



Universiteit  
Leiden  
The Netherlands

## **De kroongetuige in het Nederlandse strafproces : vertrouwen is goed, controle is beter**

Janssen, S.L.J.; Janssen S.L.J.

### **Citation**

Janssen, S. L. J. (2013, December 11). *De kroongetuige in het Nederlandse strafproces : vertrouwen is goed, controle is beter*. Boom Juridische Uitgevers, Den Haag. Retrieved from <https://hdl.handle.net/1887/22356>

Version: Corrected Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/22356>

**Note:** To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/22356> holds various files of this Leiden University dissertation.

**Author:** Janssen, Sander Leon Jan

**Title:** De kroongetuige in het Nederlandse strafproces : vertrouwen is goed, controle is beter

**Issue Date:** 2013-11-11

## SUMMARY

### THE KEY WITNESS IN DUTCH CRIMINAL PROCEDURE

This study examines whether within the laws and regulations regarding key witnesses an explanation can be found for the fact that agreements with these witnesses more often than not cause major problems in practice. The witness protection agreement in particular regularly leads to an escalating conflict between the prosecution and the witness, which is reflected in the criminal case where the witness' statement is required. Furthermore, it is unclear what the District Attorney can and cannot accept as compensation in the 'statement-agreement' in which the witness agrees to give his statements in a particular criminal case. The issue requires an examination of the totality of rules and regulations regarding the witness, and of the creation, content and meaning of the legislation in its historical context.

Chapter one starts from the rule of law as a basis to describe the role, tasks and responsibilities of the Public Prosecutor as defined in Dutch law, which has been defined as maintaining criminal justice. This means that, barring a few exceptions, the Prosecution operates within the criminal domain, and the actions of the prosecution are reviewed within the framework of criminal law and by a criminal court. The fact that the prosecution enters an agreement that is primarily civil in form, like the witness protection agreement, makes no difference: if the agreement is negotiated and closed within the objective of the Public Prosecutor and serves to or directly arises from the criminal enforcement of the law, it is an agreement governed by criminal law. The unequal relationship between the prosecution and the other party (s) that put it outside a regular agreement between (equal) civil parties, underline this position

In chapter two and three, the two agreements that form the key witness agreement are investigated. The statement agreement in particular has had a very lengthy parliamentary history, and an extremely chaotic legislative process. The various officials, agencies and institutions involved in this legislation, have in the course of not less than six years repeatedly changed positions on the system of the law, especially on the question which commitments the prosecution can make with the witness. This initially led to the adoption of a very strict legal framework for establishing agreements with witnesses in 2001. In subsequent years, the discussion in (again) the House of Commons and in the Senate mostly focused on the question whether the bill, if passed, allowed an extension of the commitment possibilities through regulation by the Prosecutor's Office. This has not led to a withdrawal or an adjustment of the proposed law, and both the legal text and the adopted system remained unchanged with the passing of the bill by the Senate in 2005.

As extensive as the parliamentary discussion on commitments has been, witness protection issues have barely been discussed by the legislature. Although it was clear from

the outset that witness protection is inextricably linked to the statement agreement, a fundamental debate on how this protection should be effectuated has never taken place at the level of the legislature. Witness protection seems to have developed itself more or less independently from the (legal) developments in the regular system of surveillance and protection. There are no laws regarding witness protection, only regulations from the legislature and rules from the Public Prosecutor. Both can be characterized as open standards in which the prosecutor has much space to manoeuvre. Especially when the legislation and regulation on regular protection of (public) persons under threat and their rights and obligations are taken into account, the difference with witness protection is hard to explain. It cannot be excluded that the special position of witnesses in part stems from the decision of the Board of the Prosecution's Office to keep this form of personal security for themselves, instead of transferring it to the Ministry of Justice like the rest of the protection system. This has contributed to a practice on witness protection that is not transparent and, worse, is not subjected to any independent or objective scrutiny. Witness protection has become a possible free haven for agreements with witnesses that cannot stand the light of day and would not hold up in court. The legislature has not reflected on, let alone prescribed the (order of) the conclusion of the agreements, has not commented on the size, scope and possible inalienability of the duties of the State where protecting the witness is concerned, and in general seems to have underestimated the financial aspects of witness protection and its interaction with the statement agreement.

The fourth chapter discusses how to deal with different or opposing views in a legislative process, including the relationship between ministers, the House and the Senate. Also, the key doctrines of (criminal) legality and the prosecutor's policy freedom are subjected to further investigation. On this basis it concludes that the system of the law and the conditions to enter an agreement with a witness as laid down by the House and adopted by the Senate, does not allow extensive interpretation in rules from the Board of the Prosecution's Office. The Rule on agreements with witnesses (in Dutch: *Aanwijzing*) from the Board of the Prosecution's Office is therefore in conflict with the law. The Rule on witness protection (*Instructie*), in which the procedural creation of witness protection is prescribed, offers no standard of protection arrangements with a witness, notwithstanding the fact that the (minor) legal framework seems to anticipate and expect such standardization from the Board. For a clear picture, the agreement with a witness needs to be differentiated from the contract in which it is laid down: in assessing the various commitments between the witness and the public prosecutor neither the form of the agreement, nor whether it is (primarily) an agreement pursuant to art. 226g Sv or a witness protection agreement should be decisive. What should be decisive is whether there is a clear and established understanding between parties about what they can reasonably expect from each other, in particular what the witness can expect from the public prosecutor, and if this has played a (vital) role in the witness' willingness to give his statements. Promises regarding the way the protection of the witness will be organized and effectuated are an important part of the agreement as a whole. According to current legislation this agreement as a whole should be reviewed by a magistrate, but neither the *Aanwijzing* nor the *Instructie* provides that review. As a result,

witness protection is deployed unchecked and without supervision apart from within the organization of the Public Prosecutor itself, as it is reviewed by the same Board that more or less simultaneously has to review the agreement to testify. All the while, the impression that these are completely separate processes and separate agreements has to be upheld. In order to do this the *Aanwijzing* and *Instructie* set diverse and sometimes conflicting demands on the Prosecutors involved. This has consequences for the creation of, content of, and compliance with the agreement between the witness and the one and undividable Public Prosecution, resulting in the above-mentioned problems in practice.

Chapter five concludes that the situation cannot be resolved by the (criminal) courts. The current legal framework does not allow extensive interpretation, and the precarious instrument of a deal with a criminal witness requires standardization from and by the legislator. The legal protection of all parties involved in the witness agreement, including the suspect who is accused by the witness, is seriously flawed, especially since the instruments of the criminal court to sanction unlawful acts by the Public Prosecutor or the investigating authorities are increasingly limited. Structural improvement will only be achieved when the fundamentals of the legislation on deals with witness are considered and restructured in such a way, that both legal theory and the practice of investigating and prosecuting serious criminal offences are balanced.

To that end, in my opinion, four steps are necessary.

First, the two contracts that together form the agreement with the witness should be integrated and considered as a whole. As this agreement is concluded explicitly on behalf of a criminal trial and a prosecution, and thus on the enforcement of criminal justice, this agreement including the part on witness protection should be considered an agreement under criminal law. Second, the prosecution should be provided with the necessary tools, both in terms of the various promises that the prosecution can do, and in terms of witness protection, which should be defined in law by the legislature. As a third step, independent judicial review needs to be incorporated in the legal framework, to which both the agreement as a whole and the accomplishment of this agreement should be fully disclosed to the investigating magistrate. In addition, the trial court in criminal proceedings in which the witness delivers his statement will have to decide on his credibility and on the legality of the agreement, to which parts of the agreement need also be disclosed. However the scrutiny of the section regarding witness protection can only be marginal, as this has been done by the investigating magistrate. Finally, witness protection needs to be incorporated in the regular framework of regular personal security, which resides under the Ministry of Justice. The involvement of the Public Prosecutor should end altogether by the time the criminal proceedings are completed, as there is no longer a witness to protect. With the disappearance of the criminal context and the withdrawal of the prosecution, the protection agreement returns to its more general form: an agreement in which the State undertakes to provide for the safety of a citizen.

