

立法會
Legislative Council

LC Paper No. CB(2) 154/00-01
(These minutes have been seen by
the Administration and cleared with
the Chairman)

Ref : CB2/BC/25/98

**Bills Committee on
Witness Protection Bill**

**Minutes of meeting
held on Monday, 5 June 2000 at 2:30 pm
in Conference Room B of the Legislative Council Building**

Members present : Hon James TO Kun-sun (Chairman)
Hon Mrs Sophie LEUNG LAU Yau-fun, JP
Hon Gary CHENG Kai-nam, JP
Hon Andrew WONG Wang-fat, JP

Member absent : Hon David CHU Yu-lin

Public Officers attending : Miss Eliza YAU
Principal Assistant Secretary for Security E

Ms Jessie WONG
Assistant Secretary for Security E

Mr CHEUNG Siu-wah
Chief Superintendent of Police (Crime) (Acting)
Hong Kong Police Force

Mr W B MADDAFORD
Senior Assistant Law Draftsman

Mr LAI Tung-kwok
Assistant Director of Immigration (Personal Documentation)

Mr WONG Sai-chiu
Assistant Director of Operations
Independent Commission Against Corruption

Clerk in attendance : Mrs Sharon TONG
Chief Assistant Secretary (2)1

Staff in attendance : Mr Stephen LAM
Assistant Legal Adviser 4

Mr Raymond LAM
Senior Assistant Secretary (2)5

Action

I. Meeting with the Administration
(LC Paper Nos. CB(2)2157/99-00(01) and CB(2)2192/99-00(01))

Administration's response to issues raised at the last meeting on 5 May 2000

At the Chairman's invitation, Principal Assistant Secretary for Security E (PAS(S)E) briefed members on the paper setting out the Administration's response to issues raised at the meeting held on 5 May 2000.

Clause 11(2) - the appropriateness of using the word "intention"

Adm 2. PAS(S)E said that the Administration agreed to replace the word "intention" in clause 11(2) with "decision" to avoid misunderstanding.

Rights and obligations of a participant incurred under his new identity

3. PAS(S)E said that the Administration would revise the Bill to deal with legal rights, obligations and restrictions, which were incurred by a participant under his new identity and were extant after his original identity was restored, by applying the principle under clause 9. Provisions would be added in the Bill to provide that the approving authority would take such steps as were reasonably practicable to ensure that such rights, obligations and restrictions were dealt with according to law if and when the witness restored his original identity.

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Ways to inform a witness of the decision of not including him in the witness protection programme (WPP)

Adm 4. PAS(S)E said that the Administration agreed that there was a need to notify a witness of the approving authority's decision not to include him in the WPP. However, she pointed out that it might not be practicable in some cases to notify a witness in writing. Therefore, the Administration proposed to revise the Bill to provide that the approving authority would notify a witness of the decision of not including him in the WPP in writing as far as practicable if the witness had requested for inclusion in the WPP.

A witness' right of review

5. PAS(S)E said that the Administration remained of the view that it was not appropriate to expand the existing review mechanism to cover all the terms and conditions of a memorandum of understanding (MOU) set by the approving authority. She explained that the terms and conditions of a MOU might include a financial support arrangement and other detailed logistical arrangements including accommodation. The Administration was of the view that if a witness was allowed to request a review of these arrangements, the review mechanism might be open to abuse. She added that in practice, the approving authority would liaise with the witness and draw up the terms and conditions based on their objective and professional assessment of the genuine needs of the witness.

6. The Chairman said that if a participant failed to comply with the terms and conditions of a MOU because they were very harsh, his protection would be terminated. In the circumstances, the appeal mechanism would be triggered to review his case. In the light of this, the Chairman accepted not to subject the terms and conditions of a MOU to review.

Adm 7. In response to members' concern expressed at the last meeting, PAS(S)E said that the Administration agreed to revise the Bill to enable a participant to request a review if the approving authority refused to establish a new identity for him under clause 8.

The existing Police Witness Protection Appeal Board and the present drafting of clause 14

Adm 8. Members noted that the Police Witness Protection Appeal Board (the Board) was not advisory in nature as it could overrule the original decision of the Police to refuse to admit a witness into the WPP or the decision to withdraw a witness from the programme. PAS(S)E said that the appeal mechanism provided under the Bill would work in the same way as the Board. She informed members that the Administration would elaborate clause 14 by adding the details as set out in paragraphs 12(a) to (c) of the Administration's paper.

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9. In response to the Chairman, Assistant Secretary for Security E (AS(S)E) said that the Board was not formed by law, and so far no appeals had been lodged. She further said that the terms of reference of the Board were given in paragraph 11(a) and (b) of the Administration's paper. For each hearing, the chairman of the Board, the Deputy Secretary for Security and two of the four non-official members appointed by the Chief Executive would attend. The chairman would have to consult the three members and make decisions in respect of the appeal case heard by the Board.

10. The Chairman pointed out that there was a great difference between what the Administration said and what he understood concerning the operation of the Board. He said that all along he was given to understand that for each hearing, the Board made collective decisions. He could not accept to be told at the present moment that it was the chairman of the Board to make all the decisions. He believed that this was not what the public understood nor had this been written down in any documents.

11. Assistant Director of Operations of the Independent Commission Against Corruption (ICAC) (AD(O)/ICAC) explained that in the case of ICAC, the chairman was required under clause 14 to consult the other members of the "board" who were two non-official members before making a final decision, he was not making the decision all by himself. Should members of the board consider the decision unreasonable, they could take actions. If a witness or a participant was aggrieved by the decision, he could seek judicial review. He pointed out that in reality, it would be unlikely that the chairman would ignore the views of the other members of the board. Chief Superintendent of Police (Crime) (Acting) (CSP(C)(Atg)) added that since the Deputy Commissioner would be the chairman of the board, the chairman would exercise his professional judgement and consult the three other members in making his decision. He considered that the decision made should be seen as the decision of the board. In response to the Chairman, CSP(C)(Atg) said that he had no strong views as to whether it should be specified in the Bill that the review mechanism provided under clause 14 had to make collective decisions in respect of the appeals heard by it.

12. Mr Andrew WONG accepted the current arrangements proposed by the Administration in respect of the appeal mechanism provided in the Bill. In view of the proposed operational mode of the mechanism, he suggested that it should be called an "appeal authority" rather than an "appeal board" and that the decisions made by it could be subject to judicial review. The Chairman pointed out that it was impossible to have the decisions of appeal cases to be subject to judicial review as this would compromise the confidentiality of the cases concerned.

13. PAS(S)E reiterated that the Administration's proposed arrangements would ensure that all the different views held by official and non-official members would be taken into account in the decision-making process of the appeal mechanism. She said that the Administration would consider calling it a "review authority" rather than an "appeal board" in the light of members' comments.

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14. The Chairman said that as the appeal mechanism would work in the same way as the existing Board, the Bill should state the number of members of a board and that the decision made should be a decision of the board rather than a decision of the chairman only. He would move a CSA to amend the clause if the Administration did not accept his proposal.

Clause 15 - the definition of "law enforcement agency"

Adm

15. PAS(S)E said that the Administration considered that it was necessary for the term "law enforcement agency" in clause 15 to cover such agencies outside Hong Kong and the Bill would be revised accordingly.

Clause 17(1)(b) - possible impact on freedom of the press

16. PAS(S)E informed members that the Department of Justice had advised that clause 17(1)(b) related to information that would affect the safety or security of a witness, such as press reports which might lead to disclosure of the identity of a witness. General reports which did not prejudice the safety or security of a witness would not be prohibited and thus the present drafting of the clause should not have implications on the freedom of the press.

17. However, the Chairman remained of the view that clause 17(1)(b) as presently drafted might have implications on the freedom of the press. He pointed out that in the event of a journalist unknowingly reported on persons included in the WPP and as a result had affected the safety or security of the persons concerned, the journalist might be liable to an offence. He considered that there should be a right balance between protection of witnesses and the freedom of the press. Addressing the Chairman's concern, PAS(S)E pointed out that the provision of "reasonable excuse" would be a sufficient defence for persons who were charged with an offence under 17(1)(b). Senior Assistant Law Draftsman added that the Prosecution Division of the Department of Justice had looked at the provision and considered that, from a legal policy point of view, it was appropriate and would not place too much limitation on reporting by journalists. He also pointed out that clause 17(1)(b) was not aimed specifically or exclusively at the press. He said that it also applied to law enforcement officers.

18. Most members considered that clause 17(1)(b) as presently drafted was in order. The provision was necessary to safeguard the confidentiality of the identity of a witness and hence his security and it echoed the spirit of the Bill which was for the protection of witnesses. They also considered that under the provision of "reasonable excuse", persons who were charged with an offence under clause 17(1)(b) could defend for themselves that they had a reasonable cause for the disclosure of information which they had made.

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19. The Chairman disagreed that the provision of "reasonable excuse" would be a sufficient defence for persons who were charged with an offence under clause 17(1)(b). He considered that it remained unclear to him as to the criteria adopted by the Administration in considering whether a person had a criminal intent in his disclosure of information which, in effect, had affected the safety or security of persons included in the WPP. He gave the example of the Organized and Serious Crimes Ordinance (Cap. 455) which imposed stringent requirements to be met in judging whether a person had the mens rea to prejudice the Police's investigation in his disclosure of information related to the investigation. The Chairman also pointed out that clause 30 of the Prevention of Bribery Ordinance (Cap. 201) provided similar safeguards to protect persons making reports on investigations in respect of offences alleged to have been committed under Cap. 201.

Adm

20. To provide better safeguard to persons who might contravene the provision inadvertently, the Chairman suggested that a provision be added to the Bill to the effect that any prosecution under clause 17(1)(b) required the consent of the Secretary for Justice. PAS(S)E agreed to consult the Department of Justice.

Clause 18(2) - consistence with similar provisions in other ordinances

21. Pursuant to members' request, PAS(S)E said that the Administration had identified provisions similar with clause 18(2) in other ordinances, which were concerned with the protection of informers in legal proceedings. The Administration was of the view that since the nature and role of an informer were different from a participant and hence the protection required was not the same, those provisions did not seem to be relevant to the Bill. She said that the Administration did not see the need to revise clause 18(2).

The appropriateness of including clause 19(1)(b) in the Bill

Adm

22. PAS(S)E said that the Judiciary had confirmed that they had no objection to the present drafting of clause 19(1)(b) in relation to the "well-being" of a participant who was to give evidence in legal proceedings. To avoid that the court appeared to abdicate control over its courtroom to the Police or ICAC, the Judiciary had suggested that their powers stipulated in clause 19(1) should be subject to an application made by the prosecution to the court.

Draft Committee Stage amendments (CSAs) to be moved by the Administration

23. At the Chairman's invitation, PAS(S)E briefed members on the Administration's paper setting out the draft CSAs proposed to be moved by the Administration.

24. Members considered that the draft CSAs were in order.

Action

II. Date of next meeting

25. Members agreed to schedule a further meeting to discuss clause 17(1)(b) when the Administration had made a decision on the Chairman's proposal regarding the clause. Members would be informed of the date of the next meeting in due course.

26. There being no other business, the meeting ended at 4:35 pm.

Legislative Council Secretariat

18 September 2000