

For discussion
on 9 March 2000

Bills Committee on Witness Protection Bill

PUPRPOSE

This note informs Members of how the proposed change of identity of a witness under the witness protection programme (WPP) is operated; how the rights and obligations of a witness will be dealt with and experience of overseas countries in operating WPP.

BACKGROUND

2 At the 1st Bills Committee meeting on the Witness Protection Bill held on 20 January 2000, Members asked and we undertook to provide information on –

- (a) how threat assessments are carried out;
- (b) the modus operandi of the WPP in respect of the proposed change of identity;
- (c) whether “fake” documents, for instance, education and professional qualifications, could be created for a witness who has his identity (hereinafter referred to as an “identified witness”) changed; and
- (d) overseas experience in implementing WPP.

DETAILS

Threat Assessment

3 A professional threat assessment is carried out to ascertain whether the inclusion of a person in the WPP is necessary and justified. It is carried out by the Police Witness Protection Unit or the ICAC Witness Protection and Firearms Section, as appropriate. A threat assessment is of paramount importance to the decision to be made by the approving authority under clause 4(2)(a) of the Bill as to whether a person is to be included in the WPP.

4 In assessing the threat faced by a potential WPP witness, the law enforcement agencies will consider the following factors –

- (a) the seriousness of the offence in respect of which the witness has given, or will give, information or testimony;
- (b) the nature and importance of that information or testimony;
- (c) the nature of the perceived danger to the witness, including whether any threatening, or concrete, action has been taken against the witness;
- (d) the nature of the witness' relationship to the culprits of the offence in respect of which the witness has provided (or will provide) information or testimony;
- (e) the perceived capability of the culprits to inflict damage upon the witness and/or his family members; and
- (f) whether the threat to the witness is of limited time span or is persistent.

5 The above factors will not only be used to determine whether a person will be included in the WPP, they will also be used as the basis of the terms and conditions on which protection and assistance is to be provided to the witness, if he is included in the WPP.

Change of Identity

6 Changing the identity of witnesses is not a feature of the existing WPP. At present, the Police and the ICAC can only change the name of a protected witness by means of a deedpoll. However, this arrangement may not provide sufficient reassurance to the protected witness since consequential changes cannot be made to his birth and marriage certificates.

7 We therefore propose that, as an additional protective measure, authority should be given to change the identity of a protected witness by empowering relevant authorities to issue new documents pertaining to the new identity of the witnesses, based on “specially created” information and without indicating that any change of identity has taken place. This measure, will provide further reassurance to the protected witness to help him overcome fear of vengeance.

8 In an ideal scenario, an “identified witness” should possess all professional or academic qualifications which he previously had so as to enable him to earn a living, as he did previously. These professional or academic qualifications may include a practising certificate (if the witness was a professional such as lawyer, accountant or doctor) and HKCEE, HKAL certificates as well as university qualification. Other “qualifications” which an “identified witness” may previously have include a

driving licence, a credit card, or the deeds confirming ownership of a property, etc..

9 In practical terms, the provision of all the above documents based on a “specially created” identity will inevitably give rise to concern that the confidentiality of the WPP may be compromised and may even expose the identified witness to greater risk because more people will become aware that the person concerned is an “identified witness” under the WPP. This will defeat the purpose of the WPP.

10 We have therefore provided in the Bill that only three types of documents may be issued, based on a “specially created” identity. They are –

- (a) birth certificate under the Births and Deaths Registration Ordinance (Cap 174);
- (b) identity card under the Registration of Persons Ordinance (Cap 177);
and
- (c) marriage certificate under the Marriage Ordinance (Cap 181).

The relevant provision in the Bill is clause 8(1).

11 Using the new birth certificate and the identity card, an “identified witness” can obtain other documents such as passport, driving licence, credit cards, etc.

12 It should also be borne in mind that, in many cases, witnesses admitted into the WPP are “accomplice witnesses”. Most of them do not

have higher education qualifications, or professional qualifications. For example, according to Police records, only two out of 32 witnesses admitted into the WPP in the past have received tertiary education. The question of providing educational / professional documents based on the “specially created” identity seldom arises. Even if it does, each case will have to be dealt with on its own merits. Taking into account the necessity of maintaining the confidentiality of the WPP, we have taken the view that only the three documents set out in para. 10 above can be issued lawfully under clause 8 of the Bill for an “identified witness”.

13 Clause 8(2) of the Bill provides that the approving authority may establish a new identity for a WPP participant where the Chief Executive has approved and either the Commissioner of Police or the Commissioner, ICAC has recommended.

14 After the approval is given, the approving authority will notify the relevant public officer of the Immigration Department giving particulars of the new identity to be established and the documents (i.e. the Birth Certificate, the Identity Card and the Marriage Certificate, if applicable) that must be issued. The old identity will no longer generate any new documentation (as if the witness is dead). There would be no removal, replacement or alteration of any records held by any Government or non-government agencies. The new identity will be based on “specially created” information such as the witness’ new name, his new date of birth and the new names of his parents.

Transition of rights and obligations to “identified witness”

15 At the 1st Bills Committee meeting held on 20 January 2000,

Members were interested to know how rights and obligations of an “identified” witness would be dealt with. Examples quoted included the witness’ professional and academic qualifications (which have been dealt with in paragraphs 8 and 12 above), driving licence or any points deducted under the point-penalty system; criminal conviction records, credit cards, and ownership of property.

Driving licence

16 We believe that “driving licence” belongs to “rights” which can best be addressed by administrative arrangement than making specific legislative provisions in the context of WPP. If the witness is competent in driving, he can apply for a new driving licence and go through the necessary tests in his new identity. Some costs may be incurred by the witness. However, these may be met from a financial support agreement, if any, contained in the memorandum of understanding between the approving authority and the witness, if that is necessary and justified. The points deducted under the point-penalty system will remain with the original identity of an “identified witness” in order not to complicate the issue.

Criminal conviction record

17 As regards criminal conviction records, we do not intend to remove or alter any records pertaining to an “identified witness” under his old identity. Cross-checking can also be done by administrative means. Under our proposal, the witness will not have his previous criminal conviction records, if any, erased automatically because, if he chooses to restore his former identity, the conviction records will still exist. Furthermore, under clause 15(ii) of the Bill, the approving authority may

provide the law enforcement agencies with the criminal records of an “identified witness” for the purpose of law enforcement.

Credit card, bank balance, etc.

18 Under clause 5(1) of the Bill, the approving authority shall not include a witness into the WPP unless he is satisfied that the witness has provided him with all information to the extent necessary for the approving authority to decide whether the witness should be admitted to the WPP. Such information will include any outstanding obligations, be it legal or financial, such as credit card or bank balances. As with the driving licence, a new credit card should be applied for by the “identified witness” under his new identity, instead of being issued upon “specially created” information on the part of the credit card companies. This is, again, not to cast the net too wide for the purpose of maintaining the confidentiality of the WPP. In addition, any outstanding liabilities to credit card companies, or to banks, can either be settled in full by the witness out of his own pocket, or out of a financial support arrangement (if any) contained in the memorandum of understanding, before the change of identity is effected. Similar procedures apply to any outstanding mortgage loans.

The issue of documents pertaining to the “specially created” identity under the WPP

19 Members asked us at the 1st Bills Committee meeting to examine if there were any laws exempting any liability arising from making and using forged/fake documents under certain circumstances. Members drew analogy to “undercover” agents who were believed to have possessed and used such documents.

20 Having consulted the Department of Justice, we are not aware of any provision in the Laws of Hong Kong empowering the Government to issue forged/fake documents. In fact, “undercover” agents who produce and use such documents are not subject to prosecution because they are public officers performing their official duties and therefore do not have the necessary “mens rea” in committing a criminal offence of uttering a forged/fake document. In the event that such an offence may have been committed, the Department of Justice may exercise its discretion not to initiate criminal prosecution against the individual.

21 As regards the documents issued to an “identified witness” under the WPP, they should not be considered as forged/fake documents because they are issued by the relevant authorities, based on “specially created” information. Hence, we need not adopt the practice of an “undercover” agent and give the same immunity to an “identified witness”. We therefore do not agree that an undercover agent is a good analogy of an “identified witness”.

Overseas experience

22 We understand that Australia, Canada and the U.S. have legislation governing WPP. We also understand that relocation within a country is a measure that could be easily and conveniently adopted in overseas WPP. Given the size of these countries, relocation can be an effective method of reducing the threat faced by the witness.

23 Furthermore, both the Australian and the U.S. legislation provide for, among other things, change of identity. Like our legislation, the Australian

and the U.S. legislation do not spell out specifically how change of identity is to be effected. They only provide a general clause to the effect that a witness under the WPP may be provided with suitable documents to enable him to establish a new identity. However, whether change of identity is frequently used is not known. To seek further information, we have approached relevant overseas authorities and their replies are still awaited.

Security Bureau
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