

## Potential Challenges in a Witness Protection Programme in Malaysia

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### ABSTRACT

Witness protection is a programme which protects crucial witnesses whose testimony may put them or their family members in jeopardy. Many countries including Malaysia have included the witness protection programme into the federal legislation. The United States, which has implemented witness protection programme since the 1970s, has reported a high rate of convictions as compared to countries without such a programme. Malaysia has recently passed the Witness Protection Act and therefore it is relatively new in matters pertaining to witness protection programmes. Lessons can be learnt from countries which have long implemented such programmes. Common issues which Malaysia may face include matters such as finances and resources, the ambiguity of certain terms in the legislation and problems when witnesses are relocated or change of identity. Other problems include the maintaining of participants in the programme and the termination of it. There is also the issue of whether the programme is rebirthing and rewarding criminals. This happens when the participant is a criminal herself/himself, i.e. whose punishment is reduced or relocated to another neighbourhood in lieu of her/his testimony to convict a 'bigger' criminal. These participants sometimes continue their 'criminal' activities in the new community they are relocated to, and thus, pose a risk to the residents in the new community. It is undeniable that problems will exist and with experience, they can be ironed out periodically. This article briefly views these problems.

**Keywords:** Law, witness protection legislation, witness protection programme

### INTRODUCTION

A witness protection programme (hereinafter referred to as WPP) was designed for persons who intend to testify in a trial but are reluctant to do so in fear that their life or the life of loved ones would be threatened or put in jeopardy. Often, these are the witnesses most required by the authorities as theirs' is the testimony that determines a successful prosecution. The non-existence of these programmes leads to the absence of important testimony which makes it impossible to dispensed justice. This programme ensures that witnesses such as

eyewitnesses or their relatives do not become victims of harassment, threat, abuse or in extreme cases, killed.

Many states have adopted various ways of dealing with protecting witnesses. Many states such as Australia, Canada, Thailand, and Malaysia have incorporated these programmes as a part of the federal or state legislation. The absence of such programmes can result in the fear of reporting crimes and the failure of prosecution due to the lack of evidence. These have been the cases in the states without such protection. In Sri Lanka, for instance, the low

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Received: 26 March 2010

Accepted: 20 December 2010

conviction rate is primarily due to the reluctance of witnesses to testify against crimes<sup>1</sup>.

Many witnesses or victims of crimes who dare to speak out and make complaints against the abuse are often threatened and without proper protection, these victims/witnesses will eventually give in to the threat and withdraw the complaint. An example is the case in Sri Lanka where a woman was raped by airport officers. The victim identified the alleged perpetrator who was arrested together with four other suspects. Soon after that, the victim began receiving threatening calls from the relatives of the alleged perpetrator which included threats to kill the victim if she appeared in court to testify against the perpetrator. Various complaints were lodged by the victim; however, no protection was offered to her and her family members. The victim and her family are now afraid to pursue the matter or assist in the investigation.

On the other hand, in the United States where the witness protection programme has been in use since 1970s, it is seen as an effective mechanism in solving cases. As reported by a former United States attorney in New York<sup>2</sup> that "the more serious prosecutions you do, including terrorism and organized crime, the more you have a need for witnesses, if you can persuade them." The conviction rate in cases where these witnesses have testified is 89%.

In Malaysia, witness protection is relatively new. The implementation of the Act is yet to be seen. In view of that, a closer look at the programme as implemented by other countries should be studied, mainly the common problems. Studying the experiences of other countries could prepare us to face the eventuality that might be experienced by us. Naturally, the initial stages of implementation might pose problems. With time and experience, the possible problems would be ironed out.

<sup>1</sup>Victim and witness protection, lesson series 47. Asian Human Rights Commission, correspondence school derived from <http://www.hrschool.org>

<sup>2</sup>USA Today.com, witness protection program to add terrorism case work, posted Sept, 2004 derived from [http://www.usatoday.com/news/washington/2004-03-19-terror-witnesses\\_x.htm](http://www.usatoday.com/news/washington/2004-03-19-terror-witnesses_x.htm)

## WITNESS PROTECTION IN MALAYSIA

In Malaysia, the witness protection programme has been incorporated into the Federal law as The Witness Protection Act 2009<sup>3</sup> (hereinafter referred to as the WPA). Although this Act has been gazetted, it is still not enforced up to now. A brief introduction to the Act is given here.

Under WPA, the programme is managed by the office of the Director General, a person appointed by the Minister from amongst members of the public service<sup>4</sup>. It is therefore the responsibility of the Director General to recommend witnesses for protection and consider applications from witnesses for protection.

When considering persons to be included into the WPP, the Director General weighs matters such as their criminal records, medical records, the seriousness of the offence to which the evidence or statement of the witness relates, the nature and importance of the witness' evidence or statement, whether or not there are alternative methods of protecting the witness and any other matters as the Director General considers relevant<sup>5</sup>.

The participants are required to disclose information of any outstanding legal obligations, outstanding debts including taxes, criminal history or any pending civil proceedings and bankruptcy proceedings, immigration status, financial liabilities and others. This disclosure is necessary to avoid the WPP to be used as a gateway route for participants with liabilities. The Act provides that failure to disclose such information is an offence punishable with a fine not exceeding ten thousand *ringgit* or imprisonment for a term not exceeding five years or both, upon conviction<sup>6</sup>.

As mentioned in section 13 of WPA, in providing protection to the participant, the actions taken by the Director General include, relocating the participant, changing the identity of the participant, providing financial assistance for the participant and his/her family and any other assistance deemed necessary. The

<sup>3</sup>Witness Protection Act 2009 (Act 696)

<sup>4</sup>Section 4(1) of the WPA 2009

<sup>5</sup>Section 9 of the WPA 2009

<sup>6</sup>Section 8 WPA 2009

assistance provided by this section is essential as it gives the participant space and time before he/she and family could settle in a new location. This section impliedly encourages witnesses to participate in the programme.

The Director General may recommend a participant to be terminated from the WPP, but only after giving him/her an opportunity to be heard. Section 16 provides that a participant can be terminated from the programme for reasons such as knowingly disclosing false or misleading information, improper conduct, and the need for protection ceases to exist or the Director General is of the opinion that such protection is not reasonably justified.

As seen, the WPA narrates the basics of the WPP, with certain omissions, such as the details of the programme. The WPA is silent on the requirement of the participant entering into an agreement with the authorities, the extent of the powers of the authorities involved, the powers extended to other agencies which may be indirectly involved in the programme and the existence of any other independent agency that overlooks this programme. However, it is believed that these matters will be taken care of in the form of rules, regulations or orders upon the enforcement of the WPA.

## COMMON ISSUES IN WITNESS PROTECTION PROGRAMMES

### *Finances and Resources*

In the presence of witness protection programmes, many witnesses are still afraid to speak out. It is often argued whether the refusal of witnesses to testify is because of fear or the lack of confidence in the authorities. In view of this, it is the duty of the authorities to build more confidence in the public to encourage participants to testify.

Among the problems faced by the authorities responsible for this programme is the lack of resources such as manpower and finances. Cost is a major factor since all the expenses for the programme are sponsored by the government. These expenses include relocating and changing the identity of all the members to the programme

(usually the family which may include at least four or five persons). The costs will be higher if the relocation is outside the original county. The expenses would also include stipend, the participants' living expenses, costs of accommodation, and job searching. Apart from these, some witnesses are also given a certain amount or award in the form of cash. As the Act has not been enforced, it is difficult to further discuss on the costing issue. However, the factors discussed here are among the issues to be kept in mind when the Act is duly enforced.

In San Francisco, two witnesses were killed while they were under the WPP, which the District Attorney called an 'absolute tragedy and outrage'. As a result of these killings, a state legislation was passed, and this doubled the funding for the state's witness protection plan and the time the witnesses could receive help from the government finding new jobs, doctors, schools, and homes in their new location. In view of this, the State also tripled the number of sworn investigators assigned to the WPP and received veteran law enforcement officers<sup>7</sup>. No state or country should wait for an incident like the one in San Francisco to happen before realizing that more funding or staff are required to safeguard someone's life who had so daringly risked his/her life in order to prevail justice and prevent further crimes. A witness's life may still be in danger after the end of a trial. Therefore, further costs would still be required to maintain that particular witness.

In another case, a witness and his wife, who were removed from the WPP after seven years, sued for damages, claiming that they were penniless and forced to live off the charity after having enjoyed a more affluent lifestyle prior to their participation. The courts in New South Wales allowed the claim<sup>8</sup>. This is the type of situation which could arise again and again as participants get frustrated or find it difficult to adapt to their life either financially or for

<sup>7</sup>Brent Begin, Second witness under DA's protection shot to death, Examiner.com, Jan 2008.

<sup>8</sup>Secrecy Guide:=Witness Protection, Caslon Analytics guide secrecy and accountability retrieved from www.caslon.com.au/secrecyguide19.htm March 2007.

any other reason. Joining the WPP is a very important decision because it literally changes the lives of those involved. They should be properly guided and informed and provided with independent support. Meanwhile, the agencies involved with the WPP should train their staff rigorously to handle the programme, emphasising on secrecy and security to ensure its success.

#### *Clear Provisions*

A delicate and intricate programme such as witness protection requires clear and precise words explaining the system. This is so especially if the system has been incorporated in a statute and is relatively new to the country. Aspects such as changing the identity of a witness should be clearly stated to reflect salient features. For example, how the change is done and by whom, that is who are the people involved in the procedure. These also include how the protection is affected in emergency situations.

The WPP often involves the family of the witness. Thus, the Act (if any) should explain what is meant by family. Does it include only immediate family comprising of spouse, children and parents or does it expand to the extended family? Sometimes, the extended family member is directly dependant on the witness for care and support, such as an ailing grandmother or aunty. In the United States, one witness persuaded the government to accept 20 family members and another to include his mistress together with his wife into the programme<sup>9</sup>.

#### *Relocation and Change of Identity*

Among the mechanisms of witness protection are relocation and change of identity. While these are considered to be viable solutions, they can also pose certain problems. Relocation and change of identity are usually done simultaneously, where a person is moved to another city or state within his/her country or wherever necessary out of the

<sup>9</sup>Mark Sherman, Witness Protection a World of Secrets, FOX News.com, 2006

country. It merely means moving a person from where he/she is to a supposedly 'safer' location.

Where should a participant be moved to, is often the main issue. Primarily, it should be a place where the safety of the participant(s) will be most guaranteed. Aspects such as the religion, culture and status, as well as the background of the witness, have to be taken into consideration. Relocation is often carried out on a witness together with his/her family. The family must be able to adapt to the new 'homeland' as the family is going to be placed there for a long time. The family, especially if it involves children, must understand the situation and fit in into the new environment. The family will be required to cut ties with all previous friends and family members who are not included in the programme.

In order to prepare the family to face the 'rebirthing' under the WPP, counselling services or any other form of preparedness should be provided for those who have agreed to be part of the programme. In the United Kingdom, the 'schooling' provided to such witnesses and family members involved in the programme is a good move towards preparing the participants.

Sometimes, relocation and change of identity may have to be done several times. For example, where a witness's whereabouts have been discovered and the life of the witness is again at risk. Then, the family will have to be relocated to another place, and this migration may go on several times.

Apart from that, relocation and change of identity in Malaysia will be a little difficult, considering the size of the country. Geographically, Malaysia is a small country. The Malaysian WPA has expressly excluded east Malaysia, the states of Sabah and Sarawak to be parts of the relocation places for witnesses from Peninsular Malaysia<sup>10</sup>. Sarawak is the largest state in Malaysia and both east Malaysian states have diversified culture which will serve the programme well. Therefore, the most conducive states for relocation have been duly excluded. In view of this, if relocation is done within the

<sup>10</sup>Section 13(3) of the WPA 2009

states of Peninsular Malaysia, tracing a person and disclosing the identity of a participant may not be a very difficult task, which will further lead to several relocations or relocation to another country.

#### *Staying in the Programme and Termination of the Programme*

When a person agrees to participate in a WPP, the most challenging part is probably staying in the programme. An important aspect of this particular programme is the aspect of secrecy and confidentiality. No one under the programme is to make contact with anyone not in the programme, including close friends and even family members.

Some may be unable to take the isolation and ultimately give in by moving to their original home. Spouses and children are often parts of the programme. Therefore, a child may not be able to assimilate himself/herself in the new community and disclose her/his true identity in order to go back to her/his original community, i.e. to people she/he is comfortable with. In the event of divorce, a spouse may disclose the true identity in order to go back to the family members who are not included in the programme.

#### *Rebirthing and Rewarding Criminals*

It has to be kept in mind that by changing the identity and location of a person, the nature of that particular person is not changed. This is not a problem if the person involved is a good citizen with a clean police record, but witnesses often involve persons with notorious criminal records. These witnesses with criminal records could use the pseudonym identity to commit more crimes. Therefore, the locals in the area where the witness with criminal record is sent are totally oblivious with who their new neighbour is. If the witness stays clean, then it is fine; nevertheless, if the witness reverts to his/her criminal nature, the authorities has actually relocated a criminal and threatened the safety of an otherwise safe

neighbourhood. Nearly one in five protected witnesses has been charged with new crimes<sup>11</sup>.

In the United States, for instance, apart from being relocated with a new identity, witnesses with criminal records, especially in major crimes, are often rewarded with large sums of money or their own penalties are waived. In other words, the authorities are releasing one criminal to capture another.

The reason for the necessity to protect witnesses with criminal records is that small criminals are protected in order to prosecute the larger ones and to protect citizens who risk their lives for justice. In major mafia crimes, the witness is sometimes a member of that group who wants to get out, therefore he/she requires such protection in order to disclose the notorious group which can solve a number of homicides and prevent many more. The risk is carefully weighted between the giving of protection to a criminal and solving another crime.

### CONCLUSION

In the United States, problems in the WPP still exist even after more than 30 years of its existence. Nonetheless, it is a programme which is essential but it still needs to be administered with supreme cautiousness at the same time as it involves human lives. This is particularly important for persons who daringly risk their lives and the lives of their loved ones in order to bring justice. The country surely owes these witnesses protection. In light of the prolific crimes which involves notorious and dangerous 'underworld' gangsters, mafias, drug dealers, murderers and terrorists, no man/woman will testify unprotected, and this will definitely cripple the prosecution and encourage crimes which will further endanger the peacefulness of a country. Therefore, this is a much required programme, and the passing of the Witness Protection Act by the Malaysian parliament is a positive step towards fighting crimes and raising the prosecution's conviction rate.

<sup>11</sup>Mark Sherman, Witness Protection a World of Secrets, FOX news.com, July 2008.

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