

Comparative Analysis of Witness Protection Law in Indonesia, Malaysia, and Australia

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Abstract

Witness protection is the cornerstone of an effective criminal justice system. Therefore, it is important to ensure the quality of witness protection law. This study uses normative method to compare witness protection law in Indonesia, Malaysia and Australia. The result shows several similarities and differences in 5 areas namely a) the subject of protection; b) selection process; c) rights and obligations of parties; d) institutional arrangement; and e) criminal sanctions. Each country has its own approach to regulate the witness protection. Indonesia is progressive in terms of giving special rights for 6 different categories of subject of protections. For instance, special right for compensation and restitution for victims of particular crimes. Indonesia also encourage justice collaborator to give evidence by promising leniency, parole or remission. Conversely, Australia explicitly clarify that the witness protection must not be interpreted as

rewarding criminals. Unlike Indonesia, Malaysia and Australia grants equal rights for all witness. Despite such differences, these 3 countries have similarity in terms of the imposition of selection process to ensure the protection is prioritized for those who need it the most. The witness protection must be maintained to balance the interest of witness, accuse and the society. The goal is not to give excessive protection for witnesses, but to adjust the protection according to the limitation of resources and financial. Moreover, Indonesia should adopt the disclosure requirement as implemented in Malaysia and Australia to prevent the witness from using the program to circumvent his legal or financial obligations.

KEYWORDS *witness protection program, justice collaborator, witness testimony*

Introduction

Witness protection is crucial to the effectiveness of the criminal justice system¹, as the safety of witnesses is essential to securing their testimony², which in turn influences the success of prosecutions and conviction rates.³ In Indonesia, the framework for witness and victim protection is established under Law No. 13 of 2006, amended by Law No. 31 of 2014, which not only safeguards justice collaborators and whistleblowers but also provides victims with rights to compensation and restitution. Recent amendments under Law No. 1 of 2023, which revises the Indonesian Criminal Code, aim to create a more comprehensive legal framework that balances the rights of both perpetrators and victims, aligning with national values and international

¹ Wekgari Dulume, "Ethiopian witness protection system: comparative analysis with UNHCHR and good practices of witness protection report." *Oromia Law Journal* 6, no. 1 (2017): 124-150.

² Dulume, p. 126.

³ Sarvinder Kaur, "Potential challenges in a witness protection programme in Malaysia." *Pertanika Journal of Social Science and Humanities* 19, no. 2 (2011): 363-368.

standards.⁴ The new criminal code, as stipulated in Article 624, will be fully implemented three years after its enactment, beginning in January 2026.⁵

This study examines the witness and victim protection law in Indonesia after the enactment of the new criminal code by identifying some relevant changes. In addition, a comparative approach is used to assess the compatibility of Indonesian witness and victim protection law with international standards. This study compares the witness and victim protection law in Indonesia with relevant laws in Australia and Malaysia.

There are three main reasons why these countries are chosen for this comparative study. *Firstly*, these countries have their own legislation related to witness and victim protection. Witness protection programs can be maintained based on legislation or through administrative arrangements, for instance through special departments within police structure. Indonesia, Malaysia and Australia use similar approaches to regulate witness protection based on legislation. *Secondly*, these countries have adopted the concept of restorative justice in certain areas of their criminal justice system. The purpose of restorative justice is to shift from merely imposing criminal sanction for the offender towards a more inclusive approach by considering reparations in the light of the victim's interests.⁶ *Thirdly*, both countries are geographically located

⁴ Antony Antony. "Balancing Justice and Reconciliation: Restorative Approaches to Criminal Defamation Settlement." *Barelang Journal of Legal Studies* 1, no. 1 (2023): 15-30.

⁵ Article 624 of Indonesia's New Criminal Code (Law No. 1 of 2023) sets a three-year transition period before the full implementation of the revised criminal law, which will take effect in January 2026. This grace period allows time for necessary preparations within the legal system, including training law enforcement, updating regulations, and ensuring public awareness. The new code introduces significant reforms aimed at modernizing the criminal justice system, improving human rights protections, and aligning with international standards. The transition period ensures a smooth shift toward these changes, with full enforcement scheduled for 2026. *See also* Bintara Sura Priambada, Ade Sathya Sanathana Ishwara, and Shofiana Nurul Arifin. "National Criminal Law Transition: Existence and Implications of Criminal Law Before the Enactment of New Criminal Code." *Syiah Kuala Law Journal* 7, no. 3 (2023): 294-309

⁶ Wikan Sinatrio Aji, "The Implementation of Diversion and Restorative Justice in the Juvenile Criminal Justice System in Indonesia." *Journal of Indonesian Legal Studies* 4, no. 1 (2019): 73-88. For broader discussion related to the restorative justice practices in Indonesia, *also see* Hazar Kusmayanti, et al. "The Character of Peace in Judges' Customary Criminal Receptions as Restorative Justice." *Journal of Law and Legal Reform* 5, no. 1 (2024): 409-432; Artaji Artaji, et al. "Resolution of Agrarian Conflicts on Plantation Land through Restorative Justice in Indonesia." *Lex Scientia Law Review* 8, no. 1 (2024): 109-

near Indonesia. These facts are relevant in connection to the establishment of regional cooperation in witness and victim protection, particularly in terms of relocation programs. Furthermore, Australia has an effective witness protection program which can be used as a benchmark for Indonesia to improve its own witness protection law.⁷ Meanwhile, comparison with Malaysia is necessary because of its close ties with Indonesia. Malaysia and Indonesia share a relatively similar level of development in terms of the witness and victim protection law. Both Indonesia and Malaysia started to develop witness protection in the 1990s and enacted related legislation in 2000s.⁸

Previously, there were several studies which discussed witness protection in Indonesia, Malaysia and Australia. Wibowo and Windari elaborated the role of Indonesia Witness and Victim Protection Agency (*Lembaga Perlindungan Saksi dan Korban* or LPSK) in accomplishing the sustainable development goals (SDGs).⁹ The study concluded that LPSK performance is crucial to attain the 16th goal of SDGs, namely abolish atrocity, encourage the rule of law, reinforcing institutions and improving access to justice. Meanwhile, Kenedi (2020) portrayed the imbalance between the rights of perpetrators and the rights of victims. Kenedi argued that the retributive justice theory contributes to the legislation which provides extensive protection in favor of perpetrators. Conversely, only a few laws regulate the rights of victims, not to mention some of them are vague.¹⁰ Masrurah et.al. discussed witness and victim protection of certain crimes such as corruption, human rights violation, drugs, human

138; Setiadi Setiadi. "Optimization of Humanist Law Enforcement in Order to Realize the Paradigm of Civilian Police." *Unnes Law Journal* 9, no. 1 (2023): 66-128.

⁷ Prashant Rahangdale, "Witness protection: A comparative analysis of Indian and Australian legislation." *Journal of The Gujarat Research Society* 21, no. 3 (2019). See also Enggal Prayoga Wijaya, "Knowing Victims to Protect Them, A Book Review "Viktimologi: Perlindungan Korban dan Saksi" Bambang Waluyo, SH, MH, Sinar Grafika Jakarta, 2011, 320 pages, ISBN 978979074378." *Journal of Indonesian Legal Studies* 6, no. 2 (2021): 483-490; Zainurohmah Zainurohmah, et al. "Provisions of Legal Aid as a Form of Protection for Child Victims of Rape." *The Digest: Journal of Jurisprudence and Legisprudence* 4, no. 1 (2023): 21-46.

⁸ Abidah Abdul Ghafar, "Special measures' applications for victims and vulnerable and intimidated witnesses in Malaysia: New frontiers to right to a fair trial?." *UUM Journal of Legal Studies* 5, no. 1 (2014): 93-117.

⁹ Antonius PS Wibowo, and Rusmilawati Windari. "The Role of Victim and Witnesses Protection Agency in Achieving Sustainable Development Goals: The Best Practice of Indonesia." *2nd International Conference on Indonesian Legal Studies (ICILS 2019)*. Atlantis Press, 2019.

¹⁰ John Kenedi, "Constitutional protection for crime victims and witnesses in Indonesia and its problems." *MIMBAR: Jurnal Sosial dan Pembangunan* 36, no. 1 (2020): 53-62.

trafficking and terrorism. The study suggested harmonization between the standard of protection of witness and victim by incorporating specific provisions in the criminal code.¹¹

Kaur conducted a study to identify obstacles that can hamper the implementation of witness protection in Malaysia. He asserted that factors such as finances and resources, statutory provisions, relocation and change of identity, as well as duration of the program can affect the success of the witness protection program.¹² Meanwhile Ghafar emphasized the special measures for witness and victim in the criminal proceeding such as the use of video conference. Such special measures are vital to ensure the safety of vulnerable witnesses and victims without undermining the rights of fair trial of the defendant.¹³ Monterosso assessed multifaceted witness protection programs in Australia at federal, state and territory level.¹⁴ The analysis underscores challenges in implementing integrated witness protection programs including inadequate review mechanism and lack of coordination among jurisdictions.¹⁵ With regard to this issue, Kowalick et.al. proposed a three-tiered witness protection model to ensure the coherence and uniformity across Australia.¹⁶ On the other hand, Rahangdale praised the witness protection regime in Australia. He accentuated the extensive scope of protection stipulated clearly in the Memorandum of Understanding and special attention regarding witness anonymity in Australia legislation.¹⁷

This research aims to compare the witness and victim protection legislation in three different countries namely Indonesia, Malaysia and Australia. By using normative legal research methods, the study provides critical

¹¹ Lailatul Masrurah, Ali Ridwan, and Iskandar Iskandar. "Fulfillment of the Right to Protection Guarantee for Witnesses and Victims of Crime in Indonesia." *Definisi: Jurnal Agama dan Sosial Humaniora* 1, no. 2 (2022): 65-74.

¹² Kaur, "Potential challenges in a witness protection programme in Malaysia.", pp. 365–367.

¹³ Ghafar, "Special measures' applications for victims and vulnerable and intimidated witnesses in Malaysia: New frontiers to right to a fair trial?," p. 117.

¹⁴ Stephen Monterosso, "Shortcomings in the Operation and Coordination of Witness Protection in Australia. Where to from Here?." *Criminal Law Forum* 33, no. 3 (2022): 255–282

¹⁵ Monterosso, p. 277.

¹⁶ Philip Neil Kowalick, "A critical examination of witness protection in Australia". *Dissertation*. (New South Wales: University of New England, 2014).

¹⁷ Rahangdale, Witness protection: A comparative analysis of Indian and Australian legislation", p. 148. See also Selviana Krismawati, et al. "Advocacy and Protection for Victims of Sexual Violence against Children: Insight from Indonesia's Experience." *Indonesian Journal of Advocacy and Legal Services* 5, no. 2 (2024): 207-240.

analysis on current legislation in these countries. The primary sources in this study derive from laws and regulations in each country among others Indonesian Law No. 13 of 2006 No. 31 of 2014, Malaysia Witness Protection Act of 2009, and Australian Witness Protection Act of 1994. This study also considers relevant analysis from previous studies in the form of books, journal's articles or thesis as secondary sources. The analysis focuses on identifying similarities and differences between the witness and victim protection law in those countries. The features compared among others a) the subject of protection; b) admission to the program; c) rights and obligations of parties in the program; d) institutional arrangement; and e) criminal sanctions. Comparative analysis on these aspects will give a comprehensive overview of the witness and victim protection law in these countries. However, this study will not discuss factors related to the implementation of the program. Indeed, there is no guarantee that the law will be implemented correctly. However, ensuring the reliability of legislation is the first step toward better law enforcement.

To this date, there are not many studies which discuss witness protection after the enactment of a novel criminal code in Indonesia. Although the criminal code will only be in force in 2026, it is important to address how significant such a law is in affecting overall witness and victim protection regimes in Indonesia. Comparison with witness and victim protection law in Australia and Malaysia will benefit Indonesia in terms of identifying advantages and drawbacks of such provisions to improve the quality of Indonesia witness and protection law.

In the further context, according to positivism, legal norms must exist objectively and concretely, often manifesting as contractual agreements between citizens or their representatives. Law is thus reconceptualized, shifting from abstract moral principles to positive norms. This positivization, embodied in the transition from *ius* to *lege* or *lex*, aims to ensure certainty regarding the legal status of norms, distinguishing between those that are legally valid and those that, despite their normative character, fall outside the legal domain.¹⁸

The Legal Positivism paradigm, a cornerstone of Positivism, posits that law exists independently of morality. This perspective, which emphasizes the primacy of enacted law, is evident in the regulation of witness and victim protection. Law Number 13 of 2004, a testament to this approach, underscores the importance of safeguarding human rights. Such protection must be

¹⁸ Soetandyo Wignjosobroto, *Hukum, Paradigma, Metode dan Dinamika Masalahnya* (Jakarta: eLSAM, 2002).

grounded in principles of human dignity, security, justice, non-discrimination, and legal certainty.

However, the traditional positivist view has faced significant challenges from emerging legal theories. These theories advocate for a more comprehensive approach to law, incorporating insights from various disciplines. Criminology, for instance, can contribute to law enforcement by providing valuable insights into criminal behavior through techniques like criminal profiling.¹⁹ In addition, the Witness and Victim Protection Law is expected to address long standing legal issues, such as the difficulties associated with investigating and prosecuting crimes. By implementing robust protective measures, this law aims to enhance the efficacy of the justice system and promote a safer society.²⁰

The prevailing paradigm within the criminal justice system has been criticized for its disproportionate focus on perpetrators, often neglecting the plight of victims. This imbalance is evidenced by the limited provisions in the Criminal Procedure Code explicitly dedicated to victim protection. While articles such as 80, 108(1), 133(1), 134(1), 160(1b), 98(1), 99(1)(2)(3), 100(1)(2), and 101 offer some degree of protection, they remain insufficient.

Victims, by definition, experience both suffering and injustice. Their victimization may stem not only from criminal acts but also from systemic failures and legal processes themselves. This broader understanding aligns with criminological perspectives that recognize the societal factors contributing to both criminality and victimization.

The Indonesian criminal justice system has yet to adequately address the needs of victims. Sentencing practices, for instance, often fail to consider the impact of crimes on victims and their families. Moreover, the Criminal Code lacks specific provisions regarding restitution, a crucial form of redress for victims. The predominant focus on criminal acts, culpability, and punishment has overshadowed the importance of victim rights and reparation.²¹

¹⁹ See also Brent E. Turvey, *Criminal profiling: An introduction to behavioral evidence analysis*. (Cambridge, MA: Academic Press, 2011).

²⁰ Nyoman Serikat Putra Jaya, *Sistem Peradilan Pidana (Criminal Justice System)*. (Semarang: Universitas Diponegoro, 2006).

²¹ M. Arief Amrullah, *Politik Hukum Pidana dalam Rangka Perlindungan Korban Kejahatan Ekonomi di Bidang Perbankan* (Malang: Bayu Media Publishing, 2003). See also Wayan Santoso, "The rights of victims of illegal investment crimes against confiscated goods." *Unnes Law Journal* 8, no. 2 (2022): 355-376; Rizaldy Anggriawan, "Unravelling Financial Wrongdoing: A Regulatory Perspective on Crimes in the Indonesian Capital Market." *Indonesian Journal of Criminal Law Studies* 8, no. 2 (2023): 151-172.

Development of Witness Protection Law in Indonesia, Malaysia and Australia

A. Indonesia's Witness Protection Law

The first regulatory framework which specifically addresses witness and victim protection is Law No. 13 of 2006. It consists of 46 articles organized in 7 chapters (Chapter I concerning General Provision; Chapter II concerning Protection and Rights of Witness and Victim; Chapter III concerning Indonesian Witness and Victim Protection Agency (LPSK); Chapter IV concerning Substantive and Procedural Requirements for Protection or Assistance; Chapter V concerning Criminal Sanctions; Chapter VI concerning Transitional Provision; and Chapter VII concerning Closing Provision). The enactment of Law No. 13 of 2006 indicated a paradigm shift toward restorative justice. Restorative justice aims to distribute justice for victim by considering their interest in the criminal justice system instead of emphasizing heavily on blaming the perpetrators.²²

Eight years later, Law No. 13 of 2006 was amended with Law No. 31 of 2014. 18 provisions were altered, and 12 new provisions were added. The most striking change in Law No 31 of 2014 is the extension of scope of protection. The protection is not only granted to witness and victim, but it extends to justice collaborators and whistleblowers. The enactment of Law No. 1 of 2023 concerning Indonesia Criminal Code brings major changes to myriad laws and regulations in Indonesia, including the law on witness and victim protection. However, the changes are insignificant as it only amended 4 provisions related to criminal sanctions.

²² Saristha Natalia, "Perlindungan Hukum Terhadap Saksi Dan Korban Oleh Lembaga Perlindungan Saksi Dan Korban (LPSK)." *Lex Crimen* 2, no. 2 (2013): 56-64; Syahrir Kuba, "Optimalisasi Perlindungan Saksi dan Korban dalam Rangka Memantapkan Penegakan Hukum di Indonesia." *Jurnal Kajian Ilmiah* 22, no. 1 (2022): 89-100." *See also* Sigma Febby Annisa, "A Legal Protection of Children as Victims of Sexual Human Right Accidents." *Jurnal Scientia Indonesia* 5, no. 2 (2019): 134-149; Abdiel Abraar Arya Aradhana, and Charles Sahalatua Pangaribuan. "Cyberbullying in Media Social: A Mainstreaming the Victim Protection Principles in Indonesian Criminal Justice System." *Indonesia Media Law Review* 1, no. 2 (2022): 99-122; Arvita Hastarini, and Dista Amelia Sontana. "Perlindungan Korban Tindak Kekerasan dalam Rumah Tangga (Perspektif Viktimologi dan KUHP Baru)." *Rampai Jurnal Hukum (RJH)* 2, no. 1 (2023): 1-11.

B. Malaysia's s Witness Protection Law

Like other countries in Asia, Malaysia started to develop witness protection in the 1990s. The first legislation in Malaysia which regulates witness protection is the Evidence of Child Witness Act of 2007. However, this act is only dedicated to child witnesses and does not address protection of other categories of witness in general. In 2009, Malaysia enacted a more comprehensive Witness Protection act which was incorporated in the form of federal law. As any other countries which have been under British rules, Malaysia also adheres to the Anglo-Saxon legal system. In addition, Malaysia practices an adversarial court system due to strong influence of English rules.²³

Despite the differences in terms of legal tradition and court system, both Indonesia and Malaysia have adopted restorative justice in their criminal justice system, particularly in terms of juvenile delinquency.²⁴ The phase-by-phase adoption of restorative justice could also be traced in the adoption of law that protects witnesses. In providing protection for the witness, Malaysia passed the Witness Protection Act 2009 ('WPA 2009'). The WPA 2009 consists of 30 articles and is organized in 4 parts; Part 1 on Preliminary Provisions; Part 2 on Witness Protection Program; Part 3 on Rights, Obligations, Non-Disclosure, and Termination and Part 4 on General Provisions).

The WPA 2009 was passed with an important objective of protecting witnesses who may face threats to his life or the life of his family due to his willingness to testify against certain criminals. That said, there are three types of witnesses that could testify in the criminal proceeding; first, the fact witnesses who testify about what happened to them or also called as 'participating victim', second, insider witnesses who are connected directly to the accused and third, expert witnesses.²⁵ In Malaysia, based on observation on decided cases, the protection is mainly given to the fact witnesses who are the victims and the insider witnesses who can be the accomplice or the somebody who knew about the crime as a result of their close relation to the accused.

Protecting witnesses is deemed to protect them from potential threat, danger, and harassment. This protection encourages them to participate in the criminal proceedings and cooperate as prosecution witnesses to prove cases

²³ Ghafar, "Special measures' applications for victims and vulnerable and intimidated witnesses in Malaysia: New frontiers to right to a fair trial?", p.119.

²⁴ Taufik Mohammad, and Azlinda Azman. "'Do i want to face the offender?': Malaysian victims' motivation for participating in restorative justice." *Contemporary Justice Review* 24, no. 3 (2021): 290-311.

²⁵ International Criminal Court, 'Witnesses', online at <https://www.icc-cpi.int/about/witnesses>

against crimes, big or small. Without protection, witnesses would be reluctant to participate, and this affects the outcome of cases. Thus, the witnesses who are accorded with protection are the key witnesses, without which charges could not be established against the accused.

The WPA 2009 could be the starting of development of witness protection in Malaysia as after the passing of it, the public and most importantly, enforcement agencies started to see the importance of protecting those with information about any crimes or corruptions. Subsequently after the passing of WPA 2009, the government passed the Whistleblower Act in 2010. Soon after that, sections 265A, 265B and 265C were inserted into the Malaysian Criminal Procedure Code (CPC) that elaborate on protected witnesses and procedures on giving evidence while protecting their identities in 2015.²⁶ With the legislation and amendments at hand, the public was more confident to lodge reports and to testify before the courts.²⁷

The WPA 2009 establishes the Witness Protection Program, and it is to be maintained by a division under the Prime Minister Department called the Protection Division headed by a Director General.²⁸ The Director General of the Protection Division is mainly responsible in making recommendation to the Attorney General whether a witness should be accorded with the protection and assistance under the program.²⁹ With the responsibility accorded on this division by WPA 2009, the division through its Client's Charter promises to provide a professional and effective service in guaranteeing the witnesses a friendly and appropriate service.³⁰ Thus, the division pledges that every application and responses will be addressed within the appropriate period of time. The division also pledges to manage aspects of administration, human resources and finance of the program. The division is also actively conducting outreach about the Witness Protection Program. The target audience includes the enforcement agencies as they are more aware of potential threats to possible witnesses and the public to encourage them to come forward and testify as they are protected.

²⁶ Criminal Procedure Code (Amendment) Act 2015, https://www.cljlaw.com/files/bills/pdf/2015/MY_FS_BIL_2015_09.pdf

²⁷ The Edge, '*Whistleblower, witness protection acts have positive impact: MACC*,' (13 March 2014), <https://theedgemaalaysia.com/article/whistleblower-witness-protection-acts-have-positive-impact-macc>

²⁸ Section 3 of the Witness Protection Act 2009.

²⁹ Section 9 of the Witness Protection Act 2009.

³⁰ Client's Charter, Protection Division of Prime Minister Department <https://www.bp.gov.my/en/about-us/client-charter>

Section 7 of WPA 2009 elaborates on who can apply to join the witness protection program. Basically, an application to the Director General to join the program can be made by any witness or the guardians if the witness is below eighteen years old. Enforcement agencies may also apply on behalf of the witness with a written consent. Protecting witnesses, though important to secure charges on the accused, the Protection Division must be clear that it is not protecting criminals which may turn to be a burden on the government. Thus, any application has to be supported with disclosures of information relating to existing liabilities and criminal histories of the applicant.³¹

The witness may also be sent for further medical and psychological checks to evaluate his suitability for the program.³² This is to cater the possible problems as rightly pointed out by Kaur that among the worries of having a protection program for witnesses are that the authority might end up rewarding criminals and the fact that such a program involves relocating witnesses to a new place, there is a possibility of rebirthing the particular witness criminal.³³ Section 8 (4) WPA 2009 further explains the effect of giving false information. Upon satisfaction of the requirement in section 8, the Protection Division proceeds making the recommendation whether the witness is suitable to be included in the program to the Attorney General.³⁴

Section 9 (c) and (d) of WPA 2019 explains that among the factors to be considered by the Director General in deciding whether a witness is eligible for protection are that the kinds of evidence that he is giving must be of serious and important nature.³⁵ Once a witness is selected to be included in the protection program, the Director General shall act for the purpose of protecting and safeguarding the witness' safety and welfare.³⁶ For that purpose, the witness shall be given accommodation, relocated, any document to establish new identity such as identity card, birth certificate and marriage certificate, equivalent remuneration if the witness has to leave his job or payment of a reasonable living expenses if the witness is unemployed, employment or other things deemed necessary by the Director General.³⁷ According to section 13 the new identity includes issuance of new identity documentations such as birth certificate, identity card and marriage certificate and the witness shall be given a copy of

³¹ Section 8 of the Witness Protection Act 2009

³² Section 8(2) of the Witness Protection Act 2009

³³ Kaur, "Potential challenges in a witness protection programme in Malaysia", p. 363.

³⁴ Section 10 of the Witness Protection Act 2009.

³⁵ Section 9 (c) and (d) of the Witness Protection Act 2009.

³⁶ Section 13(1) of the Witness Protection Act 2009.

³⁷ Section 13(2) of the Witness Protection Act 2009.

such documentations. Apart from the obligation to testify before the court, the witness is also obliged not to disclose about original identity or about the program. Thus, any disclosure would result in an offence punishable under section 26.

When asked how long the protection would last, the then Minister of the Prime Minister Office when tabling the new legislation in 2009 responded that it will be for as long as the need for his security exists.³⁸ Section 16(1) explains the circumstances where the Director General may recommend to the Attorney General to terminate the protection. One of such recommendations is when the circumstances that require the protection cease to exist.

With regard to testifying before the court, the secrecy of the identity of the protected witness is to be assured. Thus, procedures that allow testimony to be given in camera when it relates to the identity of the protected witness and non-disclosure of identity in the publication of evidence given before the court are included in section 20(1) of WPA 2009. Besides that, any action taken under WPA 2009 shall not be subjected to any judicial review, prosecution or legal suit.³⁹

Observation on Decided Cases

In a few recent cases, it is observed that witnesses that are placed within the protection program also include those who happen to be the key witness or the only witness in proving charges against the accused. In the case of *PP v Zulfaldy Shafieq*⁴⁰, the accused was charged for committing murder and was the only witness as he assisted the accused of committing the act. In the case *Mustaza Abdul Rahman v PP* [2020] 1 LNS 1058, the prosecution relied on the key witness who was a member of an operative terrorist group of 'Islamic State' based in Syria. Both the accused and the key witness were members of a chat group in Telegram known as '*Gagak Hitam*'.

Whether a witness in a witness protection program escapes liability as an accomplice? In the case of *PP v Zulfaldy Shafieq Ali* [2022] 1 LNS1373, the prosecution in proving a murder charge on the accused relied on evidence given by the only witness who assisted the accused. The witness was forced by the accused to assist him in killing the deceased, which if he refused, the accused would harm him and his family. The court discussed the issue whether the

³⁸ Parliament Hansard 23rd March 2009, 1-79, at p. 59, <https://www.parlimen.gov.my/files/hindex/pdf/DR-23032009.pdf>

³⁹ Sections 23, 24, 25 of the Witness Protection Act 2009.

⁴⁰ [2022] 1 LNS1373

evidence given by the witness could incriminate him as an accomplice in the conduct of the crime. It was important for the court to determine the issue as it would also determine how his uncorroborated evidence to be treated. The court found that the protected witness was indeed an accomplice. Nevertheless, the court accepted that he was forced and threatened, ruled that his evidence could be relied upon and that he is a credible witness.

Whether the use of WPA would prejudice the accused? In the case of Aizz Amidie Aziz & Ors. v PP [2021] 5 CLJ 766, the appellant raised very interesting question about whether having witnesses testifying in protected manners against the appellant accused and not disclosing their identities would violate the appellant accused's rights to a fair trial, equality and equal protection before the law as guaranteed in articles 5 and 8 of the Federal Constitution. And that section 20(1) (a) of the WPA 2009 and section 265A of the Criminal Procedure Code should be unconstitutional as the provisions violate such rights. The Court of Appeal rejected the appeal on the reason that it was made at an unappealable stage, i.e., before the prosecution closed its case at the trial court. Nevertheless, the appeal court observed that evidence testified in protected manners by undisclosed witnesses, regardless of the manner it is given, would still need to be weighed and considered with the other evidence at the end of the prosecution stage to see if it's beyond reasonable doubt and thus the conviction is safe.⁴¹ In a way, evidence given by a protected witness is not prejudicial as the court would treat it like other evidence. That said, the appellant is by no means refrained from appealing against the final decision.

Whether WPA is only to be used for witnesses in serious and organised crimes? The court in the case Yong Choo Kiong v PP [2020]1 LNS 1307, in answering whether WPA is only meant to protect witness in serious and organised crimes referred to the parliament Hansard dated 23rd March 2009 where the then Minister in the Prime Minister Office, Dato' Seri Mohamed Nazri bin Abdul Aziz that and inferred that WPA 2009 is not limited to witness in serious and organized crimes. If the person falls under the definition of 'witness' (section 2 of WPA 2009), thus, that person is eligible to get protection under WPA 2009.⁴²

⁴¹ Aizz Amidie Aziz & Ors. v PP [2021] 5 CLJ 766, at p. 768.

⁴² At 1328

C. Australia's Witness Protection Law

Australia began conducting witness protection operations under the command of Australian Federal Police in 1981.⁴³ The main purpose of such a program is to deal with organized crime. The deficiency of witness protection correlates with the high number of unsuccessful prosecutions due to lack of evidence.⁴⁴ Australia started to adopt the concept of restorative justice particularly for sexual and family violence. This concept is more favorable because it contributes more to the needs of victims.⁴⁵

Even though the endeavor to protect witnesses had started in 1983, however, Australia first enacted the witness protection law in 1994. Such law was amended based on Act No. 80 of 2004. Prior 1994, witness protection in Australia was based on administrative arrangement which was maintained by a special unit force within the police structure.⁴⁶ The first jurisdiction which enacted witness protection legislation was Victoria in 1991. At that time, police in each jurisdiction in Australia provided protection to victims with little to no support from legislation. The protection provided *inter alia* 24 hours supervision, relocation and identity changes.⁴⁷

Based on the Australia Constitution, there is a division of power between federal, state and territory governments. Both federal and state or territory governments have the authority to maintain a witness protection program. Consequently, Australia has a multitiered witness protection program. This study only discusses the witness protection at federal level because it will be more appropriate to be compared with Indonesia protection law at national level. Moreover, the witness protection law at federal level is more comprehensive than those applied at state or territory level.

Australia Witness Protection Law consists of 32 articles. Unlike Indonesian witness protection law, the provisions of Australian law are not organized in chapters. However, the contents of Australian Witness Protection Law are quite extensive covering definitions, requirements to be admitted in the program and institutional arrangements.

⁴³ Kowalick, "A critical examination of witness protection in Australia", p. 39.

⁴⁴ Dulume, "Ethiopian witness protection system: comparative analysis with UNHCHR and good practices of witness protection report", p. 129.

⁴⁵ Daye Gang, et al. "A call for evaluation of restorative justice programs." *Trauma, Violence, & Abuse* 22, no. 1 (2021): 186-190.

⁴⁶ Kowalick, "A critical examination of witness protection in Australia", p. 16.

⁴⁷ Kowalick, p. 39.

Comparative Analysis of Witness Protection Law in Indonesia, Malaysia and Australia

A. Subject of Protection

This section presents a comparative analysis of the subject of protection and eligibility criteria under Indonesian, Malaysian, and Australian witness protection legislation. The purpose of this section is to address the following questions: Who is being protected under the witness protection law? Do all witnesses have the same right to obtain protection? Alternatively, are there any types of crime in which the witness has special rights of protection? The answers to these questions can be found in each country's legislation. Based on the comparative analysis of Indonesian, Malaysian, and Australian witness protection laws, there are some similarities and differences in terms of the subject of protection. These countries share a similarity in defining the subject of protection beyond the traditional notion of witness.

Articles 1 and 5(3) of the Indonesian Witness and Victim Protection Law (I WVPL) stipulate that six categories of individuals are eligible for protection: witnesses, justice collaborators, victims, whistleblowers, families of witnesses or victims, and expert witnesses. Article 1(1) of the I WVPL defines a witness as a person who has direct firsthand knowledge of a crime and provides testimony in criminal proceedings. This definition encompasses the entire criminal justice process, from investigation to trial.

Indonesia also extends protection to justice collaborators. According to Article 1(2) of the I WVPL, a justice collaborator is a suspect, defendant, or convict who cooperates with law enforcement to reveal information about a crime. Article 1(3) defines a victim as a person who suffers physical, mental, or financial harm because of a crime. Additionally, Article 1(4) defines a whistleblower as a person who reports information about a crime to law enforcement. Whistleblowers are also known as reporters or fact-breakers.⁴⁸

⁴⁸ Abdul Wahid, "The Urgence of Whistleblower Legal Protection in the Criminal Justice System." *Fiat Justisia: Jurnal Ilmu Hukum* 16, no. 4 (2022): 359-376. *See also and compare with some current development*, Austin Al Hariz, Hibnu Nugroho, and Ridwan Ridwan. "Reconstruction of Legal Protection for Civil Servants as Whistleblowers in Eradicating Corruption Crimes in Indonesia." *Journal of Law and Legal Reform* 5, no. 3 (2024): 1185-1226; Mangaraja Manurung, and Dany Try Hutama Hutabarat. "Public Effort and Participation in the Enforcement of Corruption Eradication in Indonesia." *Pandecta Research Law Journal* 18, no. 1 (2023): 35-46; Doni Yanto, Amarru Muftie Holish, and Hafizh Daffa Setiawan. "Legal Protection for Victims of Harassment in a Victimological Perspective (Case Study of Harassment in Higher Education Institutions)." *Law Research Review Quarterly* 9, no. 2 (2023).

The protection provided by the IWVPL also extends to the families of witnesses and victims. Article 1(7) defines family as individuals who are related to a witness or victim within the third degree of kinship, individuals who are married to a witness or victim, or individuals who are dependent on a witness or victim. Finally, the law grants protection to expert witnesses who provide testimony in criminal proceedings.

Unlike Indonesia, Malaysia and Australia do not specify a closed list of protected individuals in their witness protection legislation. Instead, they adopt a more inclusive approach, defining "*witness*" broadly to encompass individuals who have provided or committed to provide testimony in criminal proceedings or related matters. Moreover, both jurisdictions extend protection to anyone who needs protection or assistance under the program, implicitly recognizing the need to protect whistleblowers, victims, and experts. In contrast, Indonesia's witness protection law explicitly defines six categories of protected individuals, including witnesses, justice collaborators, victims, whistleblowers, families of witnesses or victims, and expert witnesses.

While there are some differences in the specific categories of protected individuals, all three countries extend witness protection to individuals involved in any type of criminal offense. However, Indonesia goes further by providing additional rights to victims of specific crimes, such as grave human rights violations, terrorism, human trafficking, torture, and sexual violence.

B. Admission to the Program

The witness protection laws of Indonesia, Malaysia, and Australia adopt a broad definition of "*witness*," encompassing various types of crimes. This inclusive approach ensures equal access to protection programs for all eligible witnesses, aligning with human rights principles. However, resource constraints necessitate selective application of protection measures. To prioritize those most in need, these countries employ rigorous selection processes.⁴⁹ Witness protection laws in these countries regulate in detail the application procedure, eligibility criteria, formal arrangements, program commencement, duration, and termination of protection.

1. Application Procedures

In Indonesia and Malaysia, a formal written application is required to initiate the protection process. Article 29 of IWVPL and Section 7 (1) of

⁴⁹ Yvon Dandurand, and Kristin Farr. *A Review of Selected Witness Protection Programs*. (Canada: Public Safety Canada, 2012).

Malaysia WPA stipulate that a written application must be filed to obtain protection. In *contrast*, the Australia WPA does not explicitly require a formal application but emphasizes the Commissioner of the National Witness Protection Program (NWPP)'s role in seeking information and deciding on witness inclusion.⁵⁰

In all three countries, the initiative to apply for protection can originate from either the witness themselves or a request from an authority. Additionally, Section 10A of the Australia WPA allows applications upon request from the International Criminal Court. Special provisions exist for child witnesses in all three jurisdictions. Article 29A of the IWBVPL, Section 7(3) of the Malaysia WPA, and Section 8(5) of the Australia WPA outline special procedures for child witness applications. The IWBVPL imposes a strict 7-day deadline for the LPSK to issue a decision after receiving an application. In contrast, the Malaysia and Australia WPAs do not specify a deadline for decision-making.

2. *Eligibility Criteria*

Indonesia, Malaysia and Australia's witness protection laws employ specific criteria to determine eligibility for witness protection. Indonesia applies distinct prerequisites to three categories of protected individuals. As outlined in Article 28(1) of the IWBVPL, factors considered for protection include the significance of the testimony, the level of threat, the results of medical and psychological assessments, and the criminal history of the witness or victim. More stringent requirements are imposed on justice collaborators. In addition to meeting the general criteria in paragraph (1), justice collaborators must be involved in crimes listed in the LPSK regulation. Article 28(2) of the IWBVPL explicitly prohibits primary perpetrators from applying for protection as justice collaborators. Furthermore, justice collaborators must commit to returning assets obtained through criminal activities. For whistleblowers and expert witnesses, as per Article 28(3) of the IWBVPL, the primary factors considered are the significance of the testimony and the severity of the threat.

Malaysia and Australia share similar provisions regarding eligibility criteria for witness protection. Both Section 9 of the Malaysian WPA and Article 8 of the Australian WPA outline non-exhaustive lists of factors to be considered when admitting applicants to the program. These factors often overlap with those stipulated in the IWBVPL, including criminal history, the level of

⁵⁰ See also Azlinda Azman, and Mohd Taufik bin Mohammad. "Crime victims support system and restorative justice: Possible implementation in Malaysia." *Journal of Arts and Humanities* 1, no. 2 (2012): 18-26.

intimidation or threat, medical and psychological assessments, and the weight of the testimony. However, the Malaysian and Australian WPAs introduce additional considerations, such as the potential harm to the public if a witness is admitted to the program and the availability of alternative protection methods.

3. *Formal Arrangements*

Once an application is accepted, both countries require the applicant to sign a formal agreement. In Indonesia, Article 30 of the IWVPL mandates a commitment letter outlining specific obligations, including: testifying in criminal proceedings, adhering to protection protocols, avoiding unauthorized contact, maintaining confidentiality, and complying with additional terms and conditions set by the LPSK. Similarly, in Australia, Section 9(2) of the WPA stipulates a Memorandum of Understanding (MoU) between the Commissioner and the participant. This MoU outlines terms and conditions, sanctions, termination procedures, security protocols, potential medical or psychological assessments, and financial arrangements. The specific terms of the MoU are tailored to each individual case.⁵¹ In contrast, Malaysia does not require applicants to sign a formal agreement. According to Section 10 of the Malaysian WPA, the witness protection institution decides whether to recommend the application to the Attorney General. Unlike the IWVPL and the Australian WPA, the final decision on inclusion in the program rests with the Attorney General.

4. *Program Commencement*

Each country has a different provision related to the commencement of the protection. Pursuant to Article 30 of IWVPL, the protection starts after the commitment letter is signed. However, LPSK may decide to give protection without requiring application in exceptional circumstances as stipulated in Article 29 (2) of IWVPL. In Malaysia WPA, there is no specific provision explaining when exactly the protection will be started. However, based on Section 10 (3) of Malaysia WPA, it is implied that the protection will be automatically started after the Attorney General decides to receive the recommendation from the Witness Protection Agency. However, the Agency may provide interim protection or assistance upon receipt of application in certain cases as stated in Section 7 (4) of Malaysia WPA. For instance, witnesses

⁵¹ Dandurand, and Farr. *A Review of Selected Witness Protection Programs*, p. 43.

related to human trafficking can get temporary interim protection.⁵² Meanwhile, according to Section 9 (4) of Australia WPA, the witness is officially included in the protection program after the MoU is signed by the witness and the Witness Protection Agency.

5. *Duration and Termination of Protection*

There is no fixed standard for the duration of the protection. Article 32 of IWVPL regulates that the protection can be only terminated based on the following reasons: a) request for termination from the witness itself; b) request for termination from the authority in case the initiative for application is submitted by that authority; c) violations of terms and conditions provided in the commitment letter; or d) LPSK consider that the protection is no longer needed based on convincing evidence. In addition, Article 32A stipulates that the protection can be terminated if the witness has a bad faith in giving the testimony. Meanwhile, based on Section 16 of Malaysia WPA the protection can be terminated if: a) witness gives misleading information; b) the witness compromises the integrity of the program; or c) the agency considers that there is no justification to extend the duration for the protection. Similarly, Section 18 of Australia WPA also stipulates these 3 reasons as factors which can trigger for the cessation of the protection. In addition, Australia WPA regulates that the protection can be terminated based on the following reasons: a) request of applicant (either the witness itself or relevant authority); or b) breaches of terms in the MoU. Overall, most witness protection came to an end due to the withdrawal of the witness itself from the program. Voluntary removal is usually triggered by the trust issue of the witness itself or the inability of the witness to obey the restriction under the terms and conditions of the program.⁵³

C. *Rights and Obligations of the Parties*

This subsection analyses the scope of protection, rights and obligations of parties in the witness protection program. As discussed in subsection A, Indonesia distinguishes 6 different subjects of protection *inter alia* witness, justice collaborator, victim, whistleblower, family of witness or victim and expert witness. There are general rights and obligations applied for all subjects

⁵² Mohammad Shahadat Hossain, and Mohammad Hassan bin Ahmad. "Protections for the victims of trafficking in person under Malaysian anti-trafficking in person act, 2007: Experience sharing in the context of Bangladesh." *International Journal of Criminal, Common and Statutory Law* 1, no. 1 (2021): 07-16.

⁵³ Dandurand, and Farr. *A Review of Selected Witness Protection Programs*, p. 46.

of protection but there are also special provisions dedicated for subjects. While Malaysia and Australia do not provide specific provisions related to typology of subject of protection. In other words, all witnesses in Malaysia and Australia have equal rights and obligations.

1. *Types of Protection Offered*

Indonesia, Malaysia and Australia have common provisions related to general rights of witness. Pursuant to Article 5 (1) of IWVPL, witness and victim are entitled to obtain protection from threat related to the testimony that will be or have been given, including protection for his family and his property; participate in determining forms of protection and assistance; give testimony without being intimidated; access to translator; be free from tricky questions; be informed on the progress of the case or court decision; obtain a new identity; relocation; reimburse of transportation cost; obtain stipend during period of protection; obtain legal assistance and avocation; and non-disclosure of witness identity.

The rights of non-disclosure of identity have a great importance in protecting vulnerable witness, particularly sexual violence victim. are Not only suffers from the sexual violence, but victims are also prone to societal judgement and negative stereotype which are rooted from patriarchal culture. This phenomenon is also known as victim blaming.⁵⁴ The provision on non-disclosure of witness or victim's identity can mitigate the negative impact of victim blaming. All these rights are also applicable for whistleblowers and expert witnesses as stated in Article 5 (3) of IWVPL. Section 13 (1) of Malaysia WPA and Section 13 (2) of Australia WPA also provides similar rights including rights to obtain new identity, non-disclosure of identity and relocation.

None of these 3 countries explicitly provides the possibility for relocation of witnesses abroad under their witness protection law. However, Malaysia and Australia WPA use a non-exhaustive list approach which means that it is

⁵⁴ I. Made Wirya Darma, I. Gusti AA Mas Triwulandari, and Dewi Bunga. "Victim blaming: labeling for women victims of sexual violence in human rights perspective." *International Journal of Law Reconstruction* 6, no. 2 (2022): 212-227. See also Andry Setiawan, et al. "Gender Based Violence in Higher Education: A Model of Protection and Law Enforcement." *Indonesian Journal of Advocacy and Legal Services* 5, no. 1 (2023): 65-80; Bachtiar Adi Prastyawan, "Juridical Review of Legal Protection for Victims of Sexual Harassment as a Form of State Responsibility." *Journal of Creativity Student* 5, no. 2 (2020): 129-148; Raden Muhammad Arvy Ilyasa, "Legal and Victimological Perspective on Sexual Violence against Children Cases in Indonesia." *The Indonesian Journal of International Clinical Legal Education* 3, no. 3 (2021): 281-300.

possible to extend the rights of witnesses if necessary. Nevertheless, there is no specific provision regarding cooperation with foreign countries related to the possibility for overseas relocation.

2. *Challenges in Administering Relocation*

There are two serious concerns about relocation. *First*, relocation is excessive compared to other forms of protection. In certain cases, not only the witness but the whole family must be relocated. Consequently, the cost of relocation would be higher. *Secondly*, relocation can contribute to the rebirth of criminals. Justice collaborators with criminal records could use the new identity to do other offences in the new place. Consequently, people in the relocation area who are completely unaware of the real identity of the witness would be at risk in case of recidivism.⁵⁵ Therefore the witness protection agency must maintain an oversight mechanism.⁵⁶ Further analysis of authority and institutional arrangement will be discussed in subsection D.

3. *Special Rights for Victims of Certain Categories of Crime*

Apart from general rights, Indonesia provides special rights for victims of grave violations of human rights, terrorism, human trafficking, torture, and sexual violence. Pursuant to article 6 (1) of IWVPL, victims of such crimes are entitled to receive medical assistance and rehabilitation. Victims of grave violations of human rights and terrorism have special rights to compensation as stipulated in Article 7 of IWVPL. Meanwhile, victims of selected crimes are entitled to receive restitution as stated in Article 7A of IWVPL. The compensation and restitutions rights reflect paradigm shift from retributive justice toward restorative justice. Restorative justice corresponds to the needs of victims for restitution and compensation rather than the imposition of aggressive sentencing.⁵⁷ Nevertheless, this extra right is impractical in Indonesia due to the absence of further regulation concerning the type of crime in which victims are entitled to restitution. Another special feature of IWVPL is the immunity of witnesses from criminal or civil lawsuits related to testimony that will be or have been given as stipulated in Article 10 (1) of IWVPL. However,

⁵⁵ Monterosso, "Shortcomings in the Operation and Coordination of Witness Protection in Australia. Where to from Here?", p. 260.

⁵⁶ Dandurand, and Farr. *A Review of Selected Witness Protection Programs*, p. 79.

⁵⁷ Donald HJ. Hermann, "Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice." *Seattle Journal for Social Justice* 16, no. 1 (2017): 71-103.

this immunity is not applicable if the witness has a bad faith in giving the testimony.

4. *Special Rights for Justice Collaborator*

Besides giving special rights for victims of crimes, Indonesia also regulates special treatment and reward for justice collaborators.⁵⁸ Pursuant to Article 10A (2) of IWVPL, justice collaborators can get special treatment such as right to be separated from the main perpetrator in the detention center and right to testify before the court without confronting the accused. Meanwhile, the reward for justice collaborator as stated in Article 10A (3) can be in the form of leniency, parole or remission. Malaysia WPA does not provide special treatment for justice collaborators. On the other hand, Section 5 of Australia WPA clearly stipulates that the inclusion to the program must not be interpreted as rewarding the witness for giving testimony.

5. *Disclosure Requirement*

Malaysia and Australia WPA impose a more balanced approach in their witness protection acts by considering society interest and the accused rights. Pursuant to Section 8 of Malaysia WPA and Section 7 of Australia WPA, the witness must disclose this following information *inter alia*: outstanding legal obligation, debts, or tax; criminal history; civil proceeding involving the witness; status of bankruptcy and immigration; financial liabilities and assets; reparation or confiscation order; general medical condition and business dealings in which the witness is involved. Witness protection agencies can use such information as consideration in granting protection. The disclosure requirements imposed by Malaysia and Australia are safeguards to minimize the risk of abuse of the program. Without the disclosure requirement, the applicant who has a bad faith can use the program to circumvent his debts or liabilities.⁵⁹ Unfortunately, Indonesia does not require the witness to disclose such information.

6. *Procedural Fairness*

Indonesia is progressive in terms of giving special treatment for witnesses. Pursuant to Article 9 of IWVPL, a witness who is in a great threat is allowed to give evidence through electronic means or affidavit without attending the hearing directly. Meanwhile, Malaysia and Australia emphasize the protection

⁵⁸ Rachmad Abduh, "Protection of Witness Justice Collaborators in Criminal Actions." *International Journal Reglement & Society (IJRS)* 2, no. 2 (2021): 96-102.

⁵⁹ Kaur, "Potential challenges in a witness protection programme in Malaysia", p. 364.

of witness identity not to be disclosed in court as regulated in Section 20 of Malaysia WPA and Section 26 of Australia WPA. In addition, Malaysia also provides special treatment for vulnerable and intimidated witnesses, particularly child witnesses or adult witnesses with significant mental illness.⁶⁰ Indeed, protection of witnesses is necessary to ensure the effectiveness of criminal proceedings. However, the endeavor to protect the witness shall not neglect the rights of any third party, especially the accused.

The perpetrator or defendant has the right to a fair trial. The right to fair trial is mentioned in Article 10 of the Universal Declaration of Human Rights (UDHR). Furthermore, Article 11 (1) of the UDHR stipulates that the defendant must be presumed innocent until proven guilty based on evidence presented in a public trial. The rights of fair trial are acknowledged universally, including by Indonesia, Malaysia and Australia. Giving the rights for victims to testify anonymously could jeopardize the rights of defendants to examine the evidence in the cross-examination as well as the rights to fair trial.⁶¹ Cross-examination gives the defendant an opportunity to confront and clarify contradictions in the statement of a witness.⁶² However, the rights to a fair trial must balance the triangular interest of the defendant or suspect, victim and society.⁶³ Therefore, witness anonymity should only be allowed as an exception. In other words, witness anonymity shall only be used as a last resort if other protective measures fail to ensure the safety of witnesses.⁶⁴

Overall, all these three countries provide extensive rights and protection for victims. The most expensive form of protection is relocation which in certain cases involves the family of the witness. The protection of witnesses is important but must be maintained prudently. Beside balancing the interest of witness, victim and society, the implementation of witness protection must also weigh the cost and contribution to the overall criminal justice system. The cost of witness protection shall not exceed the benefit for supporting the effectiveness of criminal proceedings. Thus, screening the application in the admission phase is important to ensure the balanced triangular interest of witness, victim and

⁶⁰ Ghafar, "Special measures' applications for victims and vulnerable and intimidated witnesses in Malaysia: New frontiers to right to a fair trial?", p.114.

⁶¹ Dulume, "Ethiopian witness protection system: comparative analysis with UNHCHR and good practices of witness protection report", p. 137.

⁶² Tadesse Melaku, "The Right to Cross-Examination and Witness Protection in Ethiopia: Comparative Overview." *Mizan Law Review* 12, no. 2 (2018): 303-324.

⁶³ Phoebe Bowden, Terese Henning, and David Plater. "Balancing fairness to victims, society and defendants in the cross-examination of vulnerable witnesses: An impossible triangulation?." *Melbourne University Law Review* 37, no. 3 (2014): 539-584.

⁶⁴ Dandurand, and Farr. *A Review of Selected Witness Protection Programs*, p. 64.

society. Moreover, the development of technology introduced the use of digital evidence such as CCTV. Indeed, witness testimony is regarded as the ultimate evidence in the hierarchy of evidence based on Article 184 (1) Indonesia Procedural Criminal Law. However, witness testimony is prone to mistakes which can lead to wrongful conviction.⁶⁵ Digital evidence can be used as corroborating evidence to support conviction. Meanwhile, expensive witness protection programs should only be reserved in certain circumstances such as in the absence of alternative evidence.⁶⁶

D. Institutional Arrangements

In Indonesia, the institutional arrangement is regulated under Chapter III of IWWPL. Pursuant to Article 11 of the IWWPL, *Lembaga Perlindungan Saksi dan Korban* (LPSK) or Indonesia Witness and Victim Protection Agency is an independent agency which has the authority to manage the implementation of witness protection programs in Indonesia. The LPSK's headquarter is in Jakarta, the capital city of Indonesia.⁶⁷ However, LPSK can form local representation in certain regions, if it is needed. Even though LPSK is an independent agency, it is still subject to external supervision from the president of Indonesia. As stated in Article 12 of IWWPL, LPSK must also submit a periodical report to the House of Representative of Indonesia. The board of Director (BoD) of LPSK comprises 7 members who have background in the field of law enforcement such as police or public attorney or other relevant background such as academician, lawyer or activist. The BoD of LPSK is led by a chairman and 6 Deputy. Based on Article 15 of IWWPL, the tenure of the BoD of LPSK's members lasts for 5 years with possible extension of another period of 5 years. The members of LPSK are selected by a special committee established under the President's order. The President together with the House of Representatives then appoints the members of LPSK from the list of names provided by the special committee. In conducting its duty, the BoD of LPSK is assisted by experts as stipulated in Article 16C of the IWWPL. In addition, the LPSK has 2 other organs namely Advisory Board and Secretariat. The Advisory Board consists of 5 members which are selected based on their expertise. Pursuant to

⁶⁵ Lawrence Rosenthal, "Eyewitness Identification and the Problematics of Blackstonian Reform of the Criminal Law." *Journal of Criminal Law and Criminology* 110, no. 2 (2020): 181-243.

⁶⁶ Monterosso, "Shortcomings in the Operation and Coordination of Witness Protection in Australia. Where to from Here?", p. 260.

⁶⁷ Mahfud Mahfud. "Crime Victims Protection in Indonesia: An Analysis of the Recent Victim Protection Acts." *Kertha Patrika* 42 (2020): 115-131.

Article 16D, the members of the Advisory Board serve for a period of 5 years. Meanwhile, the Secretariat is led by a Secretary General appointed by the Minister of State Secretary.

In Malaysia, the witness protection program is maintained by a Director General. Pursuant to Section 4 of Malaysia WPA, the Minister has the authority to appoint a Director General and a Deputy from amongst members of the public services. The Director General has an obligation to submit an annual report to the Minister no later than 31st March the following year. Unlike Indonesia, Malaysia does not provide detailed provision regarding institutional arrangements. Nevertheless, both Malaysia and Indonesia appoint independent agencies to maintain the witness protection program. Giving the authority to maintain witness protection to an independent agency can ensure objectivity and minimize the risk of abuse of the program.⁶⁸

Meanwhile, the witness protection program in Australia has a multitiered structure which consists of federal and state or territory level. However, this study only discusses the witness protection program at the federal level. Pursuant to Section 4 of Australia WPA, a Commissionaire of Australian Federal Police is assigned to maintain the witness protection program at federal level. Unlike Indonesia which forms an independent agency, the witness protection agency in Australia is located under the structure of federal police. The structure of the Commissionaire is led by a director and assisted by a committee which consists of Deputy. The Commissionaire can initiate special arrangements with approved authorities as stated in Section 6 of Australia WPA. However, it is clearly stated in Subsection 6 (3) that the function of the Commissionaire does not include the provision of service related to witness protection at state or territory level. According to Subsection 30 (2) of Australia WPA, the Commissionaire must file an annual report to both the Minister and the House of the Parliament.⁶⁹ However, the report only covers the overall description regarding the management of the program and does not include detail of individual case information.⁷⁰

Despite differences in terms of structure, the witness protection agencies in Indonesia, Malaysia and Australia share a common function namely to maintain the witness protection program. Pursuant to Article 12 of IWVPL, LPSK has the authority to administer the protection and assistance to witnesses and victims. Such an authority encompasses several areas including the authority to examine written application or statement from applicant or other

⁶⁸ Kowalick, "A critical examination of witness protection in Australia", p. 16.

⁶⁹ Kowalick, p. 49.

⁷⁰ Dandurand, and Farr. *A Review of Selected Witness Protection Programs*, p. 39.

party who submit application in order to check the validity of it; file a request of information from the law enforcement related to the progress of a case; provide new identity; manage safe house; administer relocation, escort and protection; advise witness and victim in criminal proceeding; and perform appraisal of the value of compensation and restitution. Meanwhile, Section 5 of Malaysia WPA only regulates 2 basic obligations of the witness protection agency. First, the Director General is responsible to decide whether to recommend witnesses to be included in the program. Second, the agency must provide protection and assistance to the witness which has been accepted to the program. The second obligation resembles Article 4 of Australia WPA. However, the Commissionaire has additional responsibility according to the Australia WPA. Pursuant to Section 11 of Australia WPA, the Commissionaire has the authority to maintain the registrar containing confidential information of the witness under the program. Meanwhile, according to Section 11 of Malaysia WPA, the registrar is maintained by a body appointed by the Minister.

In terms of decision making, Indonesia and Australia witness protection agencies have ultimate authority to decide the inclusion of participants to the program. Pursuant to Article 29 of IWVPL and Subsection 8 (1) of Australia WPA, the witness protection agency (LPSK and the Commissionaire) has the sole authority to issue final decision on the inclusion of participants to the witness protection program. Meanwhile in Malaysia, the witness protection agency (Director General) is only granted the authority to recommend the application of witness protection to the Attorney General. Pursuant to Subsection 10 (3) of Malaysia WPA, the final decision on the acceptance of an application is in the hand of the Attorney General. Notwithstanding the difference in terms of decision-making process, the witness protection agency in Indonesia, Australia and Malaysia must consider several considerations stipulated in the witness protection law of each country as discussed in subsection E.

Due to the covert nature of the program, it is impossible to address further regarding institutional arrangement and international cooperation maintained by each witness protection agency.⁷¹ International cooperation is the foundation to enable cross border joint operation or relocation.⁷² The secrecy of the witness protection agency is like a double edge sword. Confidentiality is vital to ensure the safety of participants and other parties involved in the program. The more people know about the program, the higher the risk for the participant and

⁷¹ Dandurand, and Farr, p. 80.

⁷² Dandurand, and Farr, p. 58.

other parties in the program. Therefore, Indonesia and Australia grant sole authority to the witness protection agency. Contrariwise, Malaysia's witness protection program also involves the Attorney General and Minister in administering the program. On the other hand, the lack of transparency makes it difficult to conduct monitoring and evaluation of the program. Even though there is an obligation to file an annual report regarding the implementation of the program, Indonesia and Australia grant absolute authority to the agency (LPSK and the Commissionaire of the Australian Federal Police) to control the entire operation of the witness protection program. Conversely, Malaysia allows the Attorney General and Minister to perform monitoring by limiting the authority of the witness protection agency in Malaysia.

E. Criminal Sanctions

Indonesia, Malaysia and Australia provide special regulation concerning offences related to witness protection. In Indonesia, the provision concerning offences related to witness protection is amended in 2023. Pursuant to Article 622 cc of Indonesia New Criminal Code, Article 37, 38, 39 and 41 of the IWVPL are replaced with Article 292, 294, 295, 296, 297, 298 and 299 of the New Criminal Code. The offences related to witness protection are organized in Chapter VI under the title Crimes against Trial.

There are 7 offences related to witness protection regulated under IWVPL and the New Criminal Code. First, the offence of disclosing the identity of whistleblower, witness and victim which must be concealed based on the provision of law, as stipulated in Article 292 of the New Criminal Code. Second, the offence of committing physical attack towards a) the victim while giving testimony; or b) officers who are in charge which causes the witness unable to give testimony, as stated in Article 294 of the New Criminal Code. Third, the offence of using physical attack, threat or other means to deter witness or victim from giving testimony in a trial as stipulated in Article 295. In addition, if such an attack causes severe injury, the perpetrator shall be punished with a more stringent sentencing. Fourth, the offence of preventing a witness or victim from obtaining their rights and protection as stated in Article 296. Fifth, the offence regulated under Article 297 namely causing witness or victim or their family to lose their jobs because of their testimony in trial. Sixth, offences committed by officers who fail to give protection for witnesses or victims who have given testimony in a trial as stipulated under Article 298 of the New Criminal Code. Lastly, the offence of disclosing the location of witness or victim under the protection program as provided in Article 299 of the New Criminal Code. Beside these 7 offences, the IWVPL also regulates the special

provision for offences committed by public officials and corporations. Pursuant to Article 42 of the IWVPL, if an offence related to witness protection is committed by a public official, the punishment will be imposed 3 times more stringent. Meanwhile, in case an offence is conducted by corporations, the imposition of fine as sentencing will be multiplied 3 times.

Malaysia and Australia on the other hand only regulate 2 offences related to witness protection. The first offence is regulated under Subsection 26 (1) of Malaysia WPA and Subsection 22 (1) of Australia WPA. Both subsections use similar wording to describe the offence by prohibiting anyone from disclosing identity or location of witness or conducting other acts which can compromise the safety of witness, participant or former participant. The second offence was provided in Subsection 26 (2) of Malaysia WPA and Subsection 22 (2) of Australia WPA prohibition for participant or former participant to disclose information regarding the program. Australia provides a more detail provision by mentioning all the information which must not be disclosed *inter alia* the fact that the participant is under protection or has undergone assessment to be included in the program; information on how the program works; information regarding parties involved in the program particularly the Commissionaire or the employees; information related to the memorandum of understanding. Furthermore, Australia WPA also provides an exception in which a person can disclose such information. The exception applies if the disclosure of such information has been approved by the Commissionaire; or if the disclosure is necessary to support a complaint or report to the Ombudsman.

Overall, Malaysia has the most stringent sentencing, followed by Australia and Indonesia in third place. Pursuant to Malaysia WPA, the first offence of disclosing identity or location of witness or compromising the safety of witness to the disclosure will be punished with imprisonment maximum 20 years. Meanwhile, the penalty for similar offenses in Australia is 10 years and maximum 7 years in Indonesia. Regarding the second offence in which the participant discloses confidential information, the penalty is 10 years maximum based on Malaysia WPA and 5 years pursuant to Australia WPA. Meanwhile, Indonesia does not regulate offenses committed by witnesses or participants.

Conclusion

In conclusion, witness protection programs are crucial for ensuring the safety of witnesses and supporting the overall effectiveness of the criminal justice system by encouraging testimony that can lead to convictions. While the enactment of Indonesia's New Criminal Code does not substantially alter the

Witness Protection Law, it introduces revisions primarily related to criminal sanctions. This comparative analysis of the witness protection laws in Indonesia, Malaysia, and Australia identifies several key similarities and differences, particularly in five areas: the subjects of protection, admission to the program, rights and obligations of parties, institutional arrangements, and criminal sanctions. Indonesia uniquely distinguishes between six categories of subjects requiring protection, offering specific rights and obligations for each, whereas Malaysia and Australia provide equal protection for all witnesses. The three countries also share common admission criteria, such as the importance of testimony, threat level, and criminal history, but Australia and Malaysia incorporate disclosure requirements to prevent abuse of the program by witnesses with outstanding legal or financial obligations.

Indonesia's approach to institutional arrangements, criminal sanctions, and witness protection provisions is more extensive, but its system could benefit from adopting safeguards like those found in Malaysia and Australia, particularly the disclosure requirements. The primary aim of witness protection should not be to offer excessive protection but to adjust it according to the available resources. The increasing reliance on digital evidence, such as CCTV footage, could also further substantiate witness testimony. Ultimately, while the current framework in Indonesia is robust, further research is needed to identify the factors that influence the effectiveness of witness protection programs and ensure they are properly implemented to safeguard both the witnesses and the justice system as a whole.

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