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Paper for the House Committee meeting on 16 June 2000

**Report of the Bills Committee on
Witness Protection Bill**

Purpose

This paper reports on the deliberations of the Bills Committee on Witness Protection Bill.

Background

2. In October 1992, a murder trial collapsed because a key prosecution witness declined to give evidence. It aroused great community concern about the adequacy of protection of witnesses. The then Governor appointed Mr Justice Kempster to head an independent Commission of Inquiry to look into, among other things, the arrangements for the protection of prosecution witnesses. One of recommendations in Mr Justice Kempster's Commission was that "the advisability of legislation to facilitate changes of identity should be considered".

3. A Witness Protection Bill was introduced into the former Legislative Council (LegCo) in July 1996, and a Bills Committee was formed. However, the Bills Committee was not activated and the Bill eventually lapsed when the LegCo term ended. The current Bill is substantially the same as the 1996 Bill.

The Bill

4. The Bill seeks to provide for the establishment of a programme for the protection of certain witnesses and persons associated with witnesses which will be operated by the Police and the Independent Commission Against Corruption (ICAC). One of the key features of the witness protection programme (WPP) is the establishment of a new identity for some participants, i.e. witnesses who have been included in the WPP.

The Bills Committee

5. At the meeting of the House Committee on 28 May 1999, Members agreed that a Bills Committee be formed to study the Bill. The membership list of the Bills Committee is in **Appendix I**.
6. Under the chairmanship of Hon James TO Kun-sun, the Bills Committee has held seven meetings with the Administration.

Deliberations of the Bills Committee

7. The Bills Committee has discussed in detail the proposals in the Bill, and has made reference to the existing non-statutory witness protection programme operated by the Police and the ICAC. The deliberations of the Bills Committee are summarized below.

Criteria for inclusion in the WPP

Threat assessment

8. The Bill proposes that one of the criteria for inclusion in the WPP is the nature of the perceived danger to the witness. Members have enquired how threat assessment will be carried out.
9. The Administration has explained that a threat assessment is of paramount importance to the decision to be made by the approving authority, i.e. an officer designated by the Commissioner of Police (CP) or the Commissioner of the ICAC (C,ICAC) as to whether a person is to be included in the WPP. Under the existing non-statutory witness protection programme, a professional threat assessment will be carried out by the Police Witness Protection Unit or the ICAC Witness Protection and Firearms Section, as appropriate, to ascertain whether the inclusion of a person in the programme is necessary and justified. In assessing the threat faced by a 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.

10. The Administration has further explained that these factors will apply to the threat assessment to be made under the statutory 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.

11. Members are of the view that in determining the inclusion of a witness in the WPP, the major consideration should be the perceived danger to the witness rather than the nature and importance of the evidence. Members have suggested that clause 4(3) of the Bill which sets out the factors to be considered by the approving authority in deciding whether or not to include a witness in the WPP should be amended to this effect. The Administration has explained that there are practical difficulties in attaching weight to different factors, and that each case has to be examined on its own merits. To address members' concern while at the same time provide the approving authority with the necessary flexibility, the Administration has agreed to highlight the nature of the perceived danger to the witness as a factor to be considered by the approving authority when deciding whether or not to include a witness in the WPP. The relevant Committee stage amendments (CSAs) will be moved by the Administration.

Medical, psychological or psychiatric tests or examinations

12. Members have pointed out that under clause 5(2) of the Bill, the approving authority may require a witness to undergo medical tests or examinations, or psychological or psychiatric examinations for the purpose of assessing whether or not a witness should be included in the WPP. However, the evaluation of medical tests or examinations is not included in the list of factors in clause 4(3) for considering whether or not a witness should be included in the WPP. Members have questioned whether the state of health, including the psychological and psychiatric condition, of a witness is a factor for deciding whether or not to include him in the WPP.

13. The Administration has explained that one of the factors for deciding whether or not a witness should be included in the WPP is the psychological or psychiatric condition of the witness. The purpose for asking a witness to undergo medical tests or examinations is only to allow for appropriate measures to be taken to reduce the risk of death or medical complication of the witness whilst under protection. The results of the medical tests or examinations are not for the purpose of assessing whether or not the witness should be included in the WPP. The Administration has agreed to amend the

clause to make it clear that the approving authority may require a witness to undergo medical tests or examinations before deciding whether or not to include him in the WPP but the results of such tests or examinations are not for screening purposes.

Outstanding debts of a witness

14. Members have expressed concern about whether the settlement of all outstanding debts by a witness is a factor in deciding whether or not the witness should be included in the WPP. The Administration has explained that the purpose of the WPP is to encourage more witnesses to come forward to give evidence against suspects in serious crimes. Where a real threat is proven, a witness will be admitted into the WPP regardless of his financial situation. The Administration has assured members that a person would not be barred from the WPP merely on the grounds that he is unable to repay his debts. The Administration has further explained that every effort will be made to ensure that a witness repays all his outstanding debts. Where necessary, a financial support scheme can be worked out on mutual agreement for settlement of these debts.

Witness' existing social ties in the community

15. One of the requirements for inclusion in the WPP is that the witness has to sign a memorandum of understanding (MOU) in accordance with the provisions in the Bill. Noting that a witness may be required under the MOU to sever all his existing social ties in the community, members have questioned whether this would be a factor for considering the inclusion of a witness in the WPP. The Administration has explained that whether a witness is required to sever all his existing social ties in the community will be decided by the approving authority after taking account of the particular circumstances of each case, and the detailed requirements will be set out in the MOU. The Administration has informed members that it will not be a factor in deciding whether or not to include a witness in the WPP. While a witness' social ties in the community may affect his decision of whether he should subject himself to the requirements of WPP, if he does not agree to the requirements and refuses to sign the MOU, he will not be included in the WPP.

Memorandum of understanding

16. Under the Bill, a WPP participant is required to sign a MOU with the approving authority. The MOU will set out the basis on which a participant is included in the WPP and the details of the protection and assistance that is to be provided. The MOU may also contain a list of the outstanding legal obligations of the participants as well as any other obligations of the participant, and an agreement by or on behalf of the participant as to how these obligations are to be met.

17. Members have discussed in-camera samples of MOU currently in use by the Police and the ICAC. Members have noted that the MOU will be modified in the light of

the proposals in the Bill. At the request of members, the Administration has undertaken to brief the Panel on Security on the new MOU after the passage of the Bill.

18. Clause 4(4) of the Bill provides for the signing of MOU by a parent or guardian of a WPP participant who is under the age of 18 years. It also empowers the approving authority to require a participant to sign another MOU on or after reaching 18 years of age. At the suggestion of members, the Administration has agreed to add provisions to enable a guardian or other person who is usually responsible for the care of a participant to sign the MOU if the participant lacks legal capacity to do so, and to empower the approving authority to require the participant to re-sign the MOU when he has the legal capacity. The relevant CSAs will be moved by the Administration.

Establishing new identity for participant in the WPP

Operation of change of identity

19. Under the Bill, the approving authority may establish a new identity for a WPP participant where the CP or C,ICAC has recommended and the Chief Executive has approved.

20. The Administration has explained that changing the identity of witnesses is not available in the existing witness protection programme. 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. The Administration therefore considers that, as an additional protective measure, authority should be given to change the identity of a protected witness by empowering the 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. The new documents which may be issued based on "specially created" identity include a birth certificate under the Births and Deaths Registration Ordinance (Cap. 174), an identity card under the Registration of Persons Ordinance (Cap. 177) and a marriage certificate under the Marriage Ordinance (Cap. 181).

21. Members have questioned whether the professional or academic qualifications of an "identified witness", i.e. a WPP participant for whom a new identity has been established, which he previously had would be provided to him based on a "specially created" identity. The Administration has explained that the provision of these documents based on a "specially created" identity will inevitably give rise to the 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 programme. The Administration has pointed out that witnesses admitted into the

WPP are, in many cases, accomplices. Most of them do not have higher education qualifications or professional qualifications. The question of providing educational or professional documents based on "specially created" identity seldom arises. Even if it does, each case will have to be dealt with on its own merits.

22. Members have expressed concern about how the criminal records of an "identified witness" will be dealt with. The Administration has explained that any records pertaining to an "identified witness" under his original identity will not be removed or altered. Cross-checking can be done by administrative means. The Administration has further explained that the witness will not have his previous criminal records, if any, erased automatically because, if he chooses to have his original identity restored, his criminal records will still exist.

23. As regards the outstanding liabilities to credit card companies or banks, the Administration has explained that these can either be settled in full by the witness himself or by way of a financial support arrangement, where necessary, contained in MOU before the change of identity is effected.

Factors for consideration for establishing new identity

24. Members have noted that a new identity may be established for a witness at the time when he is admitted into the WPP or some time after he has been included in the WPP. Members have questioned whether the criteria for deciding whether or not to include a witness in the WPP will apply when establishing a new identity for a participant some time after he has been included in the WPP.

25. The Administration has advised that clause 8 of the Bill enables CP and C,ICAC to have a considerable discretion as to what he should include in support of his recommendation to the Chief Executive for establishing a new identity for a participant who is already in the WPP. In exercising such discretion, he can make reference to the factors in clauses 4(3) and 5 or other criteria that he considers relevant. Such discretion provides CP or C,ICAC with the necessary flexibility in examining the need and the consequences to create a new identity for a participant.

MOU on change of identity

26. Under the Bill, a new MOU will be signed by the WPP participant where a decision is made to establish a new identity for him. Members have asked whether the provisions in clause 4(4) on signing of MOU apply to a MOU for change of identity. The Administration has advised that where a decision is made to establish a new identity for participant who is under 18 years of age or one who lacks legal capacity, another MOU will need to be signed. The Administration has agreed to add provisions along the lines of clause 4(4) as explained in paragraph 18 above to allow for the signing of MOU on change of identity of participants who is under 18 years or who lacks legal capacity.

Review mechanism

Notifying a witness of the decision of not including him in WPP

27. Members have pointed out that clause 13 provides for a witness the right of review of the approving authority's decision of not to include him in the WPP. However, there is no provision in the Bill requiring the approving authority to inform a witness in writing of such a decision. Members have expressed concern that a witness would not be able to request a review if he is not informed of the approving authority's decision.

28. While agreeing that there is a need to notify a witness of the decision, the Administration considers that it may not be practicable to notify him in writing under certain circumstances. Nevertheless, the Administration has agreed that the approving authority shall notify a witness of the decision of not including him in the WPP in writing as far as practicable if the witness has made a request for inclusion in the WPP. The relevant CSAs will be moved by the Administration.

Witness' right of review

29. Under clause 13(1) of the Bill, a person who is aggrieved by a decision of the approving authority not to include him or to terminate his protection as a participant in the WPP can request a review of the decision. Members have pointed out that the establishment of a new identity is a very important feature of the WPP. Members consider that the decision of not establishing a new identity for a participant, as well as the terms and conditions set by the approving authority in a MOU, should also be subject to review.

30. The Administration has explained that the terms and conditions of a MOU may include a financial support arrangement and other detailed logistical arrangements. The review mechanism may be open to abuse if a witness is allowed to request a review on any of these arrangements. In practice, the approving authority will liaise with the witness and draw up the terms and conditions after making an objective and professional assessment of the genuine needs of the witness. The Administration therefore does not consider that it is necessary to expand the review mechanism to cover the terms and conditions set by the approving authority.

31. As regards a WPP participant's right of review against a decision of not establishing a new identity for him, the Administration has agreed that a participant should be allowed to request a review of such a decision by the approving authority. The Administration has also agreed that the approval authority should be required to notify the participant of his decision of not establishing a new identity for the participant in writing as far as practicable if the request for establishing a new identity is from the participant. The relevant CSAs will be moved by the Administration.

Review of decision of the approving authority

32. Clause 14(1) of the Bill provides that the officer designated by CP or C, ICAC for the purpose of reviewing the decision of the approving authority shall, after consultation with such persons as are appointed by the Chief Executive to give such officer the benefit of their views, decide whether or not the approving authority's decision should be upheld.

33. On the existing review mechanism, the Administration has explained that the Police Witness Protection Appeal Board is chaired by the Deputy Commissioner of Police (Operations). Members of the Board include the Deputy Secretary for Security and four non-official members appointed by the Chief Executive. For each hearing, the Board should comprise the Chairman, the Deputy Secretary for Security and two of the four non-official members. The Board may, after reviewing the case, overrule the original decision of the Police to refuse to admit a witness into the witness protection programme or the decision to withdraw a witness from the programme. As for the ICAC, it has no formal appeal board at present. Appeals are made to C, ICAC. The Administration has confirmed that the review mechanism provided in the Bill will work in the same way as the existing Police Witness Protection Appeal Board.

34. A member has pointed out that as the existing Police Witness Protection Appeal Board may overrule the original decision of the approving authority after reviewing the case, the Board is not advisory in nature. Since the review mechanism will work in the same way as the existing Police Witness Protection Appeal Board, the member considers that the Bill should state that there is a review board comprising four members, i.e. the officer designated by CP under clause 13(1) as the chairman, one official member and two non-official members from the panel of persons appointed by the Chief Executive. As for the ICAC, the board should comprise the chairman and at least two non-official members. The Bill should also state that the decision as to whether or not the approving authority's original decision should be upheld shall be a decision of the review board, rather than the designated officer's decision as now stipulated in the Bill.

35. The Administration considers that the member's proposal acceptable so as to enhance the credibility of the review mechanism. The Administration has agreed to provide in the Bill the composition and operation of the review boards which would be similar to that adopted by the existing Police Witness Protection Appeal Board. The Chief Executive shall appoint a panel of persons consisting of public officers and persons not being public officers for the purpose of clause 14(1). For each hearing, the board would be chaired by an officer designated by CP or C, ICAC, as appropriate, who is more senior than the approving authority. Members of the board will comprise persons appointed by the Chief Executive for such purpose and at least two of them are not public officers. The relevant CSAs will be moved by the Administration.

Definition of law enforcement agency

36. Clause 15 of the Bill provides for the release of information of participants to an officer designated by the approving authority or other law enforcement agency. Members consider that there may be a need to empower the approving authority to release information to law enforcement agencies outside Hong Kong.

37. The Administration has explained that multi-jurisdiction efforts and co-operation are essential for effective law enforcement. The Police and the ICAC have so far established good operation liaison with law enforcement agencies outside Hong Kong, including cooperation in the search of person who are wanted on warrant of arrest. The Administration has agreed to move CSAs to empower the approving authority to release information to law enforcement agencies outside Hong Kong.

Possible impact on freedom of the press

38. Clause 17(1)(b) of the Bill provides that any person shall not, without lawful authority or reasonable excuse, disclose information that compromises the security of a person who is or has been a participant or who has been considered for inclusion in the WPP. Any person who contravenes this provision commits an offence and is liable on conviction on indictment to imprisonment for 10 years.

39. Some members have expressed concern that clause 17(1)(b) as presently drafted may have implications on the freedom of the press. These members have pointed out that in the event of a journalist unknowingly reported on persons included in the WPP and as a result has affected the safety or security the persons concerned, the journalist may be liable to an offence. Journalists would become overly cautious in their reporting, and may even exercise self-censorship. Members consider that there should be a right balance between protection of witnesses and freedom of the press.

40. The Administration has responded that information in clause 17(1)(b) refers to information that will affect the safety or security of a witness, such as press reports which may lead to the identity of a witness being disclosed. General reports which do not prejudice the safety or security of a witness will not be prohibited. The Administration has pointed out that the spirit of the Bill is for protection of witnesses. Clause 17(1)(b) applies to persons making reports as well as law enforcement officers. The provision of "reasonable excuse" would be a sufficient defence for persons who are charged with an offence under clause 17(1)(b).

41. Nevertheless, the Administration has agreed to the suggestion of adding a provision to the Bill to the effect that any prosecution under clause 17(1)(b) requires the consent of the Secretary for Justice. The relevant CSAs will be moved by the Administration.

Committee stage amendments

42. Apart from the CSAs explained in the above paragraphs, the Administration will move technical amendments to the Bill. A full set of the draft CSAs to be moved by the Administration is in **Appendix II**.

Recommendations

43. The Bills Committee recommends that subject to the CSAs to be moved by the Administration, the Second Reading debate of the Bill be resumed at the Council meeting commencing on 26 June 2000.

Advice Sought

44. Members are invited to support the recommendation of the Bills Committee at paragraph 43 above.

Council Business Division 2
Legislative Council Secretariat
14 June 2000

《證人保護條例草案》委員會

**Bills Committee on
Witness Protection Bill**

Membership List

涂謹申議員(主席)	Hon James TO Kun-sun (Chairman)
朱幼麟議員	Hon David CHU Yu-lin
梁劉柔芬議員	Hon Mrs Sophie LEUNG LAU Yau-fun, JP
程介南議員	Hon Gary CHENG Kai-nam, JP
黃宏發議員	Hon Andrew WONG Wang-fat, JP

合共： 5位議員
Total： 5 Members

日期： 2000年1月20日
Date： 20 January 2000

Appendix II

WMADD : DMA#23558vll

1st draft: 19.4.2000
2nd draft: 26.4.2000
3rd draft: 27.4.2000
4th draft: 16.5.2000
5th draft: 24.5.2000
6th draft: 26.5.2000
7th draft: 30.5.2000
8th draft: 30.5.2000
9th draft : 9.6.2000
10th draft: 13.6.2000
11th draft: 14.6.2000
12th draft: 14.6.2000

WITNESS PROTECTION BILL

COMMITTEE STAGE

Amendments to be moved by the Secretary for Security

Clause

Amendment Proposed

2

- (a) By adding -
““board” ()means the board established under section 14;”.
- (b) In the definition of “witness”, in paragraph (a), by deleting “Government” and substituting “HKSAR”.

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- (a) In subclause (3) -
(i) by deleting “The” and substituting “In addition to the nature of the perceived danger to the witness, the”;

(ii) in paragraph (e), by adding “and” at the end;

(iii) by deleting paragraph (f).

(b) By deleting subclause (4) and substituting -

“(4) If -

(a) a parent, guardian or other person signs a memorandum of understanding pursuant to subsection (2) (c) (i) or (ii); and

(b) the witness to which the memorandum relates is included in the witness protection programme and remains a participant on or after reaching 18 years or having legal capacity, as the case may be,

the approving authority may require the participant to sign another memorandum of understanding on or after reaching 18 years or having legal capacity, as the case may be.

(5) Where the approving authority considers a witness for inclusion in the witness protection programme pursuant to a request made by the witness and decides not to include the witness in the witness protection

programme, he shall take reasonable steps to notify the witness in writing of his decision.”.

5 (a) By deleting subclause (2) (a) and substituting -

“(a) require a witness to undergo psychological or psychiatric examinations and make the results available to the approving authority; or”.

(b) By adding -

“(3) In addition to the requirements under subsections (1) and (2), the approving authority may require a witness to undergo medical tests or examinations and make the results available to the approving authority to obtain information that may be needed in the event that the witness is included in the witness protection program.”.

6(2) (a) By deleting subparagraph (iv).

8 (a) In subclause (2), by deleting “另立” and substituting “定立” .

(b) By adding -

“(2A) Where the approving authority considers establishing a new identity for a participant pursuant to a request made by the participant and decides not to establish a new identity for him, he shall take reasonable steps to notify the participant in writing of his decision.”.

(c) In subclause (3), by deleting “另立” where it twice appears and substituting “定立” .

(d) By adding -

“(3A) If the participant is under 18 years or otherwise lacks legal capacity to sign the memorandum, it shall be signed in the manner as provided for in section 4(2) (c) (i) or (ii) (as the case may require), and if the participant remains a participant on or after reaching 18 years or having legal capacity, as the case may be, the approving authority may require him to sign another memorandum of understanding at that time.”.

(e) In subclauses (4) and (5), by deleting “另立” wherever it appears and substituting “定立” .

(f) In subclause (6), by deleting “this Ordinance”

and substituting “the Ordinance”.

9 (a) In subclause (2) -

(i) by deleting “shall” and substituting “may”;

(ii) by deleting “另立” where it twice appears and substituting “定立” .

(b) In subclause (4), by deleting “former identity” and substituting “original identity”.

10 By deleting “former identity” wherever it appears and substituting “original identity”.

11(2) By deleting “intention” and substituting “decision”.

12 (a) In subclauses (1) and (3) (a), by deleting “former identity” and substituting “original identity”.

(b) By adding -

“(3A) Where a former participant’s original identity is restored and he has outstanding legal rights or obligations or is subject to legal restrictions in respect of the identity that had been provided under the witness protection program (“the new identity”), section 9

applies to such rights, obligations and restrictions, and the approving authority may take the same actions as he could have if they had occurred before the new identity was established.”.

- 13 (a) In subclause (1) -
- (i) in paragraph (a), by deleting “or”;
 - (ii) in paragraph (b), by deleting the comma and substituting”; or”;
 - (iii) by adding -
 - “(c) not to establish a new identity for him as a participant,”;
 - (iv) by deleting “a more senior officer designated by the Commissioner for that purpose” and substituting “the board”.
- (b) In subclause (3), by deleting “officer designated by the Commissioner under subsection (1)” and substituting “board”.
- (c) In subclause (4), by adding “or not to establish a new identity for a participant” after “programme”.

- 14 (a) By deleting the clause and substituting -

“14. Establishment of board

(1) There is established a board to review decisions of the approving authority referred to in section 13(1) (a), (b) and (c).

(2) The board -

(a) shall consist of -

(i) an officer who is more senior than the approving authority designated by the Commissioner;

and

(ii) 2 persons who are not public officers; and

(b) may also consist of additional members as determined by the chairman, who may be public officers or not public officers,

and the members referred to in paragraphs (a) (ii) and (b) shall be selected from the panel referred to in subsection (4) in accordance with the procedure provided for in subsection (5).

(3) The officer referred to in subsection (2) (a) (i) shall be the chairman of the board.

(4) The Chief Executive shall, for the purposes of subsection (2) (a) (ii) and (b), appoint a panel of persons consisting of such number of public officers and other persons as he thinks fit.

(5) Members of the panel who are not public officers shall be selected to serve on the board in rotation in accordance with the alphabetical order of their surnames. The Chairman may, in addition to such members, select members of the panel who are public officers, in such manner as he sees fit, to serve on the board.

(6) An appointment made under subsection (4) shall be notified in the Gazette.

(7) The board shall review the material submitted to it under section 13(3) and shall advise the approving authority and the person who requested the review of its decision to confirm or reverse the decision being reviewed.

(8) Where the approving authority's decision is reversed, he shall amend his decision accordingly.

(9) The board may establish its own procedure for reviewing a decision.”.

15(b) By adding “in or outside Hong Kong” after “agency”.

17 By adding -

“(5A) No proceedings shall be instituted for an offence under subsection (1) (b) except with the consent of the Secretary for Justice.”.

19 (a) In subclause (1), by deleting everything before paragraph (a) and substituting -

“(1) Where a participant is to give evidence for the HKSAR in legal proceedings, the judge or magistrate in charge of such proceedings may, upon an ex parte application by the prosecution, authorize a police officer or an officer of the Independent Commission Against Corruption to require all members of the public wishing to enter the courtroom to -”.

(b) By adding -

“(1A) An application under subsection (1) shall be heard in chambers.”.

(c) In subsection (2), by adding “, subject to any direction of the judge or magistrate,” after “may”.