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THE WITNESS PROTECTION ACT

CHAPTER 79

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CHAPTER 79

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CHAPTER 79

WITNESS PROTECTION ACT

[Date of assent: 30th December, 2006.]

[Date of commencement: 1st September, 2008.]

An Act of Parliament to provide for the protection of witnesses in criminal cases and other proceedings to establish a Witness Protection Agency and provide for its powers, functions, management and administration, and for connected purposes

[Act No. 16 of 2006, Legal Notice 10 of 2008, Act No. 2 of 2010, Act No. 45 of 2016, Act No. 18 of 2018, Act No. 20 of 2020.]

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Witness Protection Act.

2. Interpretation

In this Act, unless the context otherwise requires—

"Agency" means the Witness Protection Agency established by section 3A;

"Board" means the Witness Protection Advisory Board established by section 3P;

"Commission" means the Salaries and Remuneration Commission established by Article 230 of the Constitution;

"Committee" means the Witness Protection Complaints Committee established by section 3U of this Act;

"Director" means the Director of the Agency appointed under section 3E;

"law enforcement agency" means a government agency responsible for the enforcement of the law;

"Minister" *deleted by Act No. 18 of 2018, Sch.;*

"participant" means a witness who is included in the programme;

"programme" means the witness protection programme established and maintained under section 4;

"protected person" means a person who has been placed under protection in accordance with the provisions of sections 3(2), (5) and (9);

"protection officer" includes an officer of the agency charged with the responsibility of protecting a witness;

"public interest" means matter affecting the welfare of the state or the rights, health, or finances of the general public;

"register of births" means a register of births maintained under the Births and Deaths Registration Act (Cap. 149);

"register of deaths" means a register of deaths maintained under the Births and Deaths Registration Act (Cap. 149);

"register of marriages" means—

- (a) a register maintained under any Act in which marriages are registered or recorded; or
- (b) an index, maintained under any Act, of certified copies of any such registers;

"threat" means the possibility of adverse consequences for a witness as a result of giving evidence in the proceedings and includes any danger, physical or psychological, that may result from the involvement of the person in the proceedings;

"risk" means the likelihood or possibility that a threat may occur;

"security officer" means a person who has been trained on security matters charged with the responsibility of ensuring physical safety.

"Tribunal" *deleted by Act No. 45 of 2016, s. 2;*

"witness" means a person who has made a statement or has given or agreed to give evidence in relation to an offence or criminal proceedings in Kenya or outside Kenya, and requires protection on the basis of an existing threat or risk;

"witness protection order" means an order of the High Court under Part III.

[Act No. 2 of 2010, s. 3, Act No. 45 of 2016, s. 2, Act No. 18 of 2018, Sch.]

3. Application

(1) This Act shall apply to—

- (a) a witness in criminal proceedings; and
- (b) a witness who is required to give evidence in a prosecution or inquiry held before a court, commission, or tribunal outside Kenya—
 - (i) for the purposes of any treaty or agreement to which Kenya is a party; or
 - (ii) in circumstances prescribed by Regulations made under this Act.

(2) A person is a protected person for purposes of this Act if that person qualifies for protection—

- (a) by virtue of being related to a witness;
- (b) on account of a testimony given by a witness; or
- (c) for any other reason which the Director may consider sufficient.

[Act No. 2 of 2010, s. 4, Act No. 45 of 2016, s. 3.]

PART IA – ESTABLISHMENT, POWERS AND FUNCTIONS OF THE WITNESS PROTECTION AGENCY, ADVISORY BOARD AND TRIBUNAL

A. The Witness Protection Agency

3A. Establishment of the Agency

(1) There is established an Agency to be known as the Witness Protection Agency.

(2) The Agency shall be a body corporate with perpetual succession and a common seal, and shall, in its corporate name, be capable of—

- (a) suing and being sued;

- (b) holding and alienating movable and immovable property;
- (c) borrowing and lending money; and
- (d) doing or performing all such other acts or things as may be lawfully done by a body corporate.

[Act No. 2 of 2010, s. 5.]

3B. Object and purpose of the Agency

(1) The object and purpose of the Agency is to provide the framework and procedures for giving special protection, on behalf of the State, to persons in possession of important information and who are facing potential risk or intimidation due to their co-operation with prosecution and other law enforcement agencies.

(2) The nature of the special protection referred to in subsection (1) shall entail the power of the Agency to acquire, store, maintain and control firearms and ammunition and electronic or other necessary equipment, despite the provisions of any other law.

[Act No. 2 of 2010, s. 5.]

3C. Functions of the Agency

The functions of the Agency shall be to—

- (a) establish and maintain a witness protection programme;
- (b) determine the criteria for admission to and removal from the witness protection programme;
- (c) determine the type of protection measures to be applied;
- (d) advise any Government Ministry, department, agency or any other person on the adoption of strategies and measures on witness protection; and
- (e) perform such other functions as may be necessary for the better carrying out of the purpose of this Act.

[Act No. 2 of 2010, s. 5.]

3D. Powers of the Agency

(1) The Agency shall have power to—

- (a) control and supervise its staff in a manner and for such purposes as may be necessary for the promotion of the purpose and the object for which the Agency is established;
- (b) administer the funds and assets of the Agency;
- (c) receive any grants, gifts, donations or endowments and make legitimate disbursement therefrom;
- (d) enter into association with such other persons, bodies, or organizations within or outside Kenya as it may consider desirable or appropriate in furtherance of its object and purpose;
- (e) enter into confidential agreements with relevant foreign authorities, international criminal courts or tribunals and other regional or international entities relating to the relocation of protected persons and other witness protection measures;
- (f) open bank accounts for the funds of the Agency;
- (g) collect, analyze, store and disseminate information related to witness protection;

- (h) give such instructions to a protected person as the Agency may consider necessary;
- (i) search the protected person and their property and seize items regarded by the Agency to be a threat to the protected person or another person or the integrity of the programme;
- (j) summon a public officer or other person to appear before it or to produce a document or thing or information which may be considered relevant to the functions of the Agency within a specified period of time and in such manner as it may specify;
- (k) invest the funds of the Agency not currently required for its purposes.

(2) A person who fails to comply with a direction of the Agency issued under subsection (1)(i), commits an offence and is liable, on conviction, to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding one year or both.

(3) A person who disobeys a summons issued by the Agency commits an offence and shall upon conviction be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years, or to both.

[Act No. 2 of 2010, s. 5, Act No. 45 of 2016, s. 4.]

3E. Director of the Agency

(1) There shall be a Director of the Agency who shall be appointed by the Advisory Board on such terms and conditions as the Board may, in consultation with the Commission, approve.

(2) The Director shall have all the powers necessary or expedient for the performance of his functions under this Act.

(3) A person shall not be appointed as Director under this section, unless that person—

- (a) is a citizen of Kenya;
- (b) is of high moral character and proven integrity; and
- (c) is an advocate of the High Court of Kenya, and has since qualification, practised law in the public or private sector or has been engaged in the teaching of law or research for a period of not less than ten years, and has performed duties of an administrative nature for not less than five years.
- (d) meets the requirements of Chapter Six of the Constitution.

(4) The Director shall—

- (a) be the chief executive of the Agency and shall be responsible for carrying out the policy decisions of the Agency, its day to day administration and management and control of other staff of the Agency;
- (b) be an *ex officio* member of the Board;
- (c) cause to be kept minutes of the meetings of the Board and other records as the Agency may direct;
- (d) ensure that, in conducting its affairs, the Agency is guided by the Laws of Kenya and international best practices which shall include, but not be limited to, the development and implementation of information

security measures, technical and administrative competence, and the principles of impartiality, confidentiality, objectivity and integrity; and

(e) perform other functions as may be assigned by the Board.

(4A) The Director may, in writing, delegate any power or function conferred to the office under this Act to a senior officer of the Agency.

(4B) An officer of the Agency to whom a power or function has been delegated under subsection (4A) shall exercise that power or perform that function subject to the general directions of the Director.

(4C) The Director may at any time in writing withdraw a delegation under subsection (4A).

(4D) The delegation of any power or function does not prevent the Director from exercising or performing that power or function in person.

(5) The Director shall hold office for a period of five years and shall be eligible for re-appointment for one further term.

(6) The Director may be removed from office for—

- (a) inability to perform the functions of the office arising out of physical or mental infirmity;
- (b) misconduct or misbehaviour;
- (c) incompetence; or
- (d) conviction for a criminal offence attracting a term of imprisonment of not less than six months without the option of a fine.

(7) A person desiring the removal of the Director shall present a petition to the Board which shall be in writing, setting out the alleged facts constituting the grounds for removal of the Director.

(7A) The Board shall consider the petition and, if it is satisfied that it discloses the existence of a ground under subsection (6), the Board shall dismiss the Director.

(7B) Notwithstanding subsection (7A), the Board shall afford the Director an appropriate opportunity to defend himself against any allegation made against him before taking any action under that subsection.

(8) *Deleted by Act No. 45 of 2016, s. 5(f).*

(9) *Deleted by Act No. 45 of 2016, s. 5(g).*

(10) *Deleted by Act No. 45 of 2016, s. 5(h).*

(11) *Deleted by Act No. 45 of 2016, s. 5(i).*

(12) *Deleted by Act No. 18 of 2018, Sch.*

[Act No. 2 of 2010, s. 5, Act No. 45 of 2016, s. 5, Act No. 18 of 2018, Sch.]

3F. Staff of the Agency

(1) The Agency may, for the proper discharge of its functions, appoint professional and technical staff and other staff upon such terms and conditions as the Attorney-General may, in consultation with the Commission, approve.

(2) The staff referred to in subsection (1) may include deputy directors, assistant directors, protection officers, security officers and other officers as the Agency may determine.

(3) A number of public officers may be transferred or seconded to the Agency as the Agency may, in consultation with the Public Service Commission, determine,

for specified periods of time and on such terms and conditions as may be agreed upon between the Agency and the Public Service Commission.

(4) For the purposes of this Act, a public officer who is transferred or seconded to the Agency under subsection (3) shall be regarded as a member of the staff of the Agency and subject only to the control and direction of the Agency.

(5) In determining the terms and conditions of service for the Director and staff, the Cabinet Secretary and the Commission shall be guided by the following principles—

- (a) that witness protection falls in a strategic sector in the administration of justice process of the country and the nature of the service entailed requires commensurate compensation; and
- (b) that the nature of the operations of the Agency requires probity, integrity and incorruptibility.
- (c) that the remuneration and conditions of service may differ from those applicable in the public service.

(6) The Agency shall, with the approval of the Cabinet Secretary responsible for finance, establish a suitable social security scheme for the Director and staff of the Agency.

[Act No. 2 of 2010, s. 5, Act No. 45 of 2016, s. 6, Act No. 18 of 2018, Sch.]

3G. Independence of the Agency

(1) The Agency shall have all the powers necessary or expedient for the performance of its functions under this Act without interference from any authority.

(2) The Agency shall for the purposes of accountability, report to the Attorney-General on the overall fulfilment of its object and purpose and the performance of its functions under this Act.

[Act No. 2 of 2010, s. 5, Act No. 18 of 2018, Sch.]

3H. Funds of the Agency

(1) Except as otherwise provided in section 3I, the expenses incurred by the Agency in accordance with this Act shall be charged and issued out of the Consolidated Fund and the appropriation for the expenses shall be included in the Appropriation Bill introduced in the National Assembly to authorize the withdrawal from the Consolidated Fund.

(2) Without prejudice to subsection (1), there may be made to the Agency grants, gifts, donations or bequests towards the achievement of the objects of the Agency.

(3) The Agency shall not accept any grant, gift, donation or bequest made on any condition that the Agency performs any function or discharges any duty or obligation other than duties under this Act.

[Act No. 2 of 2010, s. 5, Act No. 45 of 2016, s. 7.]

3I. Victims Compensation Fund

(1) There is established a fund to be known as the Victims Compensation Fund (hereinafter referred to as "the Fund") which shall vest in and be operated by the Agency.

(2) There shall be paid into the Fund—

- (a) such moneys as may be provided pursuant to section 3H for the purposes of the Fund;

- (b) such moneys as may be realized from any property forfeited to the Government in connection with a crime referred to in subsection (4);
- (c) grants, gifts, donations or bequests made to the Fund by any person and received by the Agency with the approval of the Attorney-General, where such receipt does not occasion a conflict of interest in the performance of the Agency's functions under this Act;
- (d) moneys earned or arising from any investment of the Fund;
- (e) all other moneys which may in any manner become payable to, or vested in, the Fund.

(3) Where under subsection (2)(b), any immovable property is assigned to the Fund, the Agency shall deal with the property in such manner as it thinks fit and may sell the property and use the proceeds of sale for the purposes for which the Fund is established.

(4) There shall be paid out of the Fund—

- (a) restitution to a victim, or to the family of a victim of a crime committed by any person during a period when such person is provided protection under this Act;
- (b) compensation for the death of a victim of a crime committed by any person during a period when such person is provided protection under this Act, to the family of such victim; and
- (c) any moneys required to meet expenses relating to any other matter incidental to or connected with the matters stated in paragraphs (a) and (b).

(5) Unless the National Treasury directs otherwise, the receipts, earnings or accruals of the Fund and the balances of the Fund at the close of each financial year shall not be paid into the Consolidated Fund, but shall be retained for the purposes of the Fund.

(6) Subject to this section, the Cabinet Secretary may, by regulations, provide for the management and administration of the Fund and for anything incidental to or connected therewith.

[Act No. 2 of 2010, s. 5, Act No. 18 of 2018, Sch.]

3J. Estimates of Expenditure

(1) The financial year of the Agency shall be the period of twelve months ending on the thirtieth day of June in each year.

(2) The Agency shall in accordance with the law relating to the public finance management prepare annual estimates of the expenditure of the Agency and the Board for that financial year.

(3) The annual estimates shall make provision for all estimated expenditure of the Agency and the Board for the financial year to which they relate, including a reserve fund to provide for contingency in the event of an unforeseen increase in expenditure and other emergencies not contemplated at the time of making the estimates.

(4) *Deleted by Act No. 20 of 2020, Sch.*

(5) Expenditure shall not be incurred by the Agency except in accordance with the annual estimates provided under subsection (2) or in pursuance of an

authorization of the advisory Board given with prior written approval of the Cabinet Secretary responsible for finance.

[Act No. 2 of 2010, s. 5, Act No. 45 of 2016, s. 8,
Act No. 18 of 2018, Sch, Act No. 20 of 2020, Sch.]

3K. Accounts and audit

(1) The Agency shall keep books, and other proper records of accounts of the expenditure, assets and liabilities of the Agency, which shall be classified in accordance with the information security policy of the Agency and shall be preserved or disposed of in accordance with that policy.

(2) The annual accounts of the Agency shall be prepared, audited and reported upon in accordance with the Public Audit Act (Cap. 412B), without prejudicing the integrity or security of the Agency's operations.

(3) The legislative and regulatory provisions on the auditing of national security organs shall apply *mutatis mutandis* to the Agency.

(4) The legislative and regulatory provisions on classified procurement and disposal of assets shall apply *mutatis mutandis* to the Agency.

[Act No. 2 of 2010, s. 5, Act No. 18 of 2018, Sch, Act No. 20 of 2020, Sch.]

3L. Annual reports

(1) The Agency shall within four months after the end of each financial year, make a report to the Board on the activities and operations of the Agency during the financial year.

(2) The Board shall submit the annual report to the Attorney-General within fourteen days of receipt of the report.

(3) The Attorney-General shall within fourteen days after receipt of the report from the Board, submit the report to the President.

[Act No. 2 of 2010, s. 5, Act No. 18 of 2018, Sch.]

3M. Director etc. to have powers of a police officer

For the purposes of their functions under the Act, the Director, assistant directors and protection officers shall have the powers, privileges and immunities of a police officer in addition to any other powers they may have under the Act.

[Act No. 2 of 2010, s. 5.]

3N. Identity certificate and appointment

(1) The Director shall issue to every member of staff of the Agency on appointment, a certificate of identity and appointment in such form as the Agency may prescribe, which shall be evidence of the appointment for the purposes of this Act.

(2) A person appointed as a member of staff of the Agency and issued with an appointment certificate referred to under subsection (1) shall have authority to carry concealed official firearms and ammunition.

[Act No. 2 of 2010, s. 5.]

3O. Dissolution of Witness Protection Unit, savings

(1) Upon the commencement of this Part, the Witness Protection Unit existing immediately before the commencement, shall stand dissolved.

(2) Notwithstanding the provisions of subsection (1)—

- (a) a person who, immediately before the commencement of this Part, was the Head of the Witness Protection Unit is, for the purposes of this Part, the Director of the Agency until a Director is appointed under this Act;
- (b) a valid contract entered into on behalf of the Witness Protection Unit before the commencement of this Part, shall continue to be in force to the extent that the terms and conditions thereof are not inconsistent with the provisions of the Act;
- (c) movable and immovable property and the rights and liabilities previously attaching to the Witness Protection Unit and property held by any person on behalf of the Witness Protection Unit before the commencement of this Part shall, upon such commencement, vest in the Agency.

[Act No. 2 of 2010, s. 5.]

B. The Witness Protection Advisory Board

3P. Establishment and membership

(1) There is established a board to be known as the Witness Protection Advisory Board.

(2) The Board shall be an unincorporated body consisting of—

- (a) the Solicitor-General as chairperson;
- (b) the Principal Secretary responsible for matters relating to foreign affairs;
- (c) the Principal Secretary responsible for matters relating to finance;
- (d) the Chief Registrar of the Judiciary;
- (e) the Director-General of the National Intelligence Service;
- (f) the Inspector-General of the National Police Service;
- (g) the Commissioner-General of Prisons;
- (h) the Director of Public Prosecutions; and
- (i) the Chairperson of the Kenya National Commission on Human Rights.

(3) The Director shall be the secretary of the Board.

(4) A member of the Board may in writing designate an officer not below the level of Director or equivalent to represent him on the Board.

[Act No. 2 of 2010, s. 5, Act No. 45 of 2016, s. 9, Act No. 18 of 2018, Sch.]

3Q. Functions and Powers

(1) The principal function of the Board shall be to advise the Agency generally on the exercise of its powers and the performance of its functions under the Act and shall, in particular but without prejudice to the generality of the foregoing—

- (a) advise on the formulation of witness protection policies in accordance with the current law and international best practices;
- (b) have general oversight on the administration of the Agency;
- (c) approve the budgetary estimates of the Agency; and
- (d) perform any other functions as may be conferred by this Act or any other law.

(2) The Board may establish committees consisting of members of the Board to carry out any of its functions.

[Act No. 2 of 2010, s. 5.]

3R. Allowances

Members of the Board shall be paid such allowances as may be determined from time to time by the Cabinet Secretary responsible for finance in consultation with the Commission.

[Act No. 2 of 2010, s. 5, Act No. 45 of 2016, s. 10.]

3S. Meetings and procedure of the Board

(1) The Board shall meet at least four times in every financial year and not more than four months shall elapse between one meeting and the next meeting.

(2) Unless three quarters of the members otherwise agree, at least fourteen days' notice of a meeting shall be given to every member.

(3) The quorum at the meeting of the Board is five members of the Board or a greater number determined by the Board in respect of an important matter.

(4) The Chairperson shall convene and preside at meetings of the Board or in the absence of the Chairperson, by the Vice-chairperson or in both their absence, by a member of the Board elected by the members present from among their number.

(5) Matters before the Board shall be decided by a majority of the members present and voting and in the event of equality of votes, the person presiding shall have a casting vote.

(6) The proceedings of the Board shall not be invalidated by reason of a vacancy among the members.

[Act No. 2 of 2010, s. 5.]

3T. Disclosure of interest, etc.

(1) A member of the Board or a person present at a meeting of the Agency who has interest in a matter for consideration by the Board or by the Agency shall disclose in writing the nature of that interest and is disqualified from participating in the deliberations of the Board or the Agency in respect of that matter unless the Board or the Agency decides otherwise.

(2) A member of the Board, the Director of the Agency or a member of staff of the Agency shall not transact any business or trade with the Agency.

(3) A member or a person who contravenes this section commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment to a term not exceeding three years or both.

[Act No. 2 of 2010, s. 5.]

C. The Witness Protection Complaints Committee

3U. Establishment of the Witness Protection Complaints Committee

(1) There is established a committee to be known as the Witness Protection Complaints Committee.

(2) The Committee shall consist of—

- (a) a chairperson who shall be a person qualified to be appointed a judge of the High Court; and

- (b) four other members—
- (i) one of whom shall be an advocate of the High Court of five years standing;
 - (ii) two members with relevant experience in handling complaints relating to human rights and intelligence respectively; and
 - (iii) one member who shall either be a retired senior witness protection officer or a person with experience in witness protection.

(3) The chairperson and members of the Committee shall be appointed by the Attorney-General and shall serve on part-time basis.

(4) A person shall not be qualified to be appointed as a chairperson or a member of the Committee if that person—

- (a) is a member of the public service or is a member of a governing body of a political party; or
- (b) has not met the requirements of Chapter Six of the Constitution.

(5) The chairperson and members shall hold office for a non-renewable term of six years.

(6) The Attorney-General may—

- (a) by regulations provide guidelines for the operation of the committee; and
- (b) designate staff to facilitate the operations of the Committee.

[Act No. 2 of 2010, s. 5, Act No. 45 of 2016, s. 12.]

3V. Functions of Committee

(1) The Committee shall receive, consider and determine—

- (a) appeals from decisions of the Director under this Act; and
- (b) complaints against staff of the Agency.

(2) A person aggrieved by the decision of the Committee may, within thirty days of that decision, appeal to the High Court.

[Act No. 45 of 2016, s. 13.]

PART II – THE WITNESS PROTECTION PROGRAMME

4. Protective action

(1) The Agency shall establish and maintain a witness protection programme and shall take such action as may be necessary and reasonable to protect the safety and welfare of the protected persons.

(2) Without prejudice to the generality of subsection (1), the action taken under subsection (1) may include but not be limited to—

- (a) physical and armed protection;
- (b) relocation within or outside Kenya;
- (c) change of identity; or
- (d) any other measure necessary to ensure the safety of a protected person;

(3) The Agency may request the courts, in support of the programme, to implement protection measures during court proceedings which measures may include but not be limited to—

- (a) holding *in camera* or closed sessions;
- (b) the use of pseudonyms;
- (c) the reduction of identifying information;
- (d) the use of video link; or
- (e) employing measures to obscure or distort the identity of the witness.

(4) The Agency shall put in place support measures to facilitate the integration of the protected person.

[Act No. 2 of 2010, s. 6, Act No. 45 of 2016, s. 14.]

5. Inclusion in witness protection programme

(1) The decision to admit into or exclude any person from the programme, shall be the responsibility of the Director.

(2) A person may be included in the programme only if—

- (a) the Director has decided that the witness be so included;
- (b) the person agrees to be included; and
- (c) a memorandum of understanding in accordance with section 7 is signed by the witness or by—
 - (i) a parent or guardian of the person if the person is under the age of eighteen years; or
 - (ii) a guardian or other person who is usually responsible for the care and control of the person, if the person otherwise lacks legal capacity to sign it.

(3) Where a person has not been offered protection under the programme, a written request for his inclusion in the programme may be made to the Director by—

- (a) the witness; or
- (b) a law enforcement agency;
- (c) a public prosecutor; or
- (d) a legal representative or any other intermediary.

(4) An application for the protection of a person below the age of eighteen may, in such circumstances as the Attorney-General may specify in Regulations, be made without the consent of the person's parent or guardian.

(5) The Agency shall process the request under subsection (3) without undue delay.

(6) Where—

- (a) a parent or guardian of a witness signs a memorandum of understanding because the witness was under the age of eighteen; and
- (b) the memorandum is still operating after the witness turns eighteen, the Agency may require the witness to sign the memorandum.

(7) The inclusion of a witness or protected person in the programme shall not be treated as a reward or a means of persuading or encouraging the witness to give evidence or to make a statement.

(8) A person admitted into the programme shall be protected for as long as the danger or risk to their safety persists.

[Act No. 2 of 2010, s. 7, Act No. 45 of 2016, s. 15, Act No. 18 of 2018, Sch.]

6. Assessing witness for inclusion in the programme

(1) In deciding whether to include a witness in the programme, the Director shall have regard to—

- (a) the seriousness of the offence to which any relevant evidence or statement relates;
- (b) the nature and importance of any relevant evidence or statement;
- (c) the nature of the perceived danger to the witness;
- (d) *deleted by Act No. 2 of 2010, s. 8;*
- (e) *deleted by Act No. 2 of 2010, s. 8;*
- (f) whether there are viable alternative methods of protecting the witness;
- (g) *deleted by Act No. 2 of 2010, s. 8;*
- (h) the public interest in the prosecution of the case;
- (i) the ability of the person to adapt to the programme and its measures; and
- (j) such other matters as the Director considers relevant.

(2) The Director shall not include a witness in the programme if the Director does not, in his opinion, have enough information to assess the matters referred to in this section in relation to the witness.

[Act No. 2 of 2010, s. 8, Act No. 45 of 2016, s. 16.]

7. Memorandum of understanding

(1) A memorandum of understanding shall—

- (a) set out the basis on which a participant is included in the programme and details of the protection and assistance which are to be provided; and
- (b) contain a provision to the effect that protection and assistance under the programme may be terminated if the participant deliberately breaches a term of the memorandum of understanding or a requirement or undertaking relating to the programme.

(2) A memorandum of understanding in relation to a participant may also contain provisions relating to any one or more of the following—

- (a) any outstanding legal obligations of the participant and how they are to be dealt with;
- (b) any legal obligations which the participant may or may not enter into;
- (c) the surrender and issue of passports and other identification documents;
- (d) the taking, provision and retention of photographs of the participant;
- (e) the issue of any documents relating to the new identity of the participant;
- (f) the prohibition of the participant from engaging in specified activities;
- (g) marriage, family maintenance, taxation, welfare or other social or domestic obligations or relationships;
- (h) any other obligations of the participant;
- (i) consequences of the participant's failing to comply with the provisions of the memorandum of understanding; and

- (j) any other matter for which it may be necessary or expedient to make provision in the circumstances of the case.

(3) A memorandum of understanding shall contain a statement advising the participant of his right to complain to the Director about the conduct of any member of staff in relation to the matters dealt with in the memorandum.

(4) A memorandum of understanding shall be signed by or on behalf of the witness in the presence of the Director or a member of staff designated by the Director for the purposes of this section.

(5) A witness becomes included in the programme when the Director or a member of staff designated by him signs the memorandum of understanding.

(6) The Director shall, as soon as practicable after a memorandum of understanding is duly signed, notify the relevant participant that it has been signed.

[Act No. 2 of 2010, s. 9.]

8. Variation of memorandum of understanding

A memorandum of understanding may be varied with the consent of the participant and the Director.

[Act No. 2 of 2010, s. 10.]

9. Temporary protection pending full assessment

(1) The Director may include in the programme on a temporary basis a witness who, in the Director's opinion, is in urgent need of protection.

(2) The Director may require an interim memorandum of understanding to be signed by or on behalf of the witness.

(3) Sections 5 and 6 shall not be construed as preventing the exercise or performance of any power or function under this section but, in so far as the requirements of those sections have not been complied with before the witness is included in the programme, they shall be complied with as soon as practicable after the witness's inclusion.

[Act No. 2 of 2010, s. 11.]

10. Cessation of protection and assistance

(1) Protection and assistance provided under the programme to a participant shall be terminated by the Director if the participant requests in writing that it be terminated.

(2) Protection and assistance provided under the programme may be terminated by the Director if—

- (a) the participant deliberately breaches a term of the memorandum of understanding or a requirement or undertaking relating to the programme;
- (b) anything done or intended to be done by the participant is, in the opinion of the Director, likely to threaten the security or compromise the integrity of the programme; or
- (c) the circumstances which gave rise to the need for protection and assistance for the participant have ceased to exist,

and the Director is of the opinion that, in the circumstances of the case, the protection and assistance should be terminated.

[Act No. 2 of 2010, s. 12.]

11. Suspension of protection and assistance

Protection and assistance provided under the programme to a participant may be suspended by the Director for a reasonable period determined by the Director if he is satisfied that the participant has done or intends to do something which limits the ability of the Director to provide adequate protection to the participant.

[Act No. 2 of 2010, s. 13.]

12. Notice of involuntary termination or suspension

If protection and assistance provided under the programme to a participant are terminated or suspended under section 10 or 11, the Director shall notify any law enforcement agency which is interested in the decision.

[Act No. 2 of 2010, s. 14.]

PART III – PROTECTING WITNESSES FROM IDENTIFICATION**13. Identifying documents**

Without limiting the powers of the Director under section 4, he may apply for any documents necessary—

- (a) to allow a witness to establish a new identity;
- (b) otherwise to protect the witness; or
- (c) to restore a former participant's former identity.

[Act No. 2 of 2010, s. 15.]

14. Application for court order

(1) The Agency may, in a manner to be prescribed by rules of court, apply to the High Court for an order authorising a specified person, or a person of a specified class or description—

- (a) to make a new entry in a register of births or a register of marriages in respect of a witness;
- (b) to make a new entry in a register of deaths in respect of a witness or a relative (by blood or marriage) of a witness; or
- (c) to issue in the witness's new identity a document of a kind previously issued to the witness.

(2) The Agency shall provide such evidence as the High Court may require to satisfy itself as to the matters specified in section 16.

[Act No. 2 of 2010, s. 16.]

15. Court proceedings under this Part to be closed to public

All business of the High Court under this Part shall be conducted in camera.

16. Power of High Court to make order

The High Court may make a witness protection order if it is satisfied that—

- (a) the person named in the application as a witness—
 - (i) was a witness to or has knowledge of an offence and is or has been a witness in criminal proceedings relating to the offence; or
 - (ii) is a person who, because of his relationship to or association with a person to whom subparagraph (i) applies, may require protection or other assistance under this Act;

- (b) the life or safety of the person may be endangered as a result of his being a witness;
- (c) a memorandum of understanding has been entered into by the witness in accordance with section 7; and
- (d) the person is likely to comply with the memorandum of understanding.

17. Effect of witness protection order

On the making of an order of the kind referred to in section 14(1)(a) or (b)—

- (a) a person authorised to do so by the order may make such entries in a register of births, deaths or marriages as are necessary to give effect to the order;
- (b) the appropriate registrar having charge of the register of births, deaths or marriages shall afford the person so authorised full access to the relevant register and give him such assistance as he may require; and
- (c) the Agency shall maintain records showing details of the original birth, death or marriage of each person in respect of whom an entry is made under paragraph (a).

[Act No. 2 of 2010, s. 17.]

18. Effect of entries made under this Act

(1) An entry made under this Act in a register of births, deaths or marriages has effect as if it were a valid entry made in accordance with the law governing the register.

(2) An entry made under this Act in a register of births, deaths or marriages can only be cancelled by the Registrar-General or an appropriate registrar if the High Court, after being satisfied that the witness is no longer included in the relevant programme, has made an order on the application of the Agency directing that the entry be cancelled.

[Act No. 2 of 2010, s. 18.]

19. Special provision in case of marriage of participant

(1) A participant who has been provided with a new identity under the programme shall not marry unless—

- (a) the participant has given to the Agency evidence which establishes the identity of the participant and shows that the participant is of marriageable age;
- (b) if the participant has been married previously the participant has given to the Agency evidence which establishes that the contemplated marriage is not contrary to law; and
- (c) the participant has given to the Agency a statutory declaration to the effect that there is no legal impediment to the marriage and the Agency is not aware of any such impediment.

(2) A person who contravenes this section is guilty of an offence and is liable on conviction to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding six months, or both.

[Act No. 2 of 2010, s. 19.]

20. Restoration of former identity

(1) Where—

- (a) a participant has been provided with a new identity under the programme; and
- (b) protection and assistance afforded to him under the programme have been terminated,

the Agency may, if it considers it appropriate to do so, take such action as is necessary to restore the former participant's former identity.

(2) The Agency shall take reasonable steps to notify the former participant of a decision under subsection (1).

(3) If the Agency—

- (a) takes action under this section to restore the former identity of a person who was a participant; and
- (b) notifies the former participant in writing that he is required to return to the Agency all documents provided to the former participant that relate to the new identity provided under the programme,

the former participant shall not, without reasonable excuse, refuse or fail to return those documents to the Agency within fourteen days after receiving the notice.

(4) A person who contravenes subsection (3) is guilty of an offence and is liable on conviction to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding six months, or both.

[Act No. 2 of 2010, s. 20.]

21. Offences in relation to documents

While an entry made under this Act in a register of births, deaths or marriages continues in force, a person in respect of whom the entry is made who uses or obtains any document issued by a registrar having charge of a register of births, deaths or marriages which is based on the previous entry is guilty of an offence and is liable on conviction to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding six months, or both.

22. Information not to be disclosed

(1) A person who, either directly or indirectly, makes a record of, or discloses or communicates to another person, any information relating to the making of an entry under this Act in a register of births, deaths or marriages, unless it is necessary to do so—

- (a) for the purposes of this Act;
- (b) for the purposes of investigation by the Director of Public Prosecutions, the National Police Services or other law enforcement agencies; or
- (c) to comply with an order of the High Court,

is guilty of an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding three years, or both.

(2) Notwithstanding subsection (1), the Agency may disclose the former identity of a participant or former participant for the purpose of obtaining documents relating to the new identity of the participant or former participant.

[Act No. 2 of 2010, s. 21, Act No. 45 of 2016, s. 17.]

23. Non-disclosure of former identity of participant

(1) Where—

- (a) a participant who has been provided with a new identity under the programme would, apart from this section, be required by or under a law of Kenya to disclose his former identity for a particular purpose; and
- (b) the Director has given the participant permission, in the form prescribed by regulations made under this Act, not to disclose his former identity for that purpose,

the participant is not required to disclose his former identity to any person for that purpose.

(2) If a participant has been given permission under subsection (1) not to disclose his former identity for a particular purpose, it is lawful for the participant, in any proceedings or for any purpose, under or in relation to the relevant law of Kenya to claim that his new identity is his only identity.

(3) It shall be the duty of each person who is or has been associated with the administration of the programme, and who has obtained access to information or a document relevant to the programme, not to disclose that information or publish that document except as authorised by the Director.

(4) In this section, "participant" includes a person who—

- (a) was provided with a new identity under the programme; and
- (b) is no longer a participant but retains that identity.

[Act No. 2 of 2010, s. 22.]

24. Identity of participant not to be disclosed in legal proceedings

(1) If, in any proceedings in a court, tribunal or commission of inquiry, the identity of a participant is in issue or may be disclosed, the court, tribunal or commission shall, unless it considers that the interests of justice require otherwise—

- (a) hold that part of the proceedings which relates to the identity of the participant in private; and
- (b) make such order relating to the suppression of publication of evidence given before the court, tribunal or commission as, in its opinion, will ensure that the identity of the participant is not disclosed.

(2) If in any proceedings in a court, tribunal or commission of inquiry, a participant or former participant who has been provided with a new identity under the programme is giving evidence, the court, tribunal or commission may hold that part of the proceedings *in camera*.

(3) The court, tribunal or commission before which any proceedings referred to in subsection (1) or (2) are conducted may, if it thinks fit, by order direct—

- (a) that no question shall be asked in the proceedings which might lead to the disclosure of a protected identity of a participant or former participant or of his place of abode;
- (b) that no witness in the proceedings, including a participant or former participant, can be required to answer a question, give any evidence, or provide any information, which may lead to the disclosure of a protected identity of the participant or former participant or of his place of abode; and

- (c) that no person involved in the proceedings shall, in the proceedings, make a statement which discloses or could disclose a protected identity of a participant or former participant or his place of abode.

(4) In subsection (3), "protected identity" means an identity of a participant or former participant that is different from the identity under which he is known in or in connection with the proceedings concerned.

(5) This section shall have effect notwithstanding any provision of the Commissions of Inquiry Act (Cap. 102) or any other law or rule of evidence.

25. Documentation restrictions

The Agency shall not obtain documentation for a participant which represents that the participant—

- (a) has a qualification which he does not have; or
- (b) is entitled to a benefit to which he is not entitled.

[Act No. 2 of 2010, s. 23.]

26. Special commercial arrangements by Attorney-General

The Agency may make commercial arrangements with a person under which a participant is able to obtain a benefit under a contract or arrangement without revealing his former identity.

[Act No. 2 of 2010, s. 24.]

27. Dealing with rights and obligations of participant

(1) If a participant has any outstanding rights or obligations or is subject to any restrictions, the Agency shall take such steps as are reasonably practicable to ensure that—

- (a) those rights or obligations are dealt with according to law; or
- (b) the person complies with those restrictions.

(2) Such action may include—

- (a) providing protection for the participant while the participant is attending court; or
- (b) notifying a party or possible party to legal proceedings that the Agency will, on behalf of the participant, accept process issued by a court, a tribunal or a commission of inquiry and nominating an office for the purpose.

[Act No. 2 of 2010, s. 25.]

28. Avoidance of obligations by participant

(1) If the Director is satisfied that a participant who has been provided with a new identity under the programme is using the new identity—

- (a) to avoid obligations which were incurred before the new identity was established; or
- (b) to avoid complying with restrictions which were imposed on the person before the new identity was established,

the Director shall give notice in writing to the participant stating that he is so satisfied.

(2) The notice shall also state that, unless the participant satisfies the Director that the obligations will be dealt with according to law or the restrictions will

be complied with, the Director will take such action as he considers reasonably necessary to ensure that they are dealt with according to law or complied with.

(3) Such action may include informing a person who is seeking to enforce rights against the participant of the details of any property, whether real or personal, owned by the participant under his former identity.

[Act No. 2 of 2010, s. 26.]

29. Payments under witness protection programme

(1) The Director may, at his discretion, certify in writing that the whole or part of an amount held by a participant represents payments made to the participant under the programme.

(2) An amount so certified cannot be confiscated or restrained, and cannot be applied in payment of pecuniary penalties, under any law.

[Act No. 2 of 2010, s. 27.]

PART IIIA – RECIPROCAL PROTECTION ARRANGEMENTS WITH FOREIGN COUNTRIES

29A. Admission of witnesses from foreign countries on reciprocal basis

(1) The Director, in consultation with the Attorney-General, may on the basis of any treaty or convention ratified by Kenya enter into a written agreement with a competent authority from a foreign country—

- (a) to admit, on reciprocal basis, qualifying witnesses from that country into the witness protection programme under this Act; or
- (b) to have Kenyan witnesses protected under the witness protection regime of that foreign country.

(2) The particulars for the agreement referred to under subsection (1) shall include—

- (a) personal particulars and relevant documentation with respect to the witnesses sought to be protected;
- (b) the reasons for their protection, and the nature of the risk or threat they are facing;
- (c) the period of protection;
- (d) the source of funding to meet their protection costs; and
- (e) any other relevant particulars.

[Act No. 45 of 2016, s. 18.]

29B. Application for admission of a foreign witness

(1) An application for protection under this Part shall be in the prescribed form.

(2) Upon receipt of an application under subsection (1), the Director shall assess and, after consultation with the Attorney-General, determine whether or not to admit the witness into the programme.

(3) Before a foreign witness is admitted into the programme under this section, the Director shall—

- (a) request to be furnished with such further information as may be necessary; and
- (b) confirm that the foreign authority requesting for such protection shall provide all the resources and other material necessary for the protection.

(4) Where it is decided to admit a foreign witness in the programme, the Director shall liaise with the Cabinet Secretary responsible for immigration for the necessary permits.

(5) The Agency may make Regulations to give full effect of this Part.

[Act No. 45 of 2016, s. 18.]

29C. Admission of witnesses at request of international court, or tribunal, to which Kenya is a party

(1) Subject to the provisions of any other law, the Director may upon request from an international court, tribunal, commission, institution or organisation to which Kenya is a party, and after consultations with the Attorney-General, admit any witness to the programme.

(2) The provisions of this Part relating to the protection of foreign witnesses shall, with necessary modifications, apply to a request made pursuant to this section.

[Act No. 45 of 2016, s. 18.]

PART IV – MISCELLANEOUS

30. Disclosures concerning participants

A person who, without lawful excuse, discloses information—

- (a) about the identity or location of a person who is or has been a witness or participant; or
- (b) which compromises the security of such a person,

is guilty of an offence and is liable on conviction to imprisonment for a term not exceeding seven years.

30A. Prohibition of false representation

A person who, without prior written approval of the Agency, in connection with an activity carried on by him takes, assumes, uses or in any manner publishes a name, description, title or symbol conveying or purporting to indicate or convey or which is calculated or is likely to lead other persons to believe or infer that the activity is carried on under or by virtue of the provisions of this Act or on behalf of the Agency, commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or both.

[Act No. 2 of 2010, s. 28.]

30B. Offences in connection with staff of the Agency

A person, who—

- (a) not being the Director or a member staff of the Agency, by words, conduct or demeanour falsely represents himself to be the Director or member of staff of the Agency;
- (b) exercises or attempts to exercise undue influence over the Director or staff of the Agency which is calculated to prevent the Director or staff from carrying out their duties or encouraging them to perform an act which is in conflict with their duties; or
- (c) is an accomplice to the commission of an act whereby a lawful order given to a member of staff or a regulation or directive or other rule may be evaded,

commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or both.

[Act No. 2 of 2010, s. 28.]

30C. Obstruction of the staff of the Agency

A person who assaults, resists or willfully obstructs a member of staff of the Agency or a person acting under the direction of that member of staff in the due execution of his duties under this Act, commits an offence and is liable on conviction

- (a) for a first offence, to a fine not exceeding one million shillings; and
- (b) for a second or subsequent offence, to imprisonment for a term not exceeding five years.

[Act No. 2 of 2010, s. 28.]

30D. Prohibition of access to premises of the Agency

(1) The Cabinet Secretary responsible for internal security may, on the request of the Director, by notice in the *Gazette* or in any other manner as it may be necessary in the circumstances, prohibit or restrict access to land or premises under the control of the Agency.

(2) The Agency may take or cause to be taken measures as it may consider necessary for the security of, or the application of, a prohibition of or a restriction on access to land or premises referred to in subsection (1), and may in connection with measures taken cause notices to be published or warning notices to be erected as it may, in each particular case, consider necessary.

(3) A person who enters upon or is on land or premises in contravention of a prohibition or restriction under subsection (1) commits an offence and is liable on conviction to a fine of not less than five hundred thousand shillings, or to imprisonment for a term not exceeding three years or to both.

[Act No. 2 of 2010, s. 28, Act No. 18 of 2018, Sch.]

30E. Prohibition on disclosure without consent

(1) Subject to section 31(2), a person shall not, without the written consent given by or on behalf of the Agency, publish or disclose to another person the contents of a document, communication or information which the Agency itself has not made public and which has come to the persons knowledge in the course of his duty or association with the Agency under this Act, or, having information which has been published or disclosed without the authority, publish or communicate that information to another person.

(2) The limitation on disclosure in this section shall not be construed to prevent the disclosure of criminal activity by the Director or staff of the Agency.

(3) A person who contravenes the provisions of subsection (1) commits an offence and is liable on conviction to imprisonment for a term of not less than ten years.

[Act No. 2 of 2010, s. 28.]

30F. Prohibition against intimidation, harassment etc.

(1) A person shall not intimidate, harass, obstruct, threaten, hinder or prevent a witness with intention to subvert the course of justice.

(2) A person who contravenes the provisions of subsection (1) commits an offence and is liable, on conviction, to a term of imprisonment not exceeding five years.

[Act No. 45 of 2016, s. 19.]

31. Disclosure by participants and others

(1) A person who is or was a participant or a witness considered for inclusion in the programme and who directly or indirectly discloses or communicates to another person—

- (a) the fact that he or a member of his family has entered a memorandum of understanding under section 7;
- (b) details of the memorandum of understanding;
- (c) information relating to anything done by the Director or any officer under this Act; or
- (d) information about any officer gained by the person as a result of anything done under this Act,

is guilty of an offence and is liable on conviction to imprisonment for a term not exceeding ten years.

(2) This section shall not apply to a disclosure or communication which—

- (a) has been authorised by the Agency;
- (b) which has been determined by the Agency for purposes of investigation; or
- (c) is necessary to comply with an order of the High Court.

(3) For the purposes of subsection (1), a person is a witness considered for inclusion in the programme if—

- (a) the person is a witness who is the subject of consideration under section 5 for inclusion in the programme (even if the Director subsequently decides not to include the witness); or
- (b) the person is a witness included in the programme temporarily under section 9 (even if the witness does not go on to be included in the programme).

[Act No. 2 of 2010, s. 29.]

32. Non-compellability of witnesses

Except as otherwise provided by an order of the High Court, a person who acquires knowledge or information as a result of association or connection, duty or service with the programme or the Agency shall not be compellable, in proceedings in a court, tribunal or commission of inquiry, to produce any document or to divulge or communicate a matter or a thing related to the exercise of functions under this Act or the protection of witnesses included in the programme.

[Act No. 2 of 2010, s. 30.]

33. Protection of witnesses

(1) No action or proceeding, including a disciplinary action, may be instituted or maintained against a witness in respect of—

- (a) any assistance given by the witness to the court or to a law enforcement agency;

- (b) a disclosure of information made by the witness to the court or to a law enforcement agency.

(2) Subsection (1) does not apply with respect to a statement made by a witness who did not believe it to be true.

(3) No person shall be required to identify, or provide information that might lead to the identification of, a witness who assisted or disclosed information to the court or law enforcement agency.

(4) In any proceedings before a court, the court shall ensure that information that identifies or might lead to the identification of a person who assisted or disclosed information to the court or law enforcement agency is removed or concealed from any documents to be produced or inspected in connection with the proceeding.

(5) Subsections (3) and (4) shall not apply to the extent determined by the court to be necessary to ensure that justice is fully done.

34. Immunity from legal proceedings

No person shall be liable to any action, claim, suit or demand whether criminal or civil in respect of any thing done or omitted to be done by him in good faith in the exercise or purported exercise of a function conferred by or under this Act.

35.

[Repealed by Act No. 45 of 2016, s. 20.]

36. Regulations and rules

(1) The Attorney-General may make Regulations for or with respect to any matter which by this Act is required or permitted to be prescribed or which is necessary or expedient to be prescribed for carrying out or giving effect to this Act.

(2) The Chief Justice may, in consultation with the Director, make such rules of court as may be required or permitted by this Act to be made or as may be necessary or expedient to be made for carrying out or giving effect to this Act.

(3) Without prejudice to subsections (1) and (2) the nature and scope of the Regulations and rules shall—

- (a) be in line with the general purpose and objectives of this Act;
- (b) be limited only to the matters set out in this Act; and
- (c) comply to the drafting standards set out under this Act.

[Act No. 45 of 2016, s. 21.]
