



Home Office

# Facilitating witness co-operation in organised crime cases: an international review

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Home Office Online Report 27/05

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## Executive summary

Witness intimidation and the need to draw upon 'accomplice testimony' from co-operating witnesses are some of the key difficulties involved in the investigation and successful prosecution of organised crime. To address these difficulties, countries have introduced innovative approaches in legislation and policy to facilitate witness co-operation in organised crime investigations. Three approaches in particular have commanded the attention of policy makers: legislative provisions to protect witnesses; plea bargaining and immunity in relation to witnesses giving evidence; and, the compellability of witnesses. Based on a wide-ranging review of published and unpublished sources, this report examines the use of these different approaches for tackling organised crime.

The longest established witness protection programme is the US Federal Witness Security Program (WITSEC) established by the 1970 Organised Crime Control Act. The main form of protection offered by this legislation is the secret and permanent relocation of witnesses and their families to places of safety and, if necessary, a change of their identities. Although initially viewed as highly effective, several important problems emerged with WITSEC soon after it was established. These included: no clear definition of the boundaries of protection, resulting in the type of assistance being resolved on a case-by-case basis; and little consideration being given to the unintended victims of witness relocation, such as the communities into which witnesses were moved given that most of the protected witnesses had criminal convictions, and therefore posed a potential threat in the places to which they were moved. As a result of these difficulties WITSEC has undergone a series of reforms.

Over the last ten to fifteen years, US-style witness protection programmes have become a key feature of the European criminal justice landscape, although variations in the nature and extent of organised crime as well as differences in legal systems, mean that the precise form of witness protection arrangements varies from country to country. Some countries have specific legislation governing the operation of their witness protection programmes while others, like the UK and Netherlands, have none. Some countries, including the UK, view witness protection as largely a police function while others give a key role to the judiciary and government ministries. In some countries, like Belgium and Italy, there is one national or federal witness protection programme; other countries, including the UK and Germany, have several regional or local programmes. Despite these differences there are clear attempts to harmonise aspects of witness protection arrangements across Europe.

The relevance of plea bargaining and immunity in cases of organised crime centres on the role played by 'accomplice testimony' provided by criminal informants who become so-called 'crown witnesses', individuals to whom a promise has been made about the future handling of any criminal proceedings against him/her in exchange for witness co-operation. There are important variations between countries in the use of these measures. Japan and France, for example, have no system of plea bargaining or witness immunity, while the United States has well-established practices in these areas.

Although accepted as key tools in the prosecution of organised crime, the use of plea bargaining and witness immunity statutes in the United States has proved controversial. "Buying" testimony with promises of sentencing leniency or immunity is seen by critics as wrong because it presents too great a risk of perjury and thus of wrongful convictions. Creating an environment in which providing 'substantial assistance' is the main way informant witnesses get reduced sentences also risks the so-called 'co-operation paradox' whereby "kingpins" receive lower sentences than their underlings because the "kingpins" have more information to exchange for a 'substantial assistance' recommendation.

In Europe, several countries have relied on the use of crown witnesses to tackle organised crime. In Italy, for example, these crown witnesses, (or 'pentiti') benefit from reward regulations (or 'premi') so that a judge may decide not to sentence or to impose a less severe sentence on these informants. To ensure the truthfulness of statements, a review procedure exists which allows the sentence to be raised if a crown witness had made false statements. Nevertheless, the use of crown witnesses is also highly controversial, with concerns over the role that criminal informants may play in the instigation of criminal activity, their questionable motivations for providing information, and their credibility as witnesses.

While there is little research evidence on the use of witness compellability in *organised crime* investigations, studies of the use of this measure in the context of domestic abuse have indicated that the arguments for and against are not clear-cut. On the one hand, compellability may reduce the risk of witness intimidation occurring as the responsibility for testimony has (somewhat) shifted from the witness to the prosecution. However, a compelled witness may become hostile to the prosecution and only give evidence which assists the defence or refuse to give evidence and risk being punished for contempt. Moreover, the experience in other legal contexts is that compellability is only effective when it is backed up by other measures, and especially adequate protection and support for witnesses. Whilst, superficially, it might seem tenuous to apply evidence from domestic violence cases to a consideration of witness compellability in organised crime, there are certain similarities which make such a comparison instructive. In particular, familial and inter-personal relationships will typically link witness and defendant in both types of case and they may in turn have a critical bearing on witness co-operation.

The evidence base relating to the 'costs' and 'effectiveness' of the measures considered in the report is very weak. In relation to the financial costs of witness protection programmes, WITSEC in the United States had a budget of about \$24million in 2000 and had over 16,000 participants; in Italy, the Central Protection Service had a budget of 200 billion Lire in 2000 (c. £72 million), and had over 5000 participants. Anecdotal evidence of the 'effectiveness' of these and similar programmes is generally positive, indicating that few, if any, protected witnesses have become the victims of attack, while the limited amounts of conviction data relating to cases involving protected witness testimony indicate high numbers of defendants being found guilty.

Viewed in broader terms, however, assessments of 'costs' and 'effectiveness' are less encouraging. While some have argued that witness protection and immunity for criminal informants provide an 'exit strategy' for career criminals and help them establish a place in legitimate society, data from the United States indicates that 20 per cent of protected witnesses are arrested within two years of being put on the WITSEC programme.

Many of the measures designed to facilitate witness co-operation raise issues regarding their perceived and actual legitimacy. Witness immunity statutes in the United States, for example, give wide discretion to prosecutors in deciding whom to prosecute and whom to grant immunity to which risks undermining the principle of equal protection under the law. Witness immunity might also be seen as a 'bribe' on the part of governments and could be viewed by critics as encouraging potential informants to give false testimony. Specific concerns exist in Europe about the legitimacy of measures to assist witnesses in the context of the European Convention of Human Rights (ECHR) concerning the guarantee of a fair trial (Article 6). To date, the use of crown witnesses and court room measures like screens and video-links for vulnerable and intimidated witnesses have been accepted as ECHR-compliant.

There are significant variations between countries in the types of measures they have introduced to facilitate witness co-operation in organised crime investigations, partly reflecting differences in the scale and nature of the organised crime and partly linked to differences in legal traditions and environments. The evidence-base on which to judge the efficacy of these measures, however, is very weak and there remains a real need for empirical research

evaluating different approaches. Moreover, given that the overwhelming majority of witnesses on protection programmes and those involved in prosecutions as 'crown witnesses' are themselves criminals, the potential for scandal is ever-present and needs to be guarded against. If these techniques are to be utilised, therefore, they should ideally be employed in the context of enhanced evidence as to their effectiveness, and under the umbrella of transparent legislative guidelines as to their appropriate use.

# 1. Introduction

*One characteristic of organized crime is that the most culpable and dangerous individuals rarely do the dirty work. Although the organizations' leaders are ultimately responsible for its crimes, they typically deal through intermediaries and limit their own participation to behind-the-scenes control and guidance.* (Jeffries and Gleeson, 1995)

*Organised crime's oldest and most effective tool against criminal prosecution is killing the witnesses against them.* (Schur, 1988)

These two reflections on the nature of organised crime highlight the difficulties surrounding the investigation and successful prosecution of this type of criminal activity. To address these difficulties, criminal justice agencies typically need to use 'accomplice testimony' in the form of evidence from so-called 'co-operating' or 'crown' witnesses and to be able to offer protection to these witnesses given the risks of intimidation that they face. Against this background, an increasing number of countries have introduced innovative approaches in legislation and policy to facilitate witness co-operation in organised crime investigations. Three approaches in particular have commanded the attention of policy makers:

- legislative provisions to protect witnesses in organised crime investigations;
- plea bargaining and immunity in relation to witnesses giving evidence in organised crime cases; and
- the compellability of witnesses in organised crime cases.

## Research aim

This research forms part of the Crime Reduction and Community Safety Group (CRCSG) Organised Crime Research Programme. The aim of this report is to examine the use of these different approaches for tackling organised crime. Given, however, that legislation, policy development and independent evaluation in this field is, in many countries, in its infancy, the discussion of the three approaches will be uneven in its depth and coverage.

The review will focus particularly on issues to do with:

- legislative provisions to protect witnesses;
- compellability of witnesses; and
- plea bargaining and immunity.

## Methodology

- This report is based on a wide-ranging review of published and unpublished sources including academic research papers and policy documents. In addition, specific requests for information were submitted to researchers and law enforcement agencies in Europe, North America and Australia. In order to identify relevant published academic and non-academic materials, searches of a number of databases were carried out (see Appendix for details).

Several important issues emerged from this data collection exercise:

- Despite the relatively prominent discussion of organised crime cases and the experiences of witnesses in the news media, social scientific and legal research in the areas of witness protection, plea bargaining and immunity, and witness compellability in the context of organised crime is largely in its infancy and in some cases appears to be non-existent.
- Witness protection appears to have gained the greatest research attention, most of it focused on the experience of the United States which has the longest established programme for protecting witnesses in organised crime cases (see Chapter 2). By contrast, no academic references relating to the use of witness compellability in organised crime cases could be found, although some work on compellability in relation to domestic violence cases does exist (see Chapter 4). The absence of a large research-based literature on witness co-operation and organised crime most likely reflects a combination of influences, but particularly the newness of and secrecy surrounding many of the measures that have been introduced.
- The limited and uneven information available on measures used to enhance witness co-operation in organised crime investigations has important implications for this report. Using legislation and policy papers it was possible to sketch out the broad contours of what measures are used where, but given the absence of independent, evaluative research, it was much more difficult to assess what measures were effective in facilitating witness co-operation in organised crime cases and why.

## Structure of the report

To date, legislative provisions to protect witnesses appears to have attracted the highest levels of policy and research attention and Chapter 2 of this report focuses on this area. It reviews witness protection legislation in the US and Europe but also includes consideration of similar legislation elsewhere in the world, highlighting similarities and differences in the structure and operation of witness protection programmes. In the field of plea bargaining, witness immunity and accomplice testimony there was limited policy material available for scrutiny but some research findings that have assessed these measures in the US and Europe are reviewed in Chapter 3. The chapter also examines witness compellability. The only available research evidence, however, focuses on the use of this tactic in domestic violence rather than organised crime cases; consequently, discussion of this is limited by the available material. Finally, Chapter 4 brings together the research reviewed in the report to raise three broader issues about the use of these measures in organised crime investigations concerning the balance between 'costs' and 'effectiveness', accountability and legitimacy.



## 2. Legislative provisions to protect witnesses in organised crime cases

While a range of issues have been identified as problematic in investigating and prosecuting organised crime groups, the lack of effective co-operation from witnesses in organised crime investigations and court cases has been identified as an area of special concern. Effective co-operation from witnesses is widely recognised as playing a key role in the successful investigation and prosecution of all types of crime (e.g. Gabor *et al.*, 1987; Silke, 2001). Facilitating witness co-operation in cases involving organised crime groups has been particularly problematic. A perception exists that poor witness co-operation in these cases significantly hampers the successful investigation and prosecution of organised crime groups in England and Wales.

A number of foreign jurisdictions have developed detailed legislative provisions to facilitate witness co-operation in organised crime cases. The following chapter provides a review of those measures which are aimed at providing witness protection in such cases. The first system to be considered is the US Federal Witness Security Program (WITSEC) as this is the most well known and well established of the current systems.

### The US Federal Witness Security Program (WITSEC)

Described as 'the paradigm program' (Roberts-Smith, 2000) on which many other countries' witness protection programmes are modelled, the US Federal Witness Security Program (WITSEC) was established by the 1970 Organised Crime Control Act. The background to the Act was the limited success in the 1960s of the Justice Department's attempts to tackle Italian-American organised crime and, in particular, the problems created by the Mafia code of *omerta*, the code of silence which meant that it was proving difficult to get members of 'the mob' to testify (Earley and Schur, 2002). By providing a high level of security to mob witnesses, including secret relocation and a change of identity, WITSEC became the key to breaking *omerta*.

The Organised Crime Control Act states that 'The Attorney General shall provide for the care and protection of witnesses in whatever manner is deemed most useful under the special circumstances of each case'. Key provisions of the Act include:

- specifying that for a witness to qualify for protection under the Act they must be a witness in a specific case in progress and there must be evidence that it would be in the federal interest for the Justice Department to protect the witness;
- giving the Attorney General the authority to provide for the security of actual and potential government witnesses and their families in organised crime cases;
- allowing the protection of a witness and their family to continue for as long as these people are, in the Attorney General's judgement, in danger; and,
- giving the Attorney General authority to determine what kind of facilities are to be provided for a witness and their family such as housing, welfare and health care.

In the wake of a number of high-profile successful cases, some commentators heralded WITSEC as one of 'the most effective law enforcement tools for organised crime' (Montanino, 1990, p.502). Several important problems, however, began to emerge with WITSEC soon after it was established. These included:

- No clear definition of the boundaries of protection, resulting in the type of assistance being resolved on a case-by-case basis.
- Little consideration given to the unintended victims of witness relocation. These included individuals and organisations unable to recover unpaid debts from witnesses and their dependants enrolled in the Program; non-relocated parents of children taken into protection by a partner and denied access to their children; communities into which witnesses were moved given that most of the protected witnesses had criminal convictions, and therefore posed a potential threat in the places to which they were moved.
- Under-staffing and under-training of the Marshals Service, leading to breaches in security, delays in dealing with the documentation needed for new identities, and an inability to respond effectively to the welfare needs of witnesses and their families trying to adjust to their new lives.

Against this background, Congress reviewed the structure and operation of WITSEC, focusing on the need to recognise and place a higher value on the rights and interests of the public when those rights and interests conflicted with the purpose of WITSEC (Lawson, 1992). In 1984 these issues were addressed in the 'Protection of Witnesses' chapter of the Comprehensive Crime Control Act. Its main provisions include:

- broadening the Attorney General's authority to offer relocation or other protection to a witness, their immediate family or a person closely associated with the witness if that person is also in danger, in official proceedings concerning organised criminal activity, drug trafficking offences, or other serious federal or state felonies where the witness's testimony is likely to lead to retaliation by violence or threats of violence;
- defining what the Attorney General can provide for a protected witness in terms of establishing a new identity, housing, subsistence payments, help in finding employment, and any services needed to help the witness become self-sufficient;
- requiring a written assessment from the Attorney General when selecting witnesses for the Program, evaluating whether the need for a person's testimony outweighs the risk of danger to the public, including potential harm to innocent victims;
- giving statutory authority to a Memorandum of Understanding to be signed by relocated witnesses in which they must agree not to commit any crime and to comply with legal obligations and civil judgements. The Memorandum also outlines the procedures to be followed in case of a breach of the Memorandum and for the filing and resolution of the grievances of witnesses provided with protection;
- the Act allows those trying to recover debts from relocated witnesses to use the courts as a means to enforce judgements against relocated individuals, eliminating the previously laissez-faire approach to relocated persons' debts;
- in relation to parent-child relationships, the Attorney General must give an assurance that relocation will not infringe any of the non-relocated parent's custody or visitation rights;
- authorising the Attorney General to pay compensation from a victims compensation fund if the victim of a crime committed by a protected witness seeks compensation; and,
- the Office of Enforcement Operations is required to submit a quarterly report to the Deputy Attorney General detailing the results of the testimony provided by relocated witnesses.

At one level, these new provisions clearly represent an advance on the original legislation. At another level, however, even with these improvements to the original legislation, the government's policy of witness protection appeared to place harm to the public from organised crime above harm to the public from protecting witnesses. Policy makers, it was claimed, were prepared to accept a level of unintended victimisation that might result from a policy of relocating individuals of whom the overwhelming majority were criminals (Lawson, 1992). One suggestion has been for stricter standards in the selection of witnesses for

WITSEC by means of an independent review board which would focus more on the likelihood that witnesses would be able to make the necessary behavioural adjustments to relocation and a new identity than on simply the importance of their evidence. In addition, several areas of the US have established alternative forms of witness protection programmes. Examples include the Short Term Protection Program established in Washington in 1991 in response to localised criminal and street gang organisations and the Illinois Gang Crime Witness Protection Program established by State legislation in 1996 (Illinois Criminal Justice Information Authority, 1997). The latter is administered by the Illinois State Police and is aimed at facilitating the prosecution of gang crimes by providing additional assistance and resources for the protection and relocation of victims and witnesses.

## Witness protection in Europe

Despite its origins in a very particular law enforcement context, WITSEC has provided an important 'model' for other countries developing their own witness protection programmes. Over the last ten to fifteen years in Europe, US-style witness protection programmes have become a key feature of the criminal justice landscape and are now viewed by many law enforcement agencies as a crucial tool in cases involving organised crime and terrorism. Nevertheless, variations in the nature and extent of organised crime, as well as differences in legal systems, mean that the precise form of witness protection arrangements varies from country to country. Table 1.1 provides a summary of the key features of legislation relating to witness protection in European states.

Some countries such as Belgium and Germany have specific legislation governing the operation of their witness protection programmes while others, like the UK and Netherlands, have none. Despite these differences, however, the eligibility criteria for witness protection measures are broadly similar. The witness needs to be giving evidence in relation to the most serious crimes and those who are close to the witness who might be endangered are also eligible for protection. The forms of protection available are also quite similar (regardless of whether there is specific legislation) and normally involve the relocation of a witness and his/her close family, the possibility of formally changing their identity and help with social and economic assimilation in the communities to which they are moved.

Table 2.1: A summary of legislation relating to witness protection in Europe

Country	Date of relevant legislation	Title of relevant legislation	Who is eligible for protection?	What types of protection and support are available?	Who decides on who is protected?	Who provides protection?
Austria	-	Code of Police Practice and Code of Criminal Procedure.	Individuals 'able to supply information on a dangerous assault or organised crime and who are therefore especially endangered'.	Restricted participation in trial though use of audio and/or video transmission; exclusion of public or defendant during trial; 'particular protection' provided by law enforcement authorities; change of identity	The investigating judge can restrict a witness' participation in a trial; the presiding judge can exclude public or defendant from courtroom; the Federal Minister of the Interior is responsible for changes of identity.	'Particular protection' is provided by law enforcement authorities.
Belgium	2002	Rules relating to the protection of vulnerable witnesses and other provisions.	Persons placed at risk as a result of statements made in connection with a criminal case, their family members and other relatives.	Distinction between 'ordinary protective measures' and 'special protection'. The former includes: protection of data on the person protected held by the Census Board and Registrar General, provision of alarms, police patrols, monitoring of phone calls, direct physical protection, and relocation for a maximum of 45 days. Special protection includes: relocation for more than 45 days and a new identity; monthly subsistence payments; a one-off business establishment payment. A person benefiting from special protective measures will also automatically have the right to psychological assistance and assistance with finding a job.	The Witness Protection Board (comprises the Federal Public Prosecutor [Chair], a Public Prosecutor, the Attorney General, the Commissioner of the Criminal Investigation Department of the Federal Police, and in an advisory, non-voting capacity, representatives of the Ministry of Justice and Ministry of Interior). The Witness Protection Board can grant 'ordinary' or 'special' protection.	Protection co-ordinated by the Witness Protection Department of the Directorate-General of the Criminal Investigation Department of the Federal Police. Implementation lies with the Director General of Operational Support of the Federal Police.

Table 2.1: A summary of legislation relating to witness protection in Europe

Country	Date of relevant legislation	Title of relevant legislation	Who is eligible for protection?	What types of protection and support are available?	Who decides on who is protected?	Who provides protection?
Czech Republic	2001	The special protection of witnesses and other persons in connection with criminal proceedings.	A 'protected person' is an 'endangered person' provided with special protection. An endangered person is a witness or other person (including those in a 'close relationship' with the witness and the accused if they testify to assist with criminal proceeding) 'in danger of bodily harm or in other grave jeopardy'.	'Special protection and assistance' includes personal protection, relocation and help with 'social assimilation in the new environment', 'covering up the real identity of the protected person'. 'Special financial means' are also available to pay some expenses associated with 'special protection'.	A Supreme Court judge must approve a police proposal to provide special protection but the consent of the 'endangered person' concerning the conditions of special protection must have been acquired first. If the threat is immediate, the police with the approval of the Police President or, if the person is in prison, the head of the Penitentiary Service, can be provided temporarily before the Supreme Court approves the proposal. It is for the Minister to decide on the termination of special protection based on recommendations from the police.	The police or, if the 'endangered person' is in prison, the Penitentiary Service, organise and provide 'special protection'. Public administrative authorities have a statutory duty to co-operate.
France	2001/2002	'Everyday security' and 'internal security'.	A witness is defined as 'a person in respect of whom there is no indication of his/her having committed or attempted to commit an offence and who is likely to be able to contribute evidence of relevance to the proceedings'.	Distinguish between 'physical protection' and 'legal protection'. Former includes police protection before and after trial, use of audio or audio-visual devices during proceedings and allowing a witness to appear before the defendant from within or outside French national territory using appropriate technologies. Legal protection relates to scope for witnesses to testify anonymously.	Authorisation of public prosecutor or examining magistrate required for physical and legal protection.	Although no 'witness protection service' exists. French internal security policy provides for the appointment of police and gendarmerie officers in each region 'to ensure the safety of witnesses before and after judgement.

Table 2.1: A summary of legislation relating to witness protection in Europe

Country	Date of relevant legislation	Title of relevant legislation	Who is eligible for protection?	What types of protection and support are available?	Who decides on who is protected?	Who provides protection?
Germany	2001	Witness Protection Harmonisation Act.	A person crucial to criminal proceedings, who faces serious danger if they testify, and is suited to witness protection measures; family members or others close to witness and are suited to witness protection.	The type of protection is a matter for witness protection units (WPU) 'Temporary cover identities' can be requested by WPU who can also provide allowances to witnesses.	Normally the police and, in particular, the bureau of the protection of witnesses which is located in every region.	Police witness protection units based at the regional level. Only in rare cases would the Federal Bureau of Investigation be involved (BKA).
Italy	1991 (revised 2001)	Provisions for the protection of persons co-operating with justice – special protection measures.	Witnesses to drugs, mafia or murder offence and all offences where the sentence is between 5 and 20 years. Informants for mafia, terrorism and drug trafficking offences. Those close to witnesses or informants who are also in danger can be protected as well.	Three types of protection: (1) a 'Temporary plan' involving relocation and subsistence lasting for 180 days. (2) 'Special measures' involving provision of protection and social reintegration plans of relocated. If 'special measures' are inadequate then: (3) 'Special protection programme': provides relocation, provisional identity documentation, financial assistance (monthly allowance, house rent, health care, social and legal assistance), and, as a last resort, new legal identities. Informants co-operating with justice who are in prison must serve at least a quarter of their sentence or, if in for life, 10 years.	A Public Prosecutor whose office is investigating a case or the Head of Police recommends individuals for inclusion to a Central Commission comprising: Under-Secretary of State at the Ministry of the Interior [chair], two judges/prosecutors; five experts in the field of organised crime. Decisions are by majority voting; Chair has casting vote. Members of the Commission should NOT work in offices conducting investigative activities related to organised crime of the mafia or terrorists. Authorisation for a change of identity must be given by the Central Protection Service.	'Special measures' are implemented by Civil Governors (Prefetti) at a local level. The Central Protection Service is responsible for the implementation and enforcement of the special protection programmes and has local operational units. The Service is divided into two divisions: one for informants the other for witnesses.

Table 2.1: A summary of legislation relating to witness protection in Europe

Country	Date of relevant legislation	Title of relevant legislation	Who is eligible for protection?	What types of protection and support are available?	Who decides on who is protected?	Who provides protection?
Lithuania	1993	Programme to protect witnesses and victims against intimidation.	Witnesses, victims, experts, defence counsel, the accused, defendants and convicted persons, and security officials if investigations into serious crime indicate 'their lives, health and property, as well as basic rights and freedoms embodied in the constitution are at risk'. Also eligible are those close to the above people.	Direct personal protection; temporary relocation; 'data stop' on official records; permanent relocation with job or place in full-time education; a new identity; cosmetic surgery; issuing of weapon. Also trilateral agreements exist with Estonia and Latvia to allow legal stay by person being protected in another country and assistance with that person's integration.	Application for protective measures is made to the national chief of police, the prosecutor general, the heads of public prosecutors' offices, and of the police superintendents for the area concerned or the competent investigator.	National chief of police decides on the nature and scope of protective measures. A specialised unit for the protection of witnesses and victims exists within the police divisions of the Ministry of Interior.
Poland	1997	Law on Protected Witnesses.	Eligibility restricted largely to being a witness in cases involving organised crime.	Personal protection, relocation, assistance with changing employment, and 'in particularly justified cases' change of identity.	The Prosecutor decides on establishing the protection or assistance for a witness but the Council of Ministers 'shall determine in an ordinance the detailed conditions, scope and manner in which protection and assistance ... shall be granted and withdrawn'.	The Chief of Police.

Table 2.1: A summary of legislation relating to witness protection in Europe

Country	Date of relevant legislation	Title of relevant legislation	Who is eligible for protection?	What types of protection and support are available?	Who decides on who is protected?	Who provides protection?
Portugal	1999	-	Anyone in possession of information/knowledge necessary to the disclosure, apprehension or evaluation of the facts subject to investigation. This covers the co-defendant and victim, and protection measures can cover witnesses' relatives or others close to them.	<p>(i) Concealment and teleconferencing: the witness's image or voice can be distorted to avoid recognition; a witness can deliver evidence remotely via teleconferencing but a judge must be present with the witness.</p> <p>(ii) Non-disclosure of witness's identity</p> <p>(iii) Specific security measures which include transport to court in State vehicle, provision of secure room at court, and police protection of witness, relatives and others with a close relationship.</p> <p>(iv) Specific security programmes includes change of identity, changes in the 'physiognomy or the body', relocation, provision of conditions for 'obtaining means of maintenance', and granting of a subsistence allowance.</p>	Decisions regarding concealment and teleconferencing are decided by the court at the request of the Public Prosecutor, defendant or witness. The non-disclosure of a witness's identity is decided by an Examining Magistrate upon request from the Public Prosecutor but only if testimony relates to certain criminal offences (including trafficking in human beings, organised crime, drug-trafficking, terrorism and terrorist organisations), the witness faces serious danger and their testimony is crucial. The provision of 'specific security measures' can be ordered by the 'judicial authority in charge of proceedings' or upon request by interested parties or at the proposal of the criminal police authorities. Specific security programmes are only available in cases concerning serious criminal offences and are handled by the Commission for Special Security Programmes, supervised by the Ministry of Justice which appoints President and Secretary of the Commission and which also includes a judge and a Public Prosecutor with experience of violent and organised crime.	



Table 2.1: A summary of legislation relating to witness protection in Europe

Country	Date of relevant legislation	Title of relevant legislation	Who is eligible for protection?	What types of protection and support are available?	Who decides on who is protected?	Who provides protection?
Slovak Republic	1998	Protection of the witness	Protection is available to witnesses and their immediate relatives 'whose lives and health become threatened as a result of their testimonies by the perpetrators of the most serious and especially of organised forms of criminal activities'. Protection is also available to the accused and/or defendant.	Protection measures 'may be related predominantly to the identity, appearance, domicile, provision of social security and professional re-qualification' of the witness. Before judicial proceedings begin, the Unit of the Police Corps will consult with the Chief Justice of the Court about the administrative and technical measures required.	Decision taken by The Commission, comprising four members and a Chair. The Chair and one member are appointed by the Minister of Interior from among members of the Police Corps. Two members are appointed by the Minister of Justice from among his/her 'subordinates'. One member shall be appointed by the General Prosecutor from among the prosecutors in his/her office.	A unit within the Police Corps.
Spain	1994	Protection of Witnesses and Experts on Criminal Proceedings	Anyone who as a witness or an expert is obliged to participate in the criminal process and who the Judicial Authority rationally sees as being in 'severe jeopardy'. Those enjoying a close relationship with witness or expert are also eligible.	Non-disclosure of personal details of witness during trial; use of measures to prevent visual identification during trial; secure transport to and accommodation at court; police protection; change of identity and provision of financial resources in for relocation of residence or workplace.	Examining Magistrate	

Some countries, including the UK, view witness protection largely as a police function (Fyfe, 2001), while others give a key role to the judiciary and government ministries. In Belgium, for example, a Witness Protection Board, comprising public prosecutors, senior police officers and members of the ministries of Justice and the Interior, take the decision about who is protected. In Italy a Central Commission takes the decisions, chaired by the Under-Secretary of State at the Ministry of the Interior. By contrast, in the UK, decisions about inclusion on protection programmes are taken by a senior police officer.

In some countries, like Belgium and Italy, there is one national or federal witness protection programme; other countries, including the UK and Germany, have several regional or local programmes.

In some countries, most notably Italy, the nature and scale of organised crime means that there are thousands of participants on witness protection programmes while in others there are probably no more than a few hundred. In the Netherlands and Germany, for example, the number of participants on witness protection programmes is estimated to be between one and three people per million inhabitants (in Germany about 650 people a year are taken on to witness protection programmes); in Italy there are currently about 91 people per million inhabitants, equivalent to over 5,000 people of whom about 1,000 are witnesses and 4,000 are their close relatives (Heijden, 2001; Italian Ministry of the Interior, 2001).

Despite these differences there are clear attempts to harmonise aspects of witness protection arrangements across Europe (Council of the European Union, 1995; 1997). A European Liaison Network, co-ordinated by Europol and comprising the heads of specialist witness protection units, was established in 2000 and has begun a process of providing guidance and sharing best practice. As a Europol document explains, the main goal of the Network is 'to create a useful, common platform for future co-operation and to give those Member States in which the implementation of witness protection is still underway the great chance to avoid waste of time in 'reinventing the wheel' again' (Europol, 1999). One example of this is the production by the European Liaison Network of guidelines on the 'Common criteria for taking a witness into a Protection Programme' (Europol, 2003). A further important dimension to witness protection arrangements in Europe is the presence of the United Nations War Crimes Tribunal in the Netherlands. The Victims and Witnesses Section of the Tribunal plays an important role in providing witness protection services for those testifying in cases involving serious violations of humanitarian law, such as the crimes against humanity in the former Yugoslavia (McCusker, 2002; Klipp, 1996; and Hampson, 1998).

## Witness protection legislation in other countries

In addition to Europe, the US model of witness protection has also informed the development of witness protection programmes in other parts of the world. Table 2.2 summarises some of the key features of the legislation in Australia, Canada, Jamaica, Japan and South Africa. With the exception of Japan, where witness protection arrangements are limited to what happens at court, this legislation reveals many similarities with WITSEC and the various European witness protection programmes. In particular, several interesting issues emerge from this legislation. In contrast to most of Europe and the US, but like the UK, decisions about who is protected in Australia and Canada are taken by senior police officers. In Jamaica the Ministry of National Security and Justice take these decisions while in South Africa it is the Director of the Office for Witness Protection who is appointed by the Minister of Justice.

In terms of the structure of witness protection arrangements Australia and Canada - like the US - operate federal witness protection programmes, but this does not preclude individual

states within these countries using legislation to set up their own witness protection schemes. In Australia until the late 1980s, for example, witness protection was the responsibility of individual police authorities. These were largely ad hoc arrangements and suggestions were made for a national witness protection scheme to be run by a new independent agency. This was rejected in favour of mandating the Australian Federal Police to operate a National Witness Protection Program. Most, though not all, Australian states have also passed legislation creating state-level witness protection programmes run by the state police.

Finally, with regard to accountability, both Australia and Canada require their federal protection programmes to submit annual reports on their activities and expenditure to the national parliament.

Table 2.2: A summary of legislation relating to witness protection in countries outside Europe and the US

Country	Date of relevant legislation	Title of relevant legislation	Who is eligible for protection?	What types of protection and support are available?	Who decides on who is protected?	Who is responsible for providing protection?
Australia	1994 (as amended 2002)	Witness Protection Act  (note: individual states also have Witness Protection Acts)	Eligibility will depend, <i>inter alia</i> , on whether the witness is a risk to the public, the results of psychological and psychiatric testing, the seriousness of the offence about which they are giving testimony and the importance of their evidence. Foreign nationals may be included at request of foreign law enforcement agencies or International Criminal Court.	New identity, relocation (including payments for living expenses, assistance in obtaining employment or access to education), provision of any other assistance to allow witness to become self-sustaining.	The Commissioner of the Australian Federal Police has the sole responsibility of deciding whether to include a witness in the National Witness Protection Program	Australian Federal Police
Canada	1996	Witness Protection Program Act	Eligibility depends, <i>inter alia</i> , the risk to the witness, the danger to the community posed by the witness, their ability to adjust to the programme, and use of other methods of protecting the witness. Those close to the witness can also be protected.	Protection under the Act includes relocation, change of identity, counselling, and financial support to help witness become self-sufficient in their new communities.	The Commissioner of the Royal Canadian Mounted Police	Royal Canadian Mounted Police

Table 2.2: A summary of legislation relating to witness protection in countries outside Europe and the US

Country	Date of relevant legislation	Title of relevant legislation	Who is eligible for protection?	What types of protection and support are available?	Who decides on who is protected?	Who is responsible for providing protection?
Jamaica	2001	The Justice Protection Act	Witnesses, jurors, judicial officers, legal officers, law enforcement personnel or associates of such persons in cases which involve, <i>inter alia</i> , murder, use of firearms, drug trafficking, domestic violence, fraud, dishonesty or corruption.	(i) providing documents for a new identity (ii) relocation (iii) providing payments to meet reasonable living expenses and costs associated with relocation (iv) providing assistance in obtaining employment, access to education and health care (v) providing other assistance to ensure participant becomes self-sustaining.	Decisions about inclusion and the level and duration of protection and assistance are taken by the Witness Protection Administration and Victim Support Unit in the Ministry of National Security and Justice following an application by the Director of Public Prosecutions.	Officers from the Witness Protection Administration and Victim Support Unit in the Ministry of National Security and Justice
Japan	1999	Criminal Procedure Law		Witness can testify in court accompanied by lawyer; 'screens' available so face of witness is not exposed to offenders in court; witness can testify via telephone or TV link even when located in place other than the court.		
South Africa	1998	Witness Protection Act	Eligibility will depend on, <i>inter alia</i> , the risk to the witness, the nature of the proceedings in which the witness is giving evidence (includes treason, murder, rape, drug trafficking and public violence), the probability the witness will be able to adjust to protection.	Not specified in the Act but the Director of the Office for Witness Protection must 'take such reasonable steps as are necessary to provide the protected person with ... protection and related services' which includes relocation, change of identity, financial assistance and providing the witness with support from other state Social Development departments.	Director of the Office for Witness Protection, appointed by the Minister of Justice, and originally located in the Department of Justice but from 2001 transferred to the National Prosecuting Authority. The Office is now known as the Witness Protection Unit	Witness Protection Officers appointed by the Director-General Justice and security officers (who have been seconded from the South African Police Service).

### 3. Accomplice testimony, plea bargaining and witness immunity

The relevance of plea bargaining and immunity in cases of organised crime centres largely on the role played by 'accomplice testimony' provided by criminal informants who become so-called 'crown witnesses', 'government witnesses' or 'co-operating witnesses'; individuals to whom a promise has been made about the future handling of any criminal proceedings against him/her in exchange for witness co-operation. There are, of course, important variations between countries in the use of these measures. Japan and France, for example, have no system of plea bargaining or witness immunity, while the United States has well established practices in these areas. Table 3.1 summarises some of these differences for countries for which evidence was available. The following sections examine some of these cross-national differences in approach to co-operating witnesses in more detail.

**Table 3.1 Summary of measures used with respect to co-operating, criminal witnesses**

Country	Terms used to describe co-operating criminal witnesses or their evidence	Measures used with respect to co-operating, criminal witnesses
Germany	'Staatszeugen' (State's witnesses) or 'Kronzeuge' (Crown witnesses)	<b>Crown Witness Act (Kronzeugengesetz) 1989:</b> When a crown witness who has committed criminal offences relating to organised crime but who cooperates with law enforcement agencies with the result that the offences are prevented or offenders arrested, statutory regulations allow charges against the crown witness to be dropped, or for the crown witness to remain unpunished or punished by a less severe sentence. Crimes of genocide, murder and manslaughter are specifically excluded
Italy	'Pentiti' or 'collaboratore della giustizia'	<b>Premali</b> (reward regulations) are used with regard to four kinds of crime to induce accomplices to co-operate: terrorism, kidnapping with the aim to obtain ransom, production of and dealing in drugs and organised (Mafia) crime. For each of these kinds of crime a crown witness regulation exists so that a judge may decide not to sentence or to impose a less severe sentence. For those involved in Mafia crime and who have been found guilty of criminal offences carrying life imprisonment, punishment will be a prison sentence of 12-20 years; if the offences carry a temporary prison sentence this will be reduced by one third or two thirds. To ensure the truthfulness of statements, a review procedure exists which allows sentence to be raised if a crown witness had made false statements. A crown witness does also not have to be personally present at the trial; his hearing and interrogation can take place 'at a distance'.
Northern Ireland	Supergrasses	Supergrasses were initially offered full immunity but this was later replaced by the offer of reduced sentences and the promise of new identities after serving them.
Spain	Arrependitos	<b>Penal Code 1995:</b> permits a system of extended remission of punishment for those implicated in crimes relating to terrorism or drug trafficking but who collaborate with the police and judicial authorities. In relation to drug crimes, the person must engage in 'active collaboration' to prevent a crime or to provide evidence that can lead to the identification or capture of suspects.

United States	Informant witnesses	<b>Plea- bargaining:</b> Federal Rules of Criminal Procedure specifically sanction plea bargaining in respect of accomplice testimony; <b>Witness immunity:</b> federal prosecutors can coerce testimony by granting limited immunity for the use of witness testimony whereby a prosecutor promises that what the witness says will not be used against them although granting of immunity does not cover perjury.
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## The US experience

Although state and local level prosecutors may be involved in the prosecution of organised crime, this section focuses on the federal level given that several features of federal law combine to give federal prosecutors certain advantages over their state and local counterparts in the investigation and prosecution of organised crime cases (Jeffries and Gleeson, 1995). One of these advantages is the Racketeer Influence Corrupt Organizations Act (discussed by Levi and Smith, 2002) but other advantages include the use of accomplice testimony, plea bargaining, and witness immunity.

### Accomplice testimony

Given that one of the key characteristics of organised crime is that the leaders of criminal organisations typically operate through intermediaries, their guilt can rarely be proved by the testimony of victims, eyewitnesses or forensic evidence. Successful prosecution of organised crime leaders therefore normally requires the use of accomplice testimony. In federal courts, a defendant (unlike a defendant in many state courts) can be convicted on the uncorroborated testimony of an accomplice, although juries are cautioned to use care in evaluating the testimony of accomplices. Indeed, because juries tend to be sceptical of such testimony, federal prosecutors rarely rely solely on accomplices. Nevertheless, the fact that federal courts are more permissive than state courts in allowing uncorroborated testimony is viewed as a crucial advantage in the federal prosecution of organised crime because such testimony can provide a richly detailed context to a case (e.g., that a criminal organisation met at a particular location and that the witness was in a position to know about the types of criminal acts at issue) that can help make the case against a defendant compelling.

### Federal Sentencing Guidelines and plea bargaining

The Federal Sentencing Guidelines introduced in 1987 established a mechanism to prescribe sentences for federal crimes with judicial discretion narrowly restricted by the creation of sentencing 'ranges'. Although originally produced to address the absence of uniformity in the sentences of federal defendants, the guidelines have become 'a valuable tool, used by federal law enforcement authorities to turn targets and defendants into accomplice witnesses' (Jeffries and Gleeson, 1995). Before the guidelines it was difficult to 'turn' members of an organised criminal group because investigators were unable to make a 'persuasive plea offer' given the uncertainties about the reward an accomplice witness might receive for co-operating. With the Guidelines, however, a 'prospective co-operator' can be shown exactly where they will fall within the 'sentencing chart' if found guilty and that the only way out of the position on the chart is to co-operate with the government. The prosecution can then offer the individual the opportunity to plead guilty, typically to the most serious offence s/he has committed, and to testify for the government in exchange for a 'substantial assistance motion' (described by Bowman, 1999, as 'the most powerful prosecutorial tool in modern federal criminal law'). The court is also provided with a report on the nature and value of the co-operation rendered. This arrangement allows the prosecutor to argue to the jury that any leniency the witness receives will come from the court and therefore counter any suggestions by the defence that the accomplice's willingness to testify in exchange for leniency makes him/her an unreliable witness. As Jeffries and Gleeson argue, 'By creating a system in which

the prosecutor alone can make an accomplice witness eligible for leniency, but in which the terms of that leniency are determined afterward by the court, Congress has vastly strengthened the hands of federal prosecutors in dealing with organized crime'.

According to Bowman (1999) the Sentencing Guidelines have radically altered the plea bargaining environment in federal courts. For most defendants, virtually the only ground on which a departure from the severe sentences set out in the guidelines can be based is 'substantial assistance' to the government. Indeed, according to Bowman, not only have the Guidelines encouraged federal prosecutors to bargain for testimony, they have also changed the way criminal defendants think about co-operating (he quotes one defendant who claimed that "Before [the guidelines], nobody wanted a snitch jacket. Now everybody rats, man").

However, several concerns exist in the US about plea bargaining and 'substantial assistance' recommendations by federal prosecutors. In particular, critics of current practices argue that "buying" testimony is wrong because "testimony" purchased with promises of sentencing leniency present too great a risk of perjury and thus of wrongful convictions. Furthermore, creating an environment in which providing 'substantial assistance' is the main way informant witnesses get reduced sentences may generate a range of 'unfair results'. It risks the so-called 'co-operation paradox' whereby "kingpins" receive lower sentences than their underlings because the "kingpins" have more information to exchange for a 'substantial assistance' recommendation.

In response to these concerns, however, Bowman (1999) sets out a number of counter arguments. 'The true justification for exchanging leniency for co-operation', he contends, 'is a utilitarian argument from necessity - without accomplice information and testimony, many serious crimes, particularly complex crimes involving groups could not be solved or punished'. This is echoed by Ewing (2000) who argue that there are strong public policy interests in allowing bargaining for testimony:

*Many prosecutions depend heavily on the testimony of co-conspirators and accomplices as evidence against the defendant. Prohibiting prosecutors from entering into plea bargains in exchange for testimony would make it much more difficult to prosecute crimes, such as drug trafficking conspiracies, where there are few potential witnesses who were not involved in the criminal activities at some level. This reality provides a strong public policy justification for continuing to permit prosecutors to make plea agreements that exchange leniency for testimony.*

The US has both federal and state level witness immunity statutes which allow a witness with a valid Fifth Amendment privilege (i.e. the privilege that no person 'shall be compelled in any criminal case to be a witness against himself) to be compelled to testify by a court if the prosecution determines that the testimony is necessary and in the public interest. If the prosecutor makes such a determination, the witness is granted limited immunity which protects them from the use of their testimony as evidence against them in a criminal prosecution. The rationale given by the proponents of immunity statutes is this: 'the Fifth Amendment protects only compelled testimony that tends to incriminate, and therefore if a person is granted immunity from prosecution for his incriminating statements, the Fifth Amendment does not apply and that person may thus be compelled to testify' (Menza, 1999).

## The use of 'crown witnesses' in Europe

The use of criminal informants in pursuit of organised and serious crime is now well known across Europe (Tak, 1997). At present in many countries in Western Europe, police intelligence systems have developed a considerable capacity to identify and recruit criminal informants in the illicit or underground economies that feed organised crime. These capacities have been developed in the context of perceived failure to control these markets by



traditional law enforcement means. Informers who have been deployed in the criminal milieu may contribute useful information that directs other aspects of police investigations (such as suggestions about where to target other surveillance efforts through the use of tools such as telephone intercepts and financial monitoring). However, there is a current of opinion that the ability of these criminal informers to become 'crown witnesses' in the context of criminal trials has the greatest potential to impact upon organised crime.

## Historical background

The use of 'crown witnesses' has deep historical roots. According to Radzinowicz (1956) the legal figure of 'approvement' is an ancient idea in common law. As he explained it, under the rubric of 'approvement',

*an offender was allowed to confess both to the particular crime and to all the other treasons or felonies in which he had been either an agent or principal. He could then offer to name an accomplice and to prove his guilt. When the Court admitted his offer, which it had the power to refuse, the accused was put on trial: if he were acquitted, the approver was sentenced to death; but if convicted, the approver was pardoned.* (ibid, p. 44)

The use of the pardon for crown witnesses became a major instrument for bringing criminals to justice (ibid. p. 55). However, giving 'impunity for accomplices' was acknowledged to be fraught with moral ambiguity and challenged on effectiveness grounds, not least 'because the majority who were pardoned for having 'turned the King's evidence' did not, on release, lead an honest life but instead having got rid of the leader of the gang, stepped into his place' (ibid, p. 53-54).

In the 19<sup>th</sup> century, continental jurists in the classical tradition of Beccaria cautioned that those who are guilty of crimes cannot claim full credibility. When a witness makes a statement against an accomplice, and by doing so becomes eligible for a reduction of sentence, pardon or other privilege that the criminal justice system may give, reliance on any such statement is always questionable (Mittermaier, 1851). According to Peter Tak (1997) it was subsequent to the establishment of the modern police that the use of the crown witness 'nearly disappeared from the scene of criminal proceedings' (p. 4). One might speculate that the emphasis of the 'new police' on prevention, and especially in its British manifestation, the emphasis on high visibility police patrol, tended to de-emphasise the darker police arts of managing informants. Whatever the reasons for the hiatus in the use of serious criminal informants, it was only during the 1970s that the practice experienced a revival when, under the influence of political activism, unorthodox investigation methods and means to clear up crime were in demand. Since then the use of *pentiti-type* witnesses in cases of serious and organised crime, and, of course, terrorism has come increasingly to the fore in numerous European countries.

## The Italian experience

The Italian anti-Mafia trials that have taken place depended significantly on *pentiti* (crown witness) testimony. This testimony was facilitated by *premiati* (reward regulations). Such regulations pertain to four kinds of crime: terrorism, kidnapping with ransom aims, production of and dealing in drugs, and organised (Mafia) crime. *Premiali* regulations for all four types of crime are established along similar lines. The judge may decide not to sentence or to impose a less severe sentence in light of co-operation given to police. The conditions for the application of *premiati* regulations vary, but the main requirement is that the co-operation must be aimed at preventing or thwarting criminal offences or at supplying information which is crucial to the progress of an investigation (Tak, 1997, pp. 18-19).

The use of this approach in Italy began with the efforts against the Red Brigades, but mutated in the wake of the arrest and trial of Tommaso Buscetta in the United States in 1984 (Greer, 1995). Information provided by Buscetta, plus the evidence of one Salvatore Contorno led to the first 'maxi-trial' which involved 475 defendants which ended in December 1987, 22 months after it began with 338 convictions. By early 1989 only 60 of those convicted at the maxi-trial were still in prison,

In contrast to the lack of success against organised crime in Italy, enforcement efforts against terrorist cells bent on the 'subversion of the democratic order by violent means' met with evident success; at least for a time. According to Greer, (2001, p. 131-133) an important part of the explanation for the diminution of political/ideological terror in Italy after its inception in the late 1970s, has to do with the narrow social base that such terrorism sprung from. This stands in notable contrast to the more broadly rooted Mafia-related crime (and which, given its propensity to corrupt officials in the highest offices of the state and judiciary, can also be said to have a political dimension). Greer (2001, pp. 131-133) charted a series of temporary legal innovations that were made in the wake of the activities of the Red Brigades. These included:

- The crime of 'terrorism or subversion of the democratic order' (Law N. 191, 21 March 1978). The law contained statutes providing for new intelligence gathering provisions (including telephone surveillance) and extra police powers to detain suspects and conduct interviews without the presence of a lawyer.
- The Cossiga Act (Law N.15 of Feb. 15 1980) which made it an offence to join, promote, organise, or direct an association aimed at the subversion of the democratic order by violent means. Article 5 gave immunity from punishment for those who collaborated with the authorities in order to prevent crimes against the state, and who provided substantial evidence regarding conspiracies, the modus operandi of their crimes, and identification of conspirators.
- A temporary *pentiti* statute (Law N. 304 of May 29, 1982) offering immunity from prosecution and/or reductions of penalties to persons involved in terrorist activities providing that they had dissociated themselves from such activities, made full confessions and helped to reduce the impact of their wrong doing.
- An act which provided formal conditions for the reduction of penalties (Law N. 34 of Feb. 18, 1987) requiring dissociation, confession, repudiation and reformation, but not active co-operation in the judicial process.
- No legal instruments came into force (or, apparently, were considered) to provide *pentiti* with formal witness protection (Tak, 1997, p. 19).

Greer characterised the *pentiti* programme in the combat against terrorism in Italy as a success. This judgement was arrived at not only because of the number of arrests and successful prosecutions, but also because of the apparent diminution of such activity. It is therefore perhaps worth noting that in 1999, the reborn Red Brigades claimed responsibility for killing another political consultant, Professor Sergio D'Antona, in broad daylight on a street in Rome. While not on the same scale as in the 1970s, the rekindling of political violence was apparent to all, claiming the life of at least one police officer.

Greer's analysis of the contribution of *pentiti* strategies and associated witness protection to effective control of organised crime was less positive. In his estimation, the *pentiti* process was 'dogged by controversy and marked by peaks and troughs' (2001, p. 127). The controversies surrounding the credibility of witnesses and their motives, as well as a 'series of familiar political crises' cast doubt on the witness protection programme which had, by the end of the 1990s, more than a thousand *pentiti* under its wing. He was not able to provide any quantitative data that could show the impact of these crime control measures on organised crime and corruption in Italy. Nevertheless, in summing up his analysis, Greer observed that the new millennium has 'dawned in Italy, with the Mafia weakened, but not

defeated, and with the credibility of the *pentiti* as a legitimate and viable method of dealing with it in serious doubt' (ibid. p. 128).

According to Tak (1997)

*As the years have passed, it has become clear that the figure of the crown witness could be crucial to the fight against other forms of organised crime, if parallel legal and administrative measures were developed to do full justice to the role of the crown witness inside and outside the criminal procedure. The latest crown witness legislation is, therefore, part of a package of measures which have considerably strengthened their position in the criminal procedure. These measures also offer more certainty about the credibility of statements, provide the necessary protection against revenge attacks and produce broader acceptance of this figure by the judiciary and the public at large. These measures were urgently required when the reliability of crown witnesses in Mafia trials was questioned.* (p. 19)

This analysis provided a close view of the legal innovations surrounding the pentiti process, but did not seek to provide any measure of impact. Tak's overview reveals considerable trouble in co-ordinating the multi-agency efforts required in managing witness protection (p. 22). It would, perhaps do to note that this echoes Norris and Dunningham's analysis of inter-agency conflicts in the management of informants in the UK (2000). Italian Minister of Interior, Massimo Brutti, acknowledged the evident difficulties of managing witness protection in the Italian context in 2001. Brutti confirmed a series of botched witness protection cases reported in *La Repubblica* - some of which culminated in murder of protected witnesses - saying that the cases were representative but would not recur under a law passed in January of that year. He stated at that time that "Now there is a structure for witnesses and one for judicial collaborators. I do not deny there was a lot of confusion" (Carroll, 2001). Table 1.1 summaries this revised structure.

## The German experience

Like the Italian case, the use of state's witnesses (*staatszeugen*) in Germany - sometimes known as crown witnesses (*Kronzeuge*) - evolved out of earlier experiments in trials of those accused of terrorism (Greer, 1995). The prosecution case against the so-called Baader-Meinhof gang hinged upon crown witness testimony provided by an associate of the group, one Gerhard Muller. However, it was somewhat later, in the mid-1980s, that this type of evidence became systematically used in the trial process, and then in the context of Neo-nazi groups (Kolinsky, 1988). These were viewed as somewhat exceptional circumstances and when it was first mooted that these legal innovations be further adapted to address organised crime, legal scholars, the Bar and the judiciary declared themselves against (Tak, 1997, p. 12). Pursuant to the *Verbrechensbekämpfungsgesetz* of October 28, 1994 (BGB1 I p. 3186) provision was made for this type of witness testimony in cases involving participants in organised crime (Tak, 1997 p. 13). As Tak notes:

*The Explanatory Memorandum to the regulation goes into its extraordinary nature. The regulation violates the principle of legality which in Germany is the basis of prosecution, as well as the principle of the rule of law. More particularly, it touches on the principle of equal treatment and endangers the purpose of criminal administration of justice, namely the irrefutability of legal order (Unverbrüchlichkeit der Rechtsordnung). All this is, however, taken for granted with regard to strictly defined forms of organised crime because they constitute a very serious threat to society.* (Tak, 1997, p. 13)

Other scholars echoed this assessment criticising the new laws on the grounds that, very often, the evidence seemed to lack credibility, there was no corroboration requirement, the

approach was of doubtful efficacy and the legitimacy of the criminal justice system could be damaged by the appearance of a deal being struck with criminals (Vercher, 1992, p. 284). Given these grave doubts, the legal framework that has developed for witness protection, especially as it involves the use of undercover police methods and criminal informants, is highly circumscribed.<sup>1</sup> The most comprehensive digest of relevant legislation for Germany that is currently available was penned by the former Head of Division of Judicial System, Federal Ministry of Justice (Hilger, 2001). Drawing on this source, a number of points can be cited that are of particular relevance here. Section 68 of the Code of Criminal Procedure (StPO) provides for the anonymity of witnesses in cases where their safety is in question. But, exemption from stating one's identity does not release one from the duty to state in the main trial (when asked) in what capacity the observations were made. This is aimed specifically at persons acting in an undercover capacity.

- i. The fact that prosecuting authorities employed undercover methods may come to light during the trial, and if there is a compelling wish to avoid this 'such witnesses will have to be dispensed with' (Hilger, 2001, p. 100). Section 223 allows such witnesses to be questioned by the appointed judge via a video link. Section 247 allows that the accused can be removed from the courtroom 'if the fear exists that a co-accused or a witness will not tell the truth if questioned in the presence of the accused' (ibid. p. 100). In addition, it also allows for proceedings to be held *in camera*, and specifically states that the court has a duty to protect witnesses. Section 96 allows that 'the court may not require an authority to submit files or information if the highest service authority states that the disclosure . . . would be disadvantageous to the state' (ibid. p. 101) and that where it is necessary for the protection of the witness, their anonymity may be preserved, other individuals (police, public prosecutor, judge) who have questioned the witness during the investigation to provide evidence on a hearsay basis (ibid. p. 101). Sections 110b and 110d allow for the new/secret identities of undercover officers in perpetuity. Witness Protection Act (Zeugenschutzgesetz) (Sections 58a, 168e and 255a), allows for evidence to be provided via video-link or videotape. In its decision to allow for this the court is required to balance (i) the duty to effectively detect and control crime in a manner consistent with the principles of justice; (ii) respect the interest of the accused, in particular their right to ask comprehensive questions of the witness; and, (iii) the duty to protect witnesses.

## The Dutch experience

The Dutch experience of undercover policing methods was substantially coloured by the expose provided by the Parliamentary Committee of Enquiry chaired by Maarten van Traa (den Boer, 1997). Caution about the use of these methods, and efforts to ensure that future use be circumscribed by the letter of the law need to be read in this light (Tak, 1997).

The Van Traa enquiry examined the methods used by the police against drug traffickers. It shed light on several cases in which either the police, or informers employed by police, infiltrated drug rings and, in so doing, committed crimes just as serious as those of the criminals they were mixing with. According to the findings, the Haarlem police had taken 'unacceptable' initiatives in order to infiltrate international drug trafficking networks. In

<sup>1</sup> The anxiety about the use of informers and police undercover methods in Germany during this period was probably heightened because of various scandals. In the mid-1990s the German press reported that a secret agent and an interpreter with the BND had been involved in two cases of entrapment, one concerning Russian plutonium and the other Colombian cocaine. The plutonium scam was shown to be a set-up which enabled the federal government to mount an international propaganda campaign about the Russian Mafia peril and the need to bolster the authority of President Boris Yeltsin at the height of the war in Chechnya. Above all, it enabled the BND to justify the large secret service budget even though the Cold War had ended. The Colombian cocaine plot was intended to trap traffickers bringing 330 kg of the drug into Germany. In the end it came to nothing, but nobody knows whether the cocaine did get into the country or not. The war between the Bavarian police and the federal secret services was at the bottom of the leaks to the press, especially to the monthly magazine *Stern*. The magazine reported that the mole Rafael "Rafa" Ferréiras, unhappy with the amount he was paid for the plutonium scam, pulled out of the cocaine deal.

particular two 'supercops', Klaas Langendoen and Joost van Vondel, whom the press nicknamed the 'Royal Couple', were controlling monitored deliveries in order to facilitate the infiltration of criminal organisations using criminal informants. These individuals imported large amounts of drugs, putatively in order to gain the confidence of organised criminals and identify people at the top of the criminal world, a practice known as the 'Delta Method'. These criminal informants were successful because police closed their eyes to the CID-sponsored operations. Thus protected, the police undercover operation rivalled the criminal very underworld they were supposed to infiltrate and undermine both in terms of volume and profits (EIPA, 1996). However, it seems also that many of the informers, and at least some of the police involved, were personally profiting from the drug smuggling operation.

The scandals that ensued had an international dimension, since they involved police agencies outside of the Netherlands, including German agents of the *Bundeskriminalamt* (BKA) and US agents from the Drugs Enforcement Administration (DEA), who avoided giving evidence to the Van Traa enquiry under cover of diplomatic immunity. In the face of the refusal of America's DEA and Germany's BKA to provide information on the level of their involvement in the operation, the Dutch parliament dropped this aspect of the enquiry.

The so-called IRT scandal created a strong awareness of how badly things could go wrong with undercover police operations, and how dangerous the use of criminal informants could be. Subsequent legal innovations in this field have thus been quite cautious and closely circumscribed.

## The Irish experience: Northern Ireland

The experience of Northern Ireland is arguably more fraught than any of the national experiences discussed previously in this report. The use of the 'supergrass' - that is 'state's witnesses' - were introduced there in the 1980s. This was part of a series of initiatives intended to address the problem of political violence (Bonner, 1993; Donohue, 2001; Gearty, 1991; Greer, 1995, 2001; Hogan and Walker, 1998). The adoption of the supergrass came on the back of refinements in counter-terrorist intelligence-gathering. Beginning in 1979, there was a serious attempt by the authorities in Northern Ireland to rationalise intelligence acquisition using human sources and the idea of 'turning' criminal or terrorist informants and persuading them to give Queen's evidence was a natural extension of these developments (Greer, 2001, p. 129). In the middle years of the 1980s some six hundred suspects were placed under arrest as a consequence of evidence supplied by about twenty-five supergrasses, who had been offered immunity from prosecution.<sup>2</sup> One key issue was that of corroboration, since some individuals were being convicted in Diplock trials on the strength of criminal informant evidence alone. In his analysis of the arrival and departure of the 'supergrass process,' Greer observed that it:

*turned out to be merely a fresh means for identifying defendants, obtaining confessions, and ensuring that certain key suspects were remanded in custody, which in a handful of cases, lasted for up to four years as those concerned were shunted from one supergrass to another before eventually being acquitted or having their convictions quashed.* (ibid. p. 130)

Issues surrounding the lack of corroboration of supergrass testimony cannot be viewed in isolation. In Diplock trials, where there is no jury and only the judge to decide on the facts, the traditional rule that the arbiter of facts must be warned about the dangers of drawing inferences from uncorroborated testimony "in effect merely requires the trial judge to warn himself to take utmost care in assessing the evidence and drawing inferences from it" (Bonner, 1993, p. 184). To close observers, the use of the Diplock Court system and the use

<sup>2</sup> At least in the early stages. Public criticism was substantial and full immunity was later replaced by the offer of reduced sentences and the promise of new identities after serving them.

of uncorroborated testimony from people who were essentially involved in the criminal-terrorist nexus brought the British system of justice into disrepute. Concerns were raised in the House of Commons about this to the extent that "When we sit in and observe trials in [other] countries, our position and the respect in which British law is held in those countries will be severely diminished and hampered" (quoted in Donohue, 2001, p. 348).

It may seem odd that, in the face of the danger that members of the public faced from paramilitary violence and terrorist activity, that these legal innovations were thought to bring British law into disrepute. However, as Gearty (1991) has argued, in the grey area that exists somewhere between the use of political terror and the response of a strong state to suppress it, there lies the issue of legitimacy. Legitimacy is undermined when the balance is wrong. Legitimacy is weak when carefully calculated and restrained subversion meets draconian and secretive state action, but it is emboldened when hardened terrorism meets a 'culture of lawfulness' (Godson, 2003), wherein state action is transparent, rule-governed, upright and dispassionate. The question of legitimacy is not unconnected to the more practical issue of effectiveness. Greer argues that the effectiveness of the supergrass system in Northern Ireland was "at best marginal and short-lived" (Greer, 2001, p. 130). He suggested that the locking up of large numbers of active members of paramilitaries on supergrass evidence may have had some effect on the terrorist murder rate (and, by extension, on other aspects of paramilitary action), but he went on to observe that the diminution of paramilitary violence was equally explicable as the consequence of the political rise of Sinn Fein (ibid. p. 130) and by the changing tactics of paramilitary groups. Commenting on the problems the 'supergrass years' created for law enforcement in Northern Ireland, Ellison and Smyth observe that:

*The legal system was called into further disrepute and the integrity of the judiciary questioned as the sight of members of the legal profession earning vast fees by engaging in supergrass trials was not a pleasant one . . . the RUC had once again embarked upon a high-risk strategy to defeat the IRA with no appreciable success apart from damaging their own battered reputation (Ellison and Smyth. (2000, pp. 113-114)*

Bonner (1993) is less condemnatory, arguing that the question of effectiveness is 'highly complex and controversial' and 'while anti-terrorist measures may play some role', the Republican pursuit of an electoral strategy may also have had some effect. His conclusion is "that anti-terrorist measures [he examines a raft of them including economic, legal and political ones], are likely to be with us for the foreseeable future and must continue to be strictly scrutinised" (p. 200).

## The Irish experience: The Republic of Ireland

The overspill in violence from the civil conflict in Northern Ireland to the Irish Republic has had important implications for how the Irish Government tackles organised crime. In particular, there is evidence of the increasing use of the Special Criminal Court for trying organised crime cases. Established under section 38.3 of the Irish Constitution 'for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order', the Special Criminal Court comprises three judges and no jury. The main reason for its current phase of operation, which began in 1972, was a concern that juries in cases connected with paramilitary activities were likely to be the subject of intimidation. Its continuation reflects the Irish Government's belief that organised crime poses a threat to juries equivalent to that posed by paramilitaries. This has, however, proved controversial. In a recent report of the Committee set up to review the Offences Against the State Acts and other matters (Department of Justice, Equality and Law Reform, 2002), a majority of the

Committee supported the use of the Special Criminal Court in organised crime cases given the potential threat to the administration of justice posed by organised criminals. The Committee concurred with the view put forward by Charleton and McDermott that given 'The extent to which [organised crime] can grow and dominate society, the arrogance of those involved with their gangs and their determination not to abide by any rules of decency and standards makes ... a reasonable case for the measured use of multi-judge, non-jury courts on an emergency basis' (Charleton and McDermott, 2000, p.141-142). More generally given that the Special Criminal Court has the same rules of evidence and rights of appeal as other criminal courts in Ireland and is comparable to other standard, non-jury court systems in other countries, its use in organised crime cases is viewed as an acceptable measure (Davis, 2003).

A minority of the review Committee, dissented from the view that using Special Criminal Courts was acceptable in organised crime cases. They drew attention to other common law jurisdictions, like the United States, England and Australia, where the risks of jury intimidation in organised crime cases have not provided grounds for non-jury trials in a Special Criminal Court. Further, there are other measures which could be employed to address the risk of jury intimidation, including the use of anonymous juries, providing jury protection during a trial, and allowing a jury to observe the trial remotely via a video link. The minority report of the Committee concludes that the case in favour of the Special Criminal Court has not been made and that concerns about jury intimidation can be addressed in other ways: 'if the jury are anonymous and at a secure and secret location, the risk of effective jury intimidation would not be very great' (Department of Justice, Equality and Law Reform, 2002, para.9.95). Given, too, that it is at the discretion of the Director of Public Prosecutions (DPP) as to whether a person is tried before the Special Criminal Court and that the DPP's decision cannot be effectively reviewed, the United Nations Human Rights Committee have been critical of the mechanisms for referring cases to the Court. Specifically, the UN have been concerned that, 'The law establishing the Special Criminal Court does not specify clearly the cases which are to be assigned to that Court but leaves it to the broadly defined discretion of the Director of Public Prosecutions' (Department of Justice, Equality and Law Reform, 2002, para.9.61). In response to this criticism, however, the Committee reviewing the Offences against the state Acts recommends that any decisions by the DPP to send an accused to trial to the Court should be subject to 'a positive review mechanism' (ibid., para. 9.64).

## Witness compellability

Although the extensive literature search yielded no materials on witness compellability in organised crime investigations, there is some discussion in the academic literature on the significance of compellability in the context of cases of domestic violence in the UK and US (Cretney and Davis, 1997; Morley and Mullender, 1992). While there are, of course, fundamental differences between cases involving domestic violence and those involving organised crime, it is possible to distil from the literature a set of general issues about the use of compellability that are relevant to informing debate about the relative merits of witness compellability in organised crime investigations. For example, both rely on the testimony of someone involved with the offender, that is an accomplice in one case and a spouse or partner in the other<sup>3</sup>. These issues are set out in Table 3.2.

It should be clear from Table 3.2 that the arguments for and against the compellability of witnesses are finely balanced. As Cretney and Davis conclude in the context of their discussion of domestic violence but which might equally apply to organised crime cases,

<sup>3</sup> Hobbs (1997) has noted that familial and inter-personal relationships are often a key aspect of organised and serious crime groups. However, it seems unlikely that the witness-defendant relationship will commonly have the same degree of intensity and complexity (often involving children, shared finances and property) evident in domestic violence relationships. This may make it relatively easier to manage a witness in organised crime cases. Conversely, a witness in an organised crime case may have more to fear than retaliation from the defendant, as there may be a wider network of criminal associates who will seek to intimidate or punish the witness for testifying.

'While compellability may be acceptable in some cases it will never be acceptable in all; while it may be successful in some cases it will never be successful in all' (p.82). One further point to emphasise is that while witness compellability might be considered a necessary measure in organised crime investigations, compulsion must be accompanied by adequate protection and support. As Victim Support stated in their evidence to a UK Home Affairs committee, it is 'against natural justice to compel a witness who is thereby endangered without offering protection and support' (quoted in Cretney and Davis, 1997, p.79).

**Table 3.2: Arguments for and against the compellability of witnesses**

<b>Humanitarian considerations</b>	
For	Against
Compellability represents the <i>real</i> interests of the complainant by securing punishment and deterrence of the accused	Removal of choice is a grave infringement of civil liberties
Compellability may reduce intimidation by the accused and their associates by removing sense of responsibility of the witness for the prosecution	Compellability unlikely to deflect a <i>perception</i> that a witness has chosen to cooperate with the prosecuting authorities so putting them at risk
<b>Pragmatic considerations</b>	
For	Against
Reduce the reluctance among criminal justice agencies to prosecute	Witness may become 'hostile' to the prosecution and give evidence which assists the defense or witness may refuse to give evidence at all and risk being punished for contempt while the alleged offender is discharged. In both cases the chances of achieving conviction by compelled evidence may be low
Witness may give evidence apparently willingly, relieved that the decision to do so is not in their hands	
<b>Symbolic considerations</b>	
For	Against
Compellability sends a powerful signal that society views those crimes where compellability is used as particularly serious and that offenders will not escape the justice system	Compellability may send a message about the weakness and fears of potential witnesses

Adapted from Cretney and Davis (1997)



## 4. Discussion

Emerging from this international review of the literature on witness protection programmes and crown witnesses in tackling organised crime are a set of overlapping issues which suggest the need for caution in the development and use of these measures. This concluding section focuses on the 'costs' and 'effectiveness', and the legitimacy and accountability of different measures for facilitating witness co-operation.

### "Costs' and 'effectiveness'

Despite the widespread use of witness protection programmes and informants to tackle organised crime, there is remarkably little research evaluating either the 'costs' or the 'effectiveness' of these measures. Terms like 'costs' and 'effectiveness' are, of course, open to a wide variety of interpretations and this section considers a range of substantive and conceptual evidence to illustrate some of the issues raised in trying to evaluate the use of witness protection and informants.

There is some evidence relating to the financial costs of witness protection programmes in different parts of the world:

- In the US, WITSEC expenditure on witnesses in the program has gone from just over \$17million (£10.5m) in 1997 to \$27.5 million (£17m) in 2001. In 2000, the expenditure was \$24million (£15m) and the program contained 7137 primary witnesses and 9091 family members making a total of 16,228 participants (United States Marshals, 2001).
- In one European country, the costs (as of 1999) varied between US\$80,000 (c.£50,000) and US\$160,000 (c.£100,000) per participant; in another European country the average cost for a witness and family of three people was US\$80,000 (£50,000) a year and the average duration of protection was 5 years making total cost US\$400,000 (c.£250,000) (Heijden, 2001).
- In the UK the average costs to protect a witness and their family has been estimated at between £10,000 and £50,000 but one study found the average cost to be nearer £4,000 (Fyfe, 2001).
- In Australia, the total annual expenditure of the National Witness Protection Program has ranged from AUS\$1,729,500 (c.£670,000) during its first full year of operation (in 1995/6) to a low of AUS\$668, 289 (c.£260,000) in 1998/99. The most recent figures for 2001/02, during which there were 12 witness protection operations providing assistance to 26 people, show a total expenditure of AUS\$773,948 (c.£300,000). For this year, this gives an average cost, including the witness protection service, of £11,500 per participant (Australian Federal Police, 2002).
- In Italy the Central Protection Service, which has 700 employees and protects just over 5000 people (1100 are witnesses and the remainder members of their families) has a budget of approximately 200 billion Lire a year (c. £72 million), which is equivalent to £14,500 per participant (Italian Ministry of the Interior, 2001).

In term of the 'effectiveness' of witness protection programmes, the available evidence is a mix of anecdotal observations (largely from self-interested practitioners) and conviction data. In the US, the federal government has declared that 'The Federal Witness Protection Program has become so essential that it is difficult to imagine federal law enforcement without it' (quoted in Earley and Schur, 2002, p.228) while Greer, drawing largely on newspaper reportage, claims that WITSEC 'had hit the Italian Mafia hard' (2001, p. 126). Similar claims have been made in Europe. According to Heijden, witness protection programmes in Germany, Italy and the Netherlands 'are highly effective in the sense that not a single

participant nor a relative of a protected witness has become the victim of an attack by the source of the threat' (p.6). Echoing the views of Earley and Schur in the US, Heijden (2001) goes on to note, 'The major effect of witness protection programmes is the conviction of numerous leaders and other important members of highly organised criminal groups on the basis of testimonies that otherwise would not have been given'. Interestingly, however, other researchers have argued that the success in tackling organised crime in places like New York, has been "accomplished by a shift of reliance away from criminal enforcement (usually followed by the replacement of one jailed *Mafioso* with another) and toward a regulatory strategy" which focused on denying business licences to mob controlled firms (Braithwaite, 2000, p. 229).

In addition to this anecdotal evidence, there are a handful of studies that attempt to demonstrate the efficacy of witness protection schemes in terms of convictions:

- In the US, the Government Accounting Office reviewed cases that were initiated via protected witness testimony between 1979-1980. On this period, 1,283 defendants, mainly involved in organised crime, were charged with crimes from the testimony of 220 protected witnesses resulting in 965 (75%) of the defendants being found guilty (Montanino, 1990).
- In South Africa between January and June 2002, there were 45 cases involving 49 protected witnesses, resulting in 37 convictions (of which 19 were life terms), there were six acquittals, and three cases were still awaiting trial/judgement (Adam, 2002).

An important issue in interpreting any conviction data in comparative perspective relates to differences in the legal systems between countries. In Italy, for example, the minimum requirements of evidence are less in cases in which the defendant is accused of organised crime. Furthermore, in such cases the defendant can be convicted on the basis of the testimonies of two co-defendants who are collaborating with justice, as long as there is some material evidence as well. However, recent concerns about the validity of the statements of collaborators has led to a new law which requires collaborators to be isolated from other witnesses and to declare everything they know about a criminal groups and its activities in a limited time period (Heijden, 2001, p.2).

The effectiveness of witness protection measures also needs to be viewed from three other perspectives. First, relocation programmes represent an essentially situational approach to dealing with the problem of witness intimidation and are focused on the management and manipulation of the environment to reduce the risk and opportunities for intimidation. Like other situational measures, witness protection programmes are therefore vulnerable to the criticism that they displace rather than tackle the problems they seek to address by shifting the target of intimidation to the families and friends of witnesses or even to jurors. Moreover, witness protection programmes clearly deal with the symptoms rather than the causes of intimidation. They are concerned with 'risk minimisation' not the reasons behind witness intimidation. If progress is to be made in terms of tackling the causes of intimidation then it is vital to explore the possibility of so-called 'social', rather than situational, approaches to the problem of crime by addressing some of the underlying reasons that lead to witness intimidation.

Second, this situational perspective is important because it means that the success or effectiveness of witness protection programmes is viewed largely in terms of the physical security of the witness and their participation in the legal process. Indeed, as indicated above, one measure of the success of these programmes is whether any witness has been physically harmed or killed while under protection. Yet for relocated witnesses, and other programme participants, their physical security is a necessary but insufficient condition for their sense of social and psychological well-being. As studies focusing on the experiences of those relocated via these programmes graphically illustrate, participants experience chronic feelings of anxiety and insecurity, causing extreme mental distress. Indeed, there is a tragic

irony that the above average suicide rate for protected witnesses revealed in the US means that it is often their own anxieties that lead them to endanger their physical safety (Fyfe and McKay, 2000a and 2000b; Koedam, 1993).

Third, while some have argued that witness protection and immunity for criminal informants "represents an exit strategy for career criminals" and that programmes such as WITSEC "provides the criminal with a place in legitimate society" (Kelly, Scharzberg and Chin, 1994, p. 501), the empirical evidence is not so unequivocal. Citing data from the US General Accounting Office (GAO), Albanese (1996) observed that approximately 21 percent of protected witnesses were arrested within two years of being put on the programme (p. 195). In one notorious instance, the US federal government was sued by a woman after her brother was killed by a 'protected witness' relocated to her city. It is not surprising to find that career criminals are recidivists and the 20 percent figure suggests that witness protection and immunity from criminal informants is a risky strategy. Moreover, given the reputation that many professional criminals have for violence (Hobbs, 1995), it should be considered a high-risk strategy.

The difficulties of evaluating the 'costs' and 'effectiveness' of witness protection programmes also apply to crown witnesses. Writing about the UK, Maguire notes that an Audit Commission report (Audit Commission, 1993) 'confidently concluded that the systematic use of informants was one of the most cost-effective methods of clearing up crime' but that it 'had little good evidence for this claim' (Maguire, 2000, p. 330). Another UK perspective on the effectiveness of informants is provided by Innes (2002) who notes that working police officers are somewhat dubious about the efficacy of informant-sourced information characterising it as 'too unreliable'. He also notes that 'particular reservations were expressed about a number of informants who it was suspected were participating in serious criminal activity' (ibid. p. 378). He characterised the relationship between criminal informants as a 'Faustian pact' (ibid. p. 376) and argued that 'once one progresses beyond the somewhat naive and simplistic cost-benefit analysis upon which the Audit Commission conclusions are based' the utility of such tactics become questionable (see also: Morgan and Newburn, 1997). In particular, 'a host of other economic and non-economic costs relating to the recruitment, cultivation, and running of an informant become apparent' (ibid. p. 378). In his view, the heavy costs accrued against the legitimacy of the police and the criminal process must be carefully weighed (see also, Innes, 2003). Similar conclusions are reached by Dunningham and Norris (1996a, 1996b). They argue that the claims made about the cost-effectiveness of informers are 'highly dubious' and that while the police use of informers has been articulated in government policy-making circles as having few negative aspects, in fact 'negative consequences abound' (ibid, p. 407). According to them:

*...crime is facilitated as well as repressed; criminals are licensed to commit crime rather than apprehended for their violations; police rule bending is often organisationally condoned rather than condemned; police morale is sapped as well as boosted; relationships with colleagues are based on distrust and secrecy rather than honesty and openness; the courts are deceived, defendants misled, and in the end justice is as likely to be undermined rather than promoted.* (ibid. p. 407)

## Legitimacy and accountability

### General concerns

A second set of issues centres on concerns about the legitimacy and accountability of the use of witness protection programmes, plea bargaining and witness immunity statutes, and the use of crown witnesses. In the US several commentators have expressed their concerns about the 'intrinsic morality and fairness to the public' of WITSEC:

*If witness testimony is the fundamental weapon in the fight against organised crime, is protection and relocation of those witnesses through concerted*

*government-supported subterfuge the most effective method to employ that weapon? Are there 'reasonable alternatives to carry out the government's duty of protection that do not involve purposeful misrepresentation, excessive expenditures, and interference in the lives of innocent third parties?'* (Lawson, 1992, p. 1455).

Indeed, Lawson goes on to argue that while the US government should continue to improve the program, there must also be serious consideration of viable alternatives to WITSEC in order 'to ensure the proper balance between the public interest in fighting organised crime and the interest of the public in protection from deceit and violence perpetrated by participants in the government's Witness Protection Program' (ibid., p. 1459). The possible alternatives to WITSEC Lawson identifies are:

- Independent relocation and protection arrangements: this would involve a witness providing testimony in exchange for a lump-sum payment after which a witness would be required to make his or her own protection arrangements. One advantage of this approach, Lawson argues, is that 'it disentangles the government from the web of formal misrepresentation and manipulation that characterises the current Witness Protection Program' (ibid., p.1457). Although there might be concerns about the safety of witnesses, Lawson claims there is evidence that fears about the risks of retributive physical harm have been exaggerated.
- Special Protective Incarceration: the suggestion here is to make use of a network of safe houses in order 'to reduce the cost both in terms of financial expenditures as well as in terms of the potential human cost occasioned by infiltrating former criminals back into society'. Another element to this would be to require witnesses who have committed crime to serve reduced sentences prior to entering the protection programme.
- Establishment of an independent review board to oversee and/or make recommendations concerning the acceptability of a witness for the protection programme. The intention here is to eliminate 'any of the lingering government bias in favour of offering protection to "important" witnesses without regard to their potential for success' in the protection programme.

In relation to witness immunity, several arguments have been advanced in the US against witness immunity, with Menza (1999) describing it as 'unconstitutional, unfair and unconscionable'. The objections Menza raises to witness immunity laws include:

- Witness immunity undermines the principle of equal protection under the law: Menza argues that witness immunity violates that Equal Protection Clause of the Fourteenth Amendment (which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws") by allowing unequal enforcement of the laws. For example, a person who has committed a murder might be granted immunity if s/he agreed to testify against a person who the prosecutor believes is a 'Mafia boss', and therefore, in the prosecutor's opinion, is more important to convict. The concern is that a prosecutor has wide discretion in deciding whom to prosecute and to whom to grant immunity but is not required to explain his/her immunity decisions to a court and that no standard exists for selection in immunity cases other than a general assertion that it is 'in the interests of justice'. With no standards to guide a prosecutor in the exercise of his/her discretion to grant immunity and no judicial oversight to restrain it, there is, Menza contends, great potential for abuse.
- Witness immunity might be seen as a 'bribe': in 1998, in a judgement that 'sent shock waves through the national criminal justice community' (Bowman, 1999), a panel of judges declared in the case of the United States against Singleton that the granting of leniency to a co-operating witness constituted a bribe and drew attention to the US Criminal Code which prohibits the giving, offering or promising anything of value to a witness for-or because of-his/her testimony (Hollis, 2000; Johnston, 1999). In its judgement the court stated, 'If justice is perverted when a criminal defendant seeks to

buy testimony from a witness, it is no less perverted when the government does so'. Although this judgement was quickly over-ruled on the basis that the federal bribery statute does not apply to the government and that discontinuing the pervasive practice of buying testimony for leniency would jeopardise law enforcement, Menza argues that the use of offers of leniency or immunity in exchange for testimony may still undermine public confidence in the legal system.

- Witness immunity may encourage corruption: Menza also contends that immunity laws may corrupt by encouraging people to give false testimony. 'Does one really believe', Menza asks, 'that a person whom the prosecutor has accused of, for example, nineteen murders, would not say anything, true or untrue, on the witness stand if that "anything" would relieve him or her of appropriate penalties... for those crimes? ". In support of this position, Menza quotes the Supreme Court which stated that 'To think that criminals will lie to save their fellows but not to obtain favours from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large'.

In terms of 'crown witnesses', studies in the United States by academic lawyers tend to emphasise the moral hazards of police use of informants giving state's evidence (e.g. Schreiber, 2001; Zimmerman, 1994). These studies catalogue the many instances where federal law enforcement agencies and prosecutors offices in the United States have engaged in questionable, unethical and illegal conduct involving criminal informants. They criticise curative suggestions from law enforcement such as the issuance of new guidelines, training, lists of do's and don'ts, and anti-corruption investigations as being unproductive of meaningful results. They also offer considerable criticism of attempts to curtail misuse of informants in the trial process (which happen, very often, with the collusion of prosecuting attorneys). This tack on reform suggests that expanded defence cross-examinations of informants, prior judicial review of informant use, and expansion of *habeas corpus* relief for those convicted with perjured testimony would provide sufficient safeguards. According to its critics, this rights-based approach maintains the assumption that the basic informant-handler relationship is not problematic. While acknowledging that the rights-based approach might contribute to identifying violations of specific rights resulting from the mishandling or misconduct of informants in specific cases, they argue that, absent is a thorough understanding of the moral hazards that infuse the informant-handler relationship and this approach fails at a systemic level. They conclude that, without an effective deterrent, informant mishandling and misconduct are destined to continue.

Similarly, Schreiber (2001) notes that the anonymity that confidential informants enjoy presents some of the most vexing issues in law enforcement. She draws attention to the criticisms that can be made with regard to the role that criminal informants may play in the instigation of criminal activity, their questionable motivations for providing information, and their credibility as witnesses. Zimmerman, (1994) cites cases where a multitude of benefits (including monetary payments, immunity from prosecution, and the anonymity that placement on a witness protection programme provides) produces ample motives for giving detailed information 'regardless of the truth'. In concluding his exhaustive analysis of the moral hazards that pertain, Zimmerman argues that the key to stopping the abuses of the informant relationship is to 'apply a rebuttable presumption that informant conduct is state action and action under the color of law'. According to his analysis, this will 'instil responsibility in law enforcement agencies for their decision to use informants' and will 'have a significant impact on how courts view informants' since it creates a linkage between government and informant that will force law enforcement to take responsibility for the use of informants'.

### The European Convention on Human Rights

In assessing the legitimacy of measures to facilitate witness co-operation it is also important to acknowledge the importance of the European Convention on Human Rights (ECHR) and specifically Article 6 concerning the guarantee of a fair trial. According to Tak (1997), in a

series of cases that have come before the European Commission on Human Rights relating to the use of crown witnesses in the UK, Italy and the Netherlands, the Commission has assumed that using evidence from accomplices in exchange for a promise of impunity could be in breach of Article 6. However, in the specific cases considered this has not been an issue for a combination of reasons:

- the Prosecution Service has been open with regard to a deal with witnesses from the beginning;
- the statements of witnesses were corroborated by other evidence;
- the defence had been able to interrogate the crown witness in order to establish their credibility; and,
- the courts had thoroughly examined the evidence.

Tak concludes that the ECHR 'has given the green light to the institution of the crown witness if only it is used openly and carefully' (1997, p.26).

In addition, concerns have been raised in the UK about the way in which protective measures designed to assist vulnerable and intimidated witnesses give evidence (such as the use of video-links or screens during a trial) might breach the Convention's guarantee of a fair trial and, in particular, the right of the defendant to examine witnesses against him under Article 6(3)d. According to Hoyano (2001) the crux of the problem is this:

*The common law adversarial trial model, unlike the inquisitorial trial systems familiar to most judges on the European Court of Human Rights places primacy on the rights of the defendant, as the only person in jeopardy of punishment in the trial. Therefore it is intrinsically incompatible with that model to balance those rights against the interests of other participants in the criminal justice system, and specifically witnesses. It is feared that special protective measures for witnesses will inevitably collide with the distinctive defendant-centred conception of justice.*

In assessing these concerns, however, Hoyano makes two important observations. First, in relation to the admissibility of evidence and the mode of taking and assessing evidence, the stance of the European Court is that these are matters for regulation under national law and its remit is confined to considering whether the trial as a whole was fair. Second, although Article 6 does not explicitly require the interests of witnesses called upon to testify to be taken into consideration, the interests of witnesses and victims are in principle covered by other substantive provisions of the convention, given that their life, liberty or security of person may be at stake. States are therefore expected to organise their criminal proceedings in such a way that those interests are not 'unjustifiably imperilled'. Thus the principles of a fair trial require that in appropriate cases the interests of the defence are balanced against those of witnesses called upon to testify. Hoyano therefore concludes that measures designed to assist vulnerable and intimidated witnesses being introduced into UK courts, like the physical separation of the accused from the witness, the use of screens and live video-links for cross-examination are ECHR-compliant. 'Affording witnesses some protection by mitigating the rigours of the orthodox adversarial trial does not', she observes, 'necessarily mean that one is hollowing out the defendant's rights'.

### Accountability

The use of witness protection programmes and informants also raises important issues about accountability. In terms of witness protection there are clearly major differences between countries in the ways in which the operation of witness protection programmes can be held to account. As section three of this report has shown, in some countries (such as the US and

those included in Tables 1.1 and 1.2) witness protection arrangements are formally accountable in law, whereas in other countries (such as the UK), there are no specific legislative provisions covering witness protection. Indeed, in the UK the government specifically rejected the need for a legal framework for witness protection on the basis that informal arrangements are working satisfactorily (Home Office, 1998). Other countries, however, have moved to formalise existing informal arrangements. In Canada, a Witness Protection Program Act was passed in 1996, twelve years after the establishment of a Witness Protection Program. According to the Solicitor General, the intention behind the Act is to ensure the program can:

*operate more openly and effectively by establishing a solid legislative and regulatory foundation for the program. ... The proposed changes will help ensure that both applicants who enter the program and the RCMP, who operate the program, have a clear understanding of their rights and obligations, and the extent and scope of the benefits and protection to be provided. This should go a long way to eliminating any potential misunderstandings between the RCMP and protected individuals.*

*(Solicitor General, 1996)*

Several countries also require reports to be published on the operation of their witness protection programmes. In Canada and Australia, these are annual reports which must be submitted by the chief of the federal police forces to their respective parliaments; in the US, the Office of Enforcement Operations is required to submit a quarterly report to the Deputy Attorney General detailing the results of the testimony provided by relocated witnesses. There is also a question of how participants on witness protection programmes hold those operating the programmes to account given several high profile examples in the US and elsewhere of witnesses claiming they were let down by those protecting them (see Earley and Schur, 2002).

Accountability has also emerged as an important issue in the police use of informants. For South (2001), 'one of the key unresolved issues ... in relation to accountability and justice is the tension between the need for transparency *versus* dispute over the disclosure of evidence in a court trial' (p. 76). He argues further that:

*This generally hinges on the arguments that, on the one hand, withholding of prosecution evidence from the defence can evidently lead to miscarriages of justice, versus the proposition that such disclosure would lead to the identification of the informer and place them in danger. This is a fundamental aspect of the overall problem of accountability. On the one hand, justice and the courts might reasonably expect that evidence submitted be open to further questioning; on the other hand, courts are also likely to accept the arguments of prosecution and police that sources must be protected 'in the public interest'. In various jurisdictions, including the UK, there have been recent initiatives to try to resolve these tensions. Nonetheless, the problem remains.* (ibid. p. 77)

## Conclusion

*Without witnesses, the rudiments of prosecution, such as identifying the accused and establishing the requisite nexus between the accused and the crime, would become insurmountable obstacles to conviction, and the criminal justice system would cease to function.*

*(Harris, 1991, p. 1285)*

Given that the evidence provided by witnesses is vital to the effective investigation of crime and in building a case against the accused, facilitating witness co-operation is a key objective of all criminal justice systems. In the context of organised crime, however, the serious problems posed by witness intimidation and the importance of accomplice testimony provided by 'crown witnesses' make the issue of witness co-operation particularly acute. In recent years, however, an increasing number of countries have introduced measures allowing a witness-centred approach to develop to the investigation and prosecution of organised crime. As this report has illustrated, there are significant variations between countries in terms of when and what types of measures they have introduced, partly reflecting differences in the scale and nature of the organised crime problem they face and partly linked to differences in the legal traditions and environments of different countries. In the United States, for example, measures like witness protection and plea bargaining are well established; France, by contrast, is only now considering introducing plea bargaining but in the face of strong opposition from magistrates and lawyers who have denounced it as a 'decline in the rights of the defence and the presumption of innocence, and the ... marginalization of the function of judges in favour of ever more powerful prosecutors' (Tagliabue, 2003, p.A14). The measures discussed in this report also vary considerably in terms of their spatial and temporal scope and in terms of the range of individuals and agencies involved. Plea bargaining and discussions of witness immunity are, for example, typically focused around the trial phase of the criminal justice process and involve a narrow range of actors, such as judges, prosecutors and defence teams. Witness protection arrangements, by contrast, are normally introduced early on in an investigation, typically provide long-term support in a variety of different locations, and involve a wide range of agencies both within and outside the criminal justice system. Despite these differences between the various measures considered here, however, there clearly needs to be a degree of integration between them if they are to be effective. Offers of witness immunity or compelling individuals to testify may only be successful if there are arrangements to provide witnesses with long-term protection.

The increasing development and use of different measures to facilitate witness co-operation in organised crime investigations also raises key questions about how to measure the 'success' and 'effectiveness' of these approaches. The evidence-base on which to judge their efficacy, however, is very weak and there remains a real need for empirical research assessing the application of these approaches. Indeed, although there are clearly difficulties of researching in this field it is reasonable to concur with Bean (2001) that no policing strategy should remain so secretive that it remains outside the boundaries of critical evaluation. As the discussion in this chapter has indicated, any research agenda focused on issues of 'costs' and 'effectiveness' also needs to consider questions of legitimacy and accountability. Given that the overwhelming majority of witnesses on protection programmes and those involved in investigations and prosecutions as 'crown witnesses' are themselves criminals, the potential for scandal is ever-present and needs to be guarded against. If these techniques are to be utilised, therefore, they should ideally be employed in the context of enhanced evidence as to their effectiveness, and under the umbrella of transparent legislative guidelines as to their appropriate use.



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# Appendix

## Databases consulted to identify literature for inclusion in the review

- **Bath Information Data Services (BIDS) International Bibliography of the Social Sciences (IBSS):** covers the core social science disciplines and draws data from over 2400 international social science journals and 7000 books a year;
- **LegalTrac:** provides international coverage of all major law reviews, law journals, speciality law and bar association journals and legal newspapers;
- **LexisNexis:** provides international coverage of legislation, case law and legal journals with particular emphasis on EU, US and Commonwealth materials;
- **ProQuest:** provides access to a range of data bases including Academic Research Library (covering 2300 journals), Academic Research Newspapers (including New York Times) and Social Science Plus (covering social science journals);
- **Sociological Abstracts:** provides international coverage of abstracts from sociological, including criminological, journals;
- **SOSIG (Social Science Information Gateway):** provides internet information for researchers and practitioners in the social sciences and law;
- **Westlaw:** provides mainly EU and US coverage of legislation, case law and legal journals.

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