

COUNCIL OF EUROPE

COMMITTEE OF MINISTERS

RECOMMENDATION No. R (97) 13

OF THE COMMITTEE OF MINISTERS TO MEMBER STATES CONCERNING INTIMIDATION OF WITNESSES AND THE RIGHTS OF THE DEFENCE

*(Adopted by the Committee of Ministers on 10 September 1997
at the 600th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Recalling that the aim of the Council of Europe is to achieve a greater unity among its members;

Aware of the need for member states to develop a common crime policy in relation to witness protection;

Considering that in some areas of criminality, such as organised crime and crime within the family, there is an increasing risk that witnesses will be subjected to intimidation;

Considering that it is unacceptable that the criminal justice system might fail to bring defendants to trial and obtain a judgment because witnesses are effectively discouraged from testifying freely and truthfully;

Noting that there is growing recognition of the special role of witnesses in criminal proceedings and that their evidence is often crucial to securing the conviction of offenders, especially in respect of organised crime and crime in the family;

Convinced that while all persons have a civic duty to give sincere testimony as witnesses, if so required by the criminal justice system, there should also be greater recognition given to their rights and needs, including the right not to be subject to any interference or be placed at personal risk;

Considering that member states have a duty to protect witnesses against such interference by providing them with specific measures of protection that effectively ensure their safety;

Bearing in mind the provisions of the European Convention on Human Rights and the case-law of its organs, which recognise the rights of the defence to examine the witness and to challenge his/her testimony but do not provide for a face to face confrontation between the witness and the alleged offender;

Taking into account Recommendation No. R (85) 4 on violence in the family, Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure, Recommendation No. R (87) 21 on assistance to victims and prevention of victimisation, Recommendation No. (91) 11 on sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults and Recommendation No. (96) 8 on crime policy in Europe in a time of change,

Recommends that governments of member states:

- be guided, when formulating their internal legislation and reviewing their criminal policy and practice, by the principles appended to this recommendation;
- ensure that all the necessary publicity for these principles is distributed to all interested bodies, such as bar associations, judicial organs, law enforcement agencies and social institutions involved in family care.

Appendix to Recommendation No. R (97) 13

I. Definitions

For the purposes of this recommendation:

- “witness” means any person, irrespective of his/her status under national criminal procedural law, who possesses information relevant to criminal proceedings. This definition also includes experts as well as interpreters;
- “intimidation” means any direct, indirect or potential threat to a witness, which may lead to interference with his/her duty to give testimony free from influence of any kind whatsoever. This includes intimidation resulting either from the mere existence of a criminal organisation having a strong reputation of violence and reprisal, or from the mere fact that the witness belongs to a closed social group and is in a position of weakness therein;
- “anonymity” means that the identifying particulars of the witness remain totally unknown to the defendant;
- “collaborator of justice” means any person who faces criminal charges, or was convicted, of having taken part in an association of criminals or other criminal organisation of any kind, or in organised crime offences but agrees to co-operate with criminal justice authorities, particularly by giving information about the criminal association or organisation or any criminal offence connected with organised crime.

II. General principles

1. Appropriate legislative and practical measures should be taken to ensure that witnesses may testify freely and without intimidation.
2. While respecting the rights of the defence, the protection of witnesses, their relatives and other persons close to them should be organised, where necessary, including the protection of their life and personal security before, during and after trial.
3. Acts of intimidation of witnesses should be made punishable either as separate criminal offences or as part of the offence of using illegal threats.
4. While taking into account the principle of free assessment of evidence by courts, procedural law should allow for consideration of the impact of intimidation on testimonies.
5. Subject to legal privileges, witnesses should be encouraged to report any relevant information regarding criminal offences to the competent authorities and thereafter agree to give testimony in court.
6. While respecting the rights of the defence, witnesses should be provided with alternative methods of giving evidence which protect them from intimidation resulting from face to face confrontation with the accused, for example by allowing witnesses to give evidence in a separate room.
7. Criminal justice personnel should have adequate training to deal with cases where witnesses might be at risk of intimidation.

III. Measures to be taken in relation to organised crime

8. When designing a framework of measures to combat organised crime, specific rules of procedure should be adopted to cope with intimidation. These measures may also be applicable to other serious offences. Such rules shall ensure the necessary balance in a democratic society between the prevention of disorder or crime and the safeguarding of the right of the accused to a fair trial.
9. While ensuring that the defence has adequate opportunity to challenge the evidence given by a witness, the following measures should, *inter alia*, be considered:
 - recording by audiovisual means statements made by witnesses during pre-trial examination;

- using pre-trial statements given before a judicial authority as evidence in court when it is not possible for witnesses to appear before the court or when appearing in court might result in great and actual danger to the life and security of witnesses, their relatives or other persons close to them;

- revealing the identity of witnesses at the latest possible stage of the proceedings and/or releasing only selected details;

- excluding the media and/or the public from all or part of the trial.

10. Where available and in accordance with domestic law, anonymity of persons who might give evidence should be an exceptional measure. Where the guarantee of anonymity has been requested by such persons and/or temporarily granted by the competent authorities, criminal procedural law should provide for a verification procedure to maintain a fair balance between the needs of criminal proceedings and the rights of the defence. The defence should, through this procedure, have the opportunity to challenge the alleged need for anonymity of the witness, his/her credibility and the origin of his/her knowledge.

11. Anonymity should only be granted when the competent judicial authority, after hearing the parties, finds that:

- the life or freedom of the person involved is seriously threatened or, in the case of an undercover agent, his/her potential to work in the future is seriously threatened; and

- the evidence is likely to be significant and the person appears to be credible.

12. Where appropriate, further measures should be available to protect witnesses giving evidence, including preventing identification of the witness by the defence, for example by using screens, disguising the face or distorting the voice.

13. When anonymity has been granted, the conviction shall not be based solely or to a decisive extent on the evidence of such persons.

14. Where appropriate, special programmes, such as witness protection programmes, should be set up and made available to witnesses who need protection. The main objective of these programmes should be to safeguard the life and personal security of witnesses, their relatives and other persons close to them.

15. Witness protection programmes should offer various methods of protection; this may include giving witnesses, their relatives and other persons close to them a change of identity, relocation, assistance in obtaining new jobs, providing them with bodyguards and other physical protection.

16. Given the prominent role that collaborators of justice play in the fight against organised crime, they should be given adequate consideration, including the possibility of benefiting from measures provided by witness protection programmes. Where necessary, such programmes may also include specific arrangements such as special penitentiary regimes for collaborators of justice serving a prison sentence.

IV. Measures to be taken in relation to vulnerable witnesses, especially in cases of crime within the family

17. Adequate legislative and practical measures should be taken to ensure protection against intimidation, and to relieve pressure on witnesses giving evidence against family members in criminal cases.

18. Such measures should be designed for different categories of vulnerable witnesses. They should take into account that in the family environment intimidation is often latent and usually affects the witness' psychological and/or emotional well-being. In the absence of overt acts of intimidation, preference should therefore be given to non-criminal law measures.

19. Special protection should be made available to children together with support against any abuse of authority in the family. Children should be made aware of their rights, in particular, the right to report crime.

20. The specific interests of the child should be protected throughout proceedings by a social agency and, if appropriate, through specially trained lawyers.

21. Women who suffer domestic violence and elderly persons subjected to ill-treatment by their family should receive adequate protection from intimidation aimed at preventing them from reporting crimes and giving evidence.

22. Programmes should be set up to assist witnesses in giving evidence against other members of the family. Such programmes could provide a framework for:

- legal, psychological and social assistance, and, if appropriate, care and financial assistance;

- measures to remove the accused from the vicinity of the witness in order to avoid further intimidation; or alternatively, measures to remove the witness;
- psychosocial measures (such as psychiatric treatment) for the accused to prevent further intimidation.

23. The different institutions within the criminal justice system should be made aware that they can have a traumatic effect on witnesses; they should strive to counter that effect.

24. When a vulnerable witness first reports allegations to the police, there should be immediate access to professional help. Furthermore, the examination of the witness should be conducted by suitably trained staff.

25. Vulnerable witnesses should, whenever possible, be examined at the earliest stage of the criminal proceedings, as soon as possible after the facts have been reported. Such examinations should be carried out in a particularly careful, respectful and thorough manner.

26. Such examinations should not be repeated. The examinations should be conducted by, or in the presence of, a judicial authority, and the defence should have sufficient opportunity to challenge this testimony.

27. If appropriate, statements made at the pre-trial stage should be recorded by video to avoid face to face confrontation and unnecessary repetitive examinations that may cause trauma. During the trial, audiovisual techniques may be used in order to enable the competent authority to hear the persons concerned out of each other's physical presence.

28. At the court hearing, examination of the witness should be closely supervised by the judge. Where cross-examination, especially in cases concerning allegations of sexual offences, might have an unduly traumatic effect on the witness, the judge should consider taking appropriate measures to control the manner of questioning.

29. The mere fact that evidence by children is not given under oath should not be, in itself, a reason for its exclusion.

V. International co-operation

30. Instruments aiming to foster international co-operation as well as national laws should be supplemented in order to facilitate the examination of witnesses at risk of intimidation and to allow witness protection programmes to be implemented across borders. The following measures should, for example, be considered:

- use of modern means of telecommunication, such as video-links, to facilitate simultaneous examination of protected witnesses or witnesses whose appearance in court in the requesting state is otherwise impossible, difficult or costly, while safeguarding the rights of the defence;
- assistance in relocating protected witnesses abroad and ensuring their protection;
- exchange of information between authorities responsible for witness protection programmes.