

UNDCP MODEL WITNESS PROTECTION BILL, 2000

1. The aim of the Model Witness Protection Bill is to ensure that the investigation and prosecution of serious criminal offences is not prejudiced because witnesses are intimidated or frightened to give evidence without protection from violent or other criminal recrimination. Through a witness protection programme to be administered and maintained by a designated person or body, witnesses can be given protection and assistance to shield them from such recrimination. The disclosure of information relating to that programme or witnesses on it is made an offence.

Clause 3 - Witness Protection Programme

2. The Commission of Police (or other person to be designated) is required to take action which he thinks necessary and reasonable to protect the safety and welfare of a witness in any proceedings relating to the Act. “*Witness*” is given a wide definition in clause 2(c) of the Bill. The term covers a person who has made a statement, or who has given or agreed to give evidence in relation to the commission or possible commission of a serious offence. “*Serious offence*” is defined in clause 2(b), and ties in with the definition of “*serious offence*” in clause 3(p) of the Mutual Legal Assistance Bill. “*Witness*” also includes a person who, because of his or her relationship to, or association with, a person who has made a statement or who has given or agreed to give evidence in relation to the commission or possible commission of a serious offence, may require protection or other assistance under the Act, and a person who for any other reason may require protection or other assistance under the Act.
3. The term “*proceedings*” is defined in clause 2(d), and is not confined to proceedings relating to serious offences. The term covers procedures in relation to any alleged or proven offence, or property derived from such offence, and includes an inquiry, investigation or preliminary or final determination of facts. “*Property derived from an offence*” is in turn defined in clause 2(e). The offence does not have to be

a serious one, and nor does it have to be criminal.

4. What the Commissioner of Police or other designated enforcement officer considers necessary and reasonable will depend on the circumstances of the case. A level of protection which is considered necessary and reasonable in circumstances where danger to the witness is perceived to be acute, would probably be considered unreasonable where the risk is considered much less.
5. Clause 3(2) lists those activities which might comprise such necessary and reasonable action. Action which is not covered in the activities referred to in clause 3(2)(a)-(f) may be taken provided the Commissioner of Police or other designated officer considers it necessary to ensure the safety of the witness (clause 3(2)(g)). Clause 3(2)(h) refers to a foreign witness present in the enacting state pursuant to an agreement or arrangement between the enacting State and a foreign State relating to witness protection.
6. Clause 3(3) makes provision that the Commissioner of Police or other designated person responsible for the establishment and maintenance of a witness protection programme shall not obtain documentation for a witness participating in the programme that represents that the participant has a qualification that he or she does not have, or is entitled to a benefit that he or she is not entitled to.
7. This provision would prevent persons being given documentation which represents for example that they have a degree, or are qualified in a particular trade, and thus would operate to stop a person making false representations to an employer or any other person in this regard. The same reasoning is behind the provision concerning a benefit. “Benefit” would cover social welfare benefits, and property and inheritance entitlements. For example the Commissioner of Police would be prevented from obtaining documentation stating that the person concerned had a child when this was not in fact the case, given that this would in most states mean that person was entitled to social security benefits.

Clause 4 - inclusion of a witness in the witness protection programme

8. Clause 12(3) provides that the Minister or other designated person may issue such directions as are necessary or convenient for the administration of a witness protection programme. Such directions could for example set out criteria which must be fulfilled before a witness is included in the programme. Subject to any such directions, clause 4(1) provides that the Commissioner of Police (or other designated person) is to be responsible for deciding whether to include a witness in a witness protection programme.

9. Clause 4(2) sets out the factors that the Commissioner of Police must consider in deciding whether to include a witness in the witness protection programme, and it is for him/her to decide how to weigh those factors, in all the circumstances of the case. Looking at factor (a), the more serious the offence to which the statement or evidence of the witness relates, the more likely it would be that a witness should be included in such a programme; one consideration is that the more that is at stake for the defendant, the more risk there might be to a witness. The nature and importance of the statement or evidence of the witness, and the nature of the perceived danger to the witness must also be taken into account. The nature of the witness's relationship to any other witness being assessed for inclusion in the programme must also be considered. This would include not only familial ties, but also for example where witnesses are neighbours, or employed by the same person.

10. If any psychological or psychiatric examination or evaluation of the witness has been made in order to establish the suitability of him/her to be included in the witness programme, this should be taken into account. There may be other ways of protecting the witness than including him/her on a witness protection programme, and these should be taken into account also. In addition, the Commissioner must consider whether the witness has a criminal record, and in particular in respect of violent crime, which indicates a risk to the public if he or she is included in the programme. The criminal record is not confined to offences similar to those to which the evidence of the witness relates; but would include any criminal conviction.

11. Clause 4(3) provides that the witness programme is voluntary, in that a witness is to not be included

in a witness protection programme unless he/she, or a person legally responsible for him/her, agrees in writing to be in it.

Clause 5 - Court orders protecting witnesses from identification

12. Clause 5 provides that court orders may be made to protect witnesses from identification. Clause 5(1) provides that the Commissioner of Police (or other designated person) may apply to the Court (or other body or person authorised to issue this kind of order) for an order authorizing a specified person, or a specified class or description of persons, to make a new entry in registers of births, marriages or deaths as appropriate in respect of the witness, and to issue in the witness's new identity a document of a kind previously issued to him/her. The Court or other body with charge over the proceedings, may then make a witness protection order, but only if it is satisfied that the life or safety of the person may be endangered by virtue of the person being a witness.
13. Proceedings of the court under clause 5 are to be conducted *in camera*, ie in private with the public being excluded, and all records must be sealed to ensure privacy. Clause 5(5) provides that entries made in the registers pursuant to an order made under clause 5(2) are as valid as if they were made under the appropriate domestic legislation by which such entries are normally made. Thus for example a witness who applied for a job could rely on an altered entry in the register of births as proof of his age.

Clause 6 - Termination of protection and assistance

14. Clause 6 makes provision for the ending of protection and assistance. The Commissioner of Police (or other designated person) must terminate protection and assistance if the witness in question requests in writing that it be terminated. The Commissioner has a discretion to terminate it in three cases; firstly if the witness has intentionally breached a requirement or undertaking relating to the witness protection programme, secondly if his conduct or threatened conduct is considered by the Commissioner to be likely to threaten the security or comprise the integrity of the programme, or thirdly if the circumstances which gave rise to the need for protection and assistance for the witness no longer exist. In all of these three

instances he must consider that all the circumstances of the case justify such termination.

Clause 7 - Non-disclosure of former identity of a witness

15. “*Proceedings*” would in this context be wider than the definition of “*proceedings*” in clause 2(d) and thus would not be limited to proceedings relating to an offence. This clause must be read subject to clause 3(3), which provides that the Commissioner of Police must not obtain documentation for a witness participating in the witness protection programme that represents that the participant has a qualification that he or she does not have, or is entitled to a benefit that he or she is not entitled to. In the event the person is being investigated or is prosecuted in connection with a serious crime, his/her identity may be revealed to the appropriate authorities by the Commissioner (clause 10).

Clause 8 - Restoration of former identity

Clause 9 - Certain persons not required to disclose information

16. An example of where a Court might consider it to be in the interests of justice to make an order under clause 9 would be where the relevant information would be important evidence in a case where a person’s liberty was at stake, and its disclosure was not considered to risk the life or safety of any participants in the programme. Clause 11 sets out offences relating to witness protection, which would amount to offences against the Act.

Clause 10 - Provision of information to competent authorities

17. “*Serious offence*” is defined in clause 2(b). The Commissioner of Police (or other designated person) can use his discretion as to whether to release information or cooperate with the authority involved in the investigation or prosecution, and cannot be compelled to do so.

Clause 11 - Offences relating to witness protection

18. Clause 11 sets out four offences against the Act, with suggested penalties for the first two offences. Clause 11(1) covers anyone who knows information about the identity of someone who is or has been a witness on the programme, and in this way the position of witnesses who are no longer on the programme continues to be protected. Clause 11(2) binds witnesses who have participated in the witness protection programme not to disclose information relating to anything done by the Commissioner of Police (or other designated person) or any police officer under the Act, or information about any police officer gained by the person as a result of anything done under the Act. Clause 11(3) provides that the duty on witnesses not to disclose information is waived in respect of any disclosure or communication that has been authorised by the Commissioner of Police, or that is necessary to comply with an order of a specified court.
19. Clause 11(4) prevents a witness using previous entries in the births, marriages or deaths registers that have been changed pursuant to powers under the Act, subject to a penalty to be specified.
20. Clause 11(5) ensures that a person given a new identity under the witness protection programme cannot thereby circumvent the requirements of a lawful marriage in the state concerned. Thus even if, in accordance with the terms of the new identity, it is represented that the person is 18, when in fact he/she is 16 and the marriageable age in the state concerned is 17, that person will be unable to marry until he/she reaches the age of 17. Similarly, if the witness was previously married, he/she must be divorced or widowed before he/she can marry again. In all cases, there must be no legal impediment to the marriage.

Clause 12 - Witness protection arrangements

21. Clause 12(1) empowers the Minister referred to in the Bill (or other designated person) to make arrangements with any foreign State about any matter relating to cooperation between the enacting State and the foreign state relating to witness protection.
22. Clause 12(2) provides that the Minister may make any arrangements as he considers necessary and

convenient for the administration of a witness protection programme with any other Minister or competent authority.

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