion for possible additional funding: "Governments could also enact statutory provisions allowing the programme to be funded through the use of proceeds from property seized or confiscated for having been acquired through activity involving drug trafficking or organized crime."[113]

XI. OPERATIONAL AND PROCEDURAL PROPOSALS FOR SMALL ISLAND STATES

While the most dangerous time for a witness might be right before and during the trial, the most pressing need for witness protection measures often comes much earlier. The point in an investigation when a witness begins working with law enforcement is the most opportune moment in time to ensuring safety, and it is then that the actions of investigators, police, prosecutors, and other court staff can have the greatest effect on that witness. If strict confidentiality is kept during the investigation, if witness identities can remain hidden or unknown, drastic protective measures might not be needed later. This would not only save costs, but it would also be more likely to encourage other potential witnesses to come forward, both of which are especially important to small island States.

i. CREATE A RISK ASSESSMENT TO BE USED AT THE BEGINNING OF THE INVESTIGATION

a. In order to know what level of security is required when a witness first begins working with police, some type of risk level assessment is needed. Whether by law enforcement, the judiciary, or witness protection staff, a rubric should be created that lists various factors which might indicate a risk of victimisation.

b. Research has shown that four factors in particular increase the chances of a witness being victimised: If the relevant crime was violent in nature, if the defendant and witness have a personal connection, if the defendant lives near the witness, and if the witness is vulnerable. Other factors to consider might be involvement of the accused or a family member of the accused with a criminal organisation. Each applicable factor would equal a point. When the points are totalled, a high number would indicate a stronger likelihood of intimidation, and vice versa for a lower number. Levels could be created based on ranges of total points. Each level would then correlate to certain protective measures that might be utilised. Using this along with any other information available on the accused to law enforcement, a plan of protection could then be customized. If a witness falls on the low risk end of the scale, perhaps nothing more than additional police patrol near the residence is needed. If, however, all four of the criteria from research are applicable, higher risk measures would be appropriate and much more confidentiality would be required.

c. Regardless of the specifics of analysis, the assessment should be used *before* a witness is intimidated or threatened, when the witness first becomes a part of the investigation. This will allow law enforcement to work proactively rather

than reactively. Once a witness has been identified and threatened, any protective measures essentially function as damage control.

Using a type of model where prescribed protection increases with threat level is more practical for most island States than focusing entirely on creating a covert relocation and identity change programme. Because of the extensive costs of such programmes, the threshold criteria for entry becomes restrictively high and only witnesses in the direst of circumstances are given protection.

ii. CREATE A SEPARATE ASSESSMENT FOR COURT PROCEEDINGS

a. American Attorney Laura Perry, writing in the American Criminal Law Review, created a simple analysis that could be adapted to small island States to be used throughout the pre-trial and trial proceedings.[114] Her process has two steps:

1. First, in dealing with a case involving a witness who either already faced intimidation or was likely to, a prosecutor could file a motion for an *in camera* review with the judge of the case.[115] In this special session, the prosecution and defence would both be able to present evidence.[116]
2. The second step, determining the needed level of protection, would only be necessary if the court found, by a preponderance of the evidence, that there was a sufficient likelihood of danger.[117] In making this judgment, the court should analyse "whether the defendant has in any way attempted to intimidate or retaliate against any known witnesses (either in the case in question or a previous matter), ... the importance of the witness to the prosecution's case, and the practicality of the court's ability to protect the witness."[118]

b. Even after examining the evidence in the light most favourable to the defendant, if the court still found danger was likely, it would then have four levels of protection to choose from:

1. Level One indicates there is no threat and therefore is the default. This level would be chosen if there was no evidence suggesting the defendant or his associates were likely to intimidate the witness.[119]
2. Level Two indicates the need for basic protection and would be implemented if "the court finds, by a preponderance of the evidence, that the defendant or any of his known associates have made an attempt or are likely to make an attempt to threaten or intimidate any known witness." In this case, the residential address of the witness would not be revealed to the defendant. If the criteria for the second level were already met and it was established that the defendant did not already know the identity of the witness, then Level Three protections could be implemented.
3. Level Three requires that both the name and address of the witness be kept from the defendant, and a pseudonym would be used at trial. Ms. Perry notes, "In determining whether to provide this level of protection, the trial court should consider any previous relationship between the two parties, the possibility of bias and the defendant's remaining avenues of testing credibility if the witness's name was not disclosed." If the defendant already knows the witness, this level should not be used.
4. Finally, Level Four calls for "absolute protection." Ms. Perry describes this level:

> Only applied in the narrowest of cases, if the witness's face would reveal his or her identity and the aforementioned requirements for Level [Three] are met, the defendant

> should not be permitted to view the witness's face, or know his name or his address . . . . . The courtroom would be cleared of spectators for any portion of time when the witness would be present. The defendant would be permitted to remain in the courtroom during the testimony if the witness's voice would not reveal his or her identity yet there would be a screen blocking the defendant's view of the witness while still permitting the jury and counsel to view the witness[120]

Under these circumstances, the witness would still be available to defence counsel before trial, but not to the defendant. If the voice of the witness was recognizable, the defendant could be removed from the courtroom and given a live transcript of what the witness said. Presumably, a screen and voice distortion technology could also be used in this situation, allowing the defendant to remain in the courtroom.

c. Unfortunately, if the accused already knows the witness, all of the measures to ensure confidentiality will not be as helpful. At this point, physical security measures will be more effective. Possible methods range from installing an alarm system at the witness's home to moving the witness and his or her family to a safer location. The new location might mean staying in a hotel during critical points in the proceedings, such as the time right before the trial. Sometime the relocation is more permanent, such as to a new apartment.

iii. INVEST IN COURT TECHNOLOGY

d. For island States, using video conferencing technology in the court system could be an extremely effective tool. Rather than being escorted by police,

threatened witnesses could testify from a secure location. If a witness needed to be made unrecognisable, this technology would make it simple to distort the image or voice. Witnesses who would be intimidated by being in the presence of the accused would be far more likely to agree to testify if they could do so from another location.

a. In States such as Maldives that are made up of many islands, this also could substantially reduce transportation costs.[121] In cases with an incarcerated defendant, certain hearings could be conducted via video link between the court and the prison or police station rather than transporting the accused. Using this method could also decrease delays due to situations such as lack of available police officers to escort the accused from prison.

b. Video conferencing technology would enhance options for expert testimony, as experts could testify from anywhere in the world.

XII. ADDRESSING WITNESS COOPERATION FROM A SOCIO-CULTURAL PERSPECTIVE

Even with new laws and measures in place, convincing people to testify may still be a huge challenge. In small islands where family, friends, and acquaintances are unavoidable, police, prosecutors, and anyone else involved in the protection of witnesses will have to build trust within the community. In some areas, they will have to overcome stigmas regarding cooperating with law enforcement. There are several ways to address this.

i. PROVIDE TRAINING FOR POLICE

a. Police are often the first interaction that witnesses have during the investigation process. They need to be able to explain to witnesses exactly what will happen if the witness chooses to give a statement. They should also know about any protective measures available to the witness in court as well as what

must be done to secure this. As soon as a State decides to adopt any type of witness protection measures, the police need to be informed about their role in the process.

ii. PROVIDE SUPPORT FOR WITNESSES AND VICTIMS

a. From the start of the very first interview with a witness, the interviewing officer should look for risks that the witness might be threatened or intimidated. Any concerns of the witness regarding intimidation should be taken seriously.

b. Witnesses should also be provided with a point of contact who can address any further concerns. Depending on the severity of the threat, more than one contact person might be needed so that each officer can be "on call" for certain times every day to address any potential emergencies regarding the case.

c. As soon as possible, witnesses should be introduced to the prosecutor in charge of the case. Experience worldwide indicates that allowing a witness to build a rapport with the prosecutor can make a huge difference in whether the witness continues to cooperate, especially if the witness is being threatened. Throughout the course of the case, witnesses should also be informed of any new developments.

d. A good example is the "No Witness No Justice" programme, implemented both in the United Kingdom and in several Caribbean States. The programme is described:

> The No Witness, No Justice (NWNJ) project provides an opportunity to test the hypothesis that improving the care of victims and witnesses and enabling them to attend court is an effective means of narrowing the justice gap and increasing public confidence in the criminal justice system (CJS). . .

e. After data was collected from the UK pilot programmes, the researchers wrote:

> Where NWNJ is working well, it improves CJS working practices and inter-agency working; these combine with increased witness attendance to improve trial outcomes; in turn, these all (but particularly the trial outcomes) increase the economy, efficiency and effectiveness of the CJS. All of these benefits have the knock-on benefit of improving job satisfaction for some CJS staff, reducing staff turnover and potentially increasing staff efficiency. NWNJ has the potential therefore to set in motion a virtuous circle in the CJS.[122]

f. There is persuasive evidence that NWNJ substantially enhances witness information and care, increases witness attendance, improves trial outcomes and increases witness satisfaction with the WCU (jointly staffed by Police and [Crown Prosecution Service ("CPS")]) and the CPS.[123]

iii. EDUCATE THE COMMUNITY

a. Whenever any new legislation pertaining to witness protection is enacted, the public needs to be informed. Possible methods include holding informational meetings or through publications in the media. If feasible, provide an online guide.

b. In addition to informing the community of what provisions are available to protect witnesses, they need to know how important witnesses are to the justice system. In the Caribbean, the No Witness No Justice initiative involved a School Engagement Project. In Barbados, this was made a part of the public school curriculum to teach students "the importance of justice in a responsible society."[124]

XIII. LEGISLATIVE FRAMEWORK WORLDWIDE: PROTECTION OF WHISTLEBLOWERS

The Organization for Economic Co-operation and Development (OECD) said, "Whistleblower protection contributes to an environment of trust and tolerance and enhances the capacity for countries to respond to wrongdoing and matters of public

concern. However, much remains to be done to develop a climate of openness and integrity that enables effective whistleblower protection."[125]

For whistleblowers in any State, some of the most important types of protection the law can provide are the ability to report anonymously and protection from employment retaliation. Whistleblowers play an important role in stopping fraud and corruption but they are far less likely to come forward if retaliation is probable. Employment protection provisions should remedy discrimination and any other harms to employment status.[126] According to the UNODC, these laws should be written broadly enough to "catch any possible retaliation."[127]

Below, different types of provisions in whistleblower legislation worldwide are examined. It should be noted, however, that this is a relatively new area of law and is still developing.

i. WHO CAN BE PROTECTED AS WHISTLEBLOWER?

a. FIJI: According to the 2015 Companies Act in Fiji, in order to be protected, the person making the disclosure must be an employee or officer of the company, someone holding a contract for goods or services with the company, or an employee of the contract holder.

b. IRELAND: Under the Protected Disclosures Act of 2014, "worker" is defined very broadly and includes anyone who might be at risk of retribution. Public and private sector employees are covered, as well as those with non-traditional roles such as volunteers, trainees, consultants, former employees, and jobseekers.[128]

c. JAMAICA: The Protected Disclosures Act, passed in 2011, is written to protect disclosures made by employees. However, the term "employee" is defined broadly in the Act. For example, "any person who in any manner assists or has assisted in the carrying on or conduct of the business of an

employer, without any entitlement to receive remuneration or reward" would be an employee for purposes of the Act.

d. MAURITIUS: Under the Prevention of Corruption Act, any person can report corruption to ICAC without incurring civil or criminal liability as a result of the disclosure. Under the Good Governance and Integrity Reporting Act, individuals reporting unexplained wealth receive the same protection. In both cases, the disclosures must be made with a reasonable belief.

e. TURKS AND CAICOS ISLANDS: Under the Integrity Commission Ordinance, only public officials are given protection as whistleblowers. The law defines "public official" as a member of a public body or a public officer.[129] The law also requires public officials to report corruption or suspicions of corruption.

f. UGANDA: The Whistleblower Protection Act, passed in 2010, states that the following persons qualified to make protected disclosures: An employee in the public or private sector in respect to their employer, an employee in respect to another employee, a person in respect to another person, and a person in respect to a private or public institution.

ii. WHICH DISCLOSURES ARE PROTECTED?

a. IRELAND: The law gives protection to disclosures of "relevant wrongdoing." Like in many other States, this includes the commission or likelihood of committing a criminal offence, the endangerment of human health and safety, and damage or likely damage to the environment. The law encourages whistleblowers to report within the relevant entity or organisation before reporting to an outside party, but it does not penalise those who do not follow this recommendation, as long as their decision is reasonable.

b. MALAYSIA: The Whistleblower Protection Act of 2010 protects any disclosure of improper conduct, as long as that disclosure is not "specifically

prohibited by written law." Improper conduct is defined as any criminal or disciplinary offence. The law clarifies the meaning of disciplinary offence: "[A]ny action or omission which constitutes a breach of discipline in a public body or private body as provided by law or in a code of conduct, a code of ethics or circulars or a contract of employment."

c. MALTA: For a disclosure to be protected under the Protection of the Whistleblower Act of 2013, it must be made in good faith, with reasonable belief, and not made for personal gain.

d. MAURITIUS: Only disclosures of corruption offences and unexplained wealth are currently protected. Also, these generally pertain only to the public sector.

e. SOLOMON ISLANDS: Currently, both a whistleblower protection bill and an anti-corruption bill are being considered by Parliament. If passed, protected disclosures will include reports made in good faith regarding corruption offences, maladministration, and misconduct in office.

f. TRINIDAD AND TOBAGO: A whistleblower bill is also being considered here. If passed, disclosures made by employees of an organisation to either a whistleblowing reporting officer or a Whistleblower Reports Unit are protected as long as they are made in good faith and based on reasonable belief. A disclosure is not protected if it is made anonymously or if the discloser gives information "which he knows, or ought reasonably to have known, is false."[130]

g. ZAMBIA: Under the Public Interest Disclosure Act, a disclosure is made by someone with reason to believe that "the information shows or tends to show" that any of certain events detrimental to the public interest have occurred, including that a criminal offence has been committed or is likely to be committed, that the environment has been or is likely to be endangered, or that the health or safety of a person has been or is likely to be endangered.[131]

iii. PROTECTIONS AND PROHIBITED ACTIONS TOWARD WHISTLEBLOWERS

a. JAMAICA: Under the Protected Disclosures Act, after a person makes a disclosure, she is legally protected from occupational detriment due to the disclosure. This includes disciplinary action, being refused transfer or promotion, being dismissed or demoted, harassment, and being given an adverse reference.

b. MADAGASCAR: Under Madagascar's anti-corruption law, the identities of both the whistleblower and the accused must be kept confidential during an investigation. The law also provides that participants in corruption offences can be exempted from punishment if they report they are prosecuted.

c. MAURITIUS: Victimisation against persons reporting corruption or unexplained wealth is prohibited. Victimisation includes, "discrimination, disadvantage or adverse treatment in relation to a person's employment."

XIV. LEGISLATIVE PROPOSALS FOR THE PROTECTION OF WHISTLEBLOWERS

i. DRAFT LEGISLATION SPECIFICALLY FOR PROTECTING WHISTLEBLOWERS

a. Just as with the protection of witnesses, it will be much easier for a State to have a separate act that details all whistleblower protections rather than pulling together pieces of different laws. This will help ensure comprehensive protection rather than in only a few sectors.

b. Whether the term "whistleblower" or "reporting person" is used, it should be defined broadly. Narrowing it to only include employees discourages anyone else who might have information from coming forward, such as interns or contractors. The Irish law provides a good example in this aspect. Additionally, public officials and officers should be able to report improper conduct as well.

c. The law must protect from all types of retribution in relation to the disclosure. Jamaica's list, in this case, in the Protected Disclosures Act, is a

good example. Additionally, the law should protect against threats of the listed harms. To make the law's prohibition on retribution effective, once an accusation of retaliation for whistleblowing has been made, the burden of proof should shift to the employer. Transparency International states, "[A]n employer must clearly and convincingly demonstrate that any measures taken against an employee were in no sense connected with, or motivated by, a whistleblower's disclosure."[132]

d. The legislation needs to include remedies for whistleblower retaliation. Such remedies can include sanctions on the employer, criminal charges against the employer, having the employer pay for the whistleblower's legal fees and any other necessary compensation, and injunctions and court orders. Another possible method of getting compensation to the whistleblower is through considering the company or government organisation vicariously liable for retaliatory harm to the whistleblower by a fellow employee.

e. The legislation must also include a waiver of liability. Persons making a disclosure in good faith should not be subject to civil or criminal liability. This is particularly important in States with strict libel and defamation laws. For example, in Mauritius, Article 297 of the Criminal Code states:

f. Any person who makes a false and malicious denunciation in writing against any individual to any officer of justice or to any officer of police, whether administrative or judicial, shall be liable to imprisonment for a term not exceeding 5 years and a fine not exceeding 100,000 rupees.[133]

g. The whistleblower protection legislation must clearly make reporting persons immune to such statutes.

h. The legislation should encourage reporting to an authority within the organisation first, whenever this is possible and reasonable. If the

organisation can fix the problem internally, then this will save time and resources. However, if the managing authorities are involved in the improper conduct, then reporting internally may not be practical. Depending on the State's government structure, reporting out might mean going to an anti-corruption agency or to law enforcement. This should be specified in the legislation, but it will likely be different for every State. Additionally, the law should also prohibit the disclosure of the whistleblower's identity without his or her consent.

i. It should be noted that worldwide, the majority of current whistleblower laws does not cover intelligence agencies or militaries. However, a good practice would be to at least make an exception for conduct that would endanger the public safety or health. In this instance, criminal and civil liability should also be waived. Regarding the lack of protection for whistleblowers in the realm of national security, former Anti-Corruption Commissioner John Githongo said, "As corruption has slowly been removed from public procurement processes. . . . the last little hole where corruption is hiding is in the area of so-called 'national security', which means that any whistleblower who causes malfeasance in that area can be very easily charged with treason."[134]

j. Finally, though many whistleblower and anti-corruption statutes do not implicate the private sector, consider legislating required whistleblower protection in certain private sector industries that can have an effect on public health and safety, such as food manufacturers and mining companies. Ensure that whistleblowing employees acting in good faith are immune from civil or criminal proceedings that arise from the violation of any non-disclosure agreements.

XV. OPERATIONAL APPROACHES TO PROTECTING WHISTLEBLOWERS

i. MECHANISM OF REPORTING

a. BRAZIL: While anonymous tips are allowed, the Supreme Court ruled that a criminal investigation cannot be opened for an anonymous tip alone.[135]

b. INDONESIA: The Corruption Eradication Commission created a website solely for whistleblowing. Whistleblowers are asked to submit documents or any other type of data backing up their claim. They are allowed to do so anonymously.[136]

c. MAURITIUS: Persons reporting corruption can report in person at ICAC, report to ICAC via phone, or submit an online report on ICAC's website.[137] In 2012, the Transparency International chapter in Mauritius and the Mauritius Institute of Directors established a Whistleblowing Council. The Whistleblowing Council recommended that an Independent Whistleblowing Service be created. The IWS would be responsible for educating the public and would operate a 24/7 call facility.[138]

d. SOLOMON ISLANDS: In the whistleblowing bill currently being considered, a specific authority is listed for every disclosure subject. Not only are they listed in the bill, but if it is passed into law, every public body will be required to display that information in addition to information on how to make the disclosure and the protections offered to the whistleblower.[139]

e. UNITED KINGDOM: The UK's Public Interest Disclosure Act sets up a tiered system of reporting. Each tier "incrementally requires a higher threshold of conditions to satisfy for the whistleblower to be protected. This is intended to encourage internal reporting and the use of external reporting channels as a last resort."[140] The first tier warrants reporting internally, such as to an

employer. The second tier involves reporting to an outside body prescribed by the law. The third tier includes police and media.[141]

XVI. Operational Proposals for Whistleblower Protection

i. Educate Employees on Whistleblower Law

a. Anyone who can legally make a protected disclosure needs to understand their rights. Information regarding who can make a disclosure and what can be disclosed needs to be readily available. Educational methods could include training sessions, e-learning courses, online guides, and signs inside the workplace that detail the process.

b. Additionally, employees should be made aware of any documentation needed to support their report. For example, keeping copies of performance evaluations before the disclosure could help prove that subsequent negative reviews were retaliatory in nature.

ii. Ensure the Security of Online Reporting

a. For States using online forms as a method of reporting, it is vitally important to keep the website accepting the reports up-to-date regarding internet security measures. All efforts at anonymity can be easily destroyed if the page is hacked.

XVII. Socio-Cultural Aspects of Whistleblower Protection

i. Create a Culture that Supports Whistleblowing

a. Overcoming cultural biases against informing and "snitching" might be the most difficult aspect of implementing whistleblower protection legislation. For the small communities of island States, this problem is magnified. Still, even with the difficulties, the importance of gaining the public support in

implementing whistleblower legislation cannot be overstated. S.N.P.N. Sinha, former Secretary of the Central Vigilance Commission in India, writes:

> For action against corruption to be successful, the involvement of the community and non-governmental actors is crucial. Education and awareness raising programs—today known as social marketing—are very important in this context, as they contribute to citizens' understanding about the negative impacts of corruption on a society and about available legal and institutional tools and mechanisms against it. . . . Only when people get a sense of participation will they be confident that combating corruption can make a difference.[142]

Mr. Sinha later notes that educational campaigns must "further instil the message that reporting corruption is a public duty."

b. Another writer emphasizes, "To create a culture of accountability and transparency, it is important that employees hear about the policy regularly. Top management should make every effort to talk about the commitment to ethical behaviour in memos, newsletters, and speeches to company personnel."[143]

XVIII. Additional Proposals to Reduce Delay and Encourage Reporting

i. Consider Creating a Separate Court for Corruption Offences

a. Agencies fighting against corruption often encounter problems when cases take years to go to trial. By that point, reporting persons may no longer wish to pursue the case or may not remember the details of what happened. Unfortunately, legal system delays are a worldwide problem that detrimentally affect the decision to report. No one who reports corruption should have to worry for years whether others will find out about his disclosure or whether he will face consequences. Because of this, a possible solution is creating a special anti-corruption court in order to expedite the process of trying corruption cases. A corruption court, much like specialized family and

bankruptcy courts, would allow cases to be addressed in a more streamlined fashion. Staff members could be trained specifically to deal with corruption cases.

b. While creating an anti-corruption court would help corruption cases proceed at a faster pace, the UNDP notes:

> Anti-Corruption Courts may prove useful when corruption is endemic across the judiciary as a whole. This is often the case in transitional states with judiciaries that comprise holdovers from the previous regime. When corruption is so entrenched in the judicial system, a statute – or even the constitution itself – can take corruption cases out of the hands of unreliable judges and entrust them to specialized anti-corruption courts, the members of which can be screened for honesty and a commitment to combating corruption.[144]

c. Additionally, the UNDP recommends that the selection process of judges be free from influence of the ruling political party.[145] The manual states that these judges should be given tenure and a salary at a level "that minimizes the risk of bribery."[146]

d. The creation of an anti-corruption court should only be undertaken if adequate resources are available. Otherwise, this could take funds away from the general jurisdiction court system, the only courts the majority of citizens have access to.

ii. REQUIRE VIDEO RECORDING OF POLICE INTERVIEWS

a. Though at first glance requiring recorded police interviews might seem unrelated to witness or whistleblower protection, another island State has had success in cutting down court delays and dragged out proceedings through adopting such legislation. In St. Vincent and the Grenadines, this was effective because the biggest causes of delay were often challenges to the police interviews. Defence attorneys would frequently argue that confessions were coerced. The Interviewing of Suspects of Serious Crimes Act, passed in 2012,

states that a law enforcement official may "conduct a custodial interview when a suspect is arrested for any serious crime and this must be electronically recorded."[147] Serious crimes include kidnapping, murder, rape, drug trafficking, money laundering, and certain corruption offences. The recorded tape, unless ruled inadmissible by the court later, would then be considered evidence.

b. The law is very clear about the procedure for interviews. The interviewing officer must inform the suspect of the right to legal counsel. Upon entering the interviewing room, the officer must immediately show the suspect the recording equipment and start the recording. The officer must state his name, rank, the suspect's name, the alleged offence, the date, the time, and the location of the interview. The officer must also tell the suspect that he does not have to talk. If any break is to be taken during the recording, the officer must state the time and reason. [148] [149]

c. United States researcher and psychology professor Jeff Kukucka wrote:

> In a recent issue of Law and Human Behavior, Saul Kassin and I, and other colleagues, published the results of an NSF-funded field experiment in which experienced police officers were filmed by a hidden camera while questioning suspects who were either guilty or innocent of a simulated crime. Some officers were told in advance that their interrogation would be videotaped; others were not. We found that interrogators who were told that their sessions would be taped were less likely to use certain high-pressure interrogation techniques, such as threatening the suspect and promising leniency in exchange for a confession. They were also better able to correctly determine the suspect's guilt or innocence. [150]

d. In a study of survey data performed by Northwestern University School of Law, it was noted that the experiences of police with recorded interviews was almost uniformly positive.[151]

XIX. CONCLUSION

Witness and whistleblower protection programmes and policies do not have to be costly to be effective. Many basic measures can have a significant impact on the security and well-being of such reporting persons while also being cost effective. Other structural and legislative changes can greatly enhance the ability to safely report wrongdoing. Organizations such as the UNODC provide tools, training, and advice for the implementation of protection programmes. In addition to publishing best practices and guidelines online, the UNODC has recently began providing free, online courses, including two on the subject of anti-corruption. NGOs can also provide assistance in meeting other witness needs.

Witness and whistleblower protection is also not antithetical to small island States. Living in a small community can even be helpful in dealing with crime, as people are far more likely to notice when something seems wrong. Educating the community about the programme and listening to their insight will not only help improve and adapt the programme, but it might also encourage others to come forward and report. Involving the community in anti-corruption efforts and emphasizing the importance of its participation will be the key to success for any new policy.

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