

Rules and scope of applying means of witnesses and victims protection and assistance according to the victims and witnesses protection and assistance bill

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I

On 15th July 2014, the Council of Ministers adopted the *witnesses and victims protection and assistance bill*¹, the aim of which is to create complex regulations dedicated to witnesses and victims protection, whose health and life are in danger². This legislative initiative is rightful in every way, because in Polish criminal law there is no such legislative act which would standardise the issues of protection and aid for witnesses and people whose laws were directly violated or threatened by crime, as they can be

¹ <http://legislacja.rcl.gov.pl/lista/2/projekt/209345/katalog/209396> (access: 21.08.2014).

² The project is a way of fulfilling the general goal of criminal proceedings, explained in Art. 2 § 1 point 3 c.c.p., according to which criminal proceedings consider the right and legal interests of victim. Moreover, the bill should implement directive of European Parliament and Council 2012/29/UE from 25th October 2012 *establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA57* (page 59), and also directive of European Parliament and Council 2011/99/UE from 13th December 2011 *European Protection Order* (page 2).

put in danger again due to the fact of testifying against the perpetrator or just because of their involvement in criminal proceedings.

The current system of aid and protection refers mostly to the state's evidence — a suspect is allowed to testify as a witness based on the rules given by the *state's evidence* act from 25th June 1997³. Some solutions in this matter can also be found in the *Criminal Code* from 6th June 1997⁴ (illegality of using violence or unlawful threats with the purpose of influencing a witness and connected with that violation of the inviolability of a person), the *Code of Criminal Procedure* from 6th June 1997 (restriction of witnesses' personal details to exclusive knowledge of the state prosecutor or the court when there is a justified concern that violence or unlawful threats will be used against the witness or his next of kin in connection with his action Art. 191 § 3; incognito witness construct — Art. 184; possibility to inquire a witness at the trial in closed session Art. 183 § 2 c.c.p., Art. 360 c.c.p.; possibility of hearing the witness with the accused withdrawn from the courtroom for so long as the person is being examined Art. 390 § 2 c.c.p.; hearing a witness without the direct contact with the accused also using technology allowing for video-conferencing Art. 177 § 1a c.c.p.; laws protecting witnesses and especially victims from trauma connected with some sort of crimes, for example sexual crimes — Art. 185a–185d c.c.p.; prohibition of contact between the victim and accused as well as an order to leave the building inhabited with the victim Art. 275 and Art. 275a c.c.p.), and for victims and witnesses who are arrested there are rules in the *Criminal Executive Code* from 6th June 1997⁵ Art. 88d, which provides special protection for those people, if there is a justified concern that their life or health is in danger because of the criminal proceedings they are or were involved in. Un-

³ *State's evidence act* from 25 June 1997 about state's evidence, Polish Law Register (Polish: Dziennik ustaw, in short: Dz.U.) from 2007 Part 36, item. 232 with changes. Terms, scope, ways of implementing, executing, retracting and ending personal protection and assistance for protected persons are described in Art. 14–21 of the mentioned act and also in Council of Ministers bylaw from 18th October 2006 *protection and help for state's evidence and other entitled persons* (Dz.U. No. 201, item. 1480).

⁴ Legislative act from 6th June 1997 *Criminal Code*, Polish Law Register (Dz.U.) Part 88, item 553 with changes (in short c.c.).

⁵ Legislative act from 6th June 1997 *Code of Criminal Procedure*, Polish Law Register (Dz.U.) part 89, item 555 with changes (in short c.c.p.).

fortunately, the scope of adopted solutions in this matter seems insufficient to provide protection and help for victims and witnesses.

These people provide the statements essential during a trial. In most cases these statements are very important evidence, which allow to determine specific circumstances or give information about the suspect and consequently, help to find out who committed the crime. Information obtained during the hearings contains clues which help to undertake required proceedings in order to determine the circumstances of the event. Because of their knowledge about the crime and the perpetrator, witnesses and victims are exposed to the hostile actions of violators who want to eliminate incriminating evidence. This may cause them to be afraid to testify. The act of testifying itself is a source of great stress and can be a traumatic experience, especially in the presence of the accused or when prosecutors treat them instrumentally. Considering all the described above, the new act that would fully cover the issues of protection and help for victims and witnesses and would complement already existing — but insufficient — solutions, is essential.

II

The presented *witnesses and victims protection and assistance* bill describes the terms, scope and ways in which aid and protection can be provided and annulled for not only witnesses and victims but also their next of kin, to ensure that they are safe from intimidation and revenge, and that they can take part in criminal and fiscal criminal proceedings without being victimised again. Moreover, these means can be applied before criminal and fiscal criminal proceedings are held, in cases where danger to life and health appears during the investigation or verifying proceedings mentioned in Art. 307 c.c.p.

Depending on the source and level of danger, the bill provides the following means of assistance and protection:

— protection for the time of legal proceedings which can be applied when the life and health of a person is in danger. It involves the presence of policemen around the person requiring protection during actions when his presence is needed, on the way to the location where the proceedings take place and on the way back;

— personal protection — it can be applied in cases of high risk that the life and health of the protected person is in danger in connection with criminal and fiscal criminal proceedings he is involved in, if there is a need for long-term protection in cases when the first recognition takes place in a provincial court and in justified situations also in other cases. It involves the constant or temporary presence of policemen close to the protected person; temporary observation of the person and his or her surroundings, recommending that person a safe place to inhabit, a safe time and means of travelling and communicating with other people. Diversification of possible forms of personal protection will enable the adjustment to the real danger in each particular case;

— help with changing one's whereabouts, which can be applied in cases of a high risk that the life and health of the protected person is in danger in connection with the criminal and fiscal criminal proceedings he is involved in, if there is a need for long-term protection and other means of protection can be insufficient, in cases when the first recognition takes place in a provincial court and in justified situations also in other cases. This solution is designed as subsidiary, which means that it can be used when it is proven that other means are insufficient. This restriction is understandable, as it generates logistic complications and high costs, as well as inconvenience for the protected person and his family⁶. The clue here is to allow the protected person to stay in another place than his usual habitat by providing a temporary flat, aid in renting a flat or with moving out. A person helped with changing their whereabouts, who has no income and is not able to work because of a threat to life or health can get financial help (monthly financial aid may not be higher than 3500 PLN and for a juvenile, 2000 PLN) to meet basic needs, to cover the costs of a flat and for the costs of healthcare if the protected person is not under health insurance (the monthly premium for healthcare is defined in the healthcare benefits financed by public resources act⁷ from 27th August 2004, 68 § 4 point 1⁸);

⁶ See: Justifying *witnesses and victims protection and assistance* bill, <http://legislacja.rcl.gov.pl/lista/2/projekt/209345/katalog/209396> (access: 21.08.2014).

⁷ Legislative act from 27th August 2004 *healthcare benefits financed by public resources* act, Polish Law Register 2008 (Dz.U.) part 164, item 1027 with changes.

⁸ Art. 68 § 4, point 1: base of premium paid by a person mentioned in § 1, is the amount of declared monthly income, but not lower than the amount of average income.

— psychological help in cases when the psychological health of the victim or his next of kin is in danger. This form of aid is important, as contact with a psychologist can help the victim or witness cope with the trauma connected with being involved in a crime or legal proceedings itself. It can also check if the person who is going to be subjected to specific means of protection and help is able to adopt to new life conditions and help him to make decisions in this matter. It can prepare him for the changes that are going to come as well.

The basis for justifying the applying any of the above instruments is a threat to life and health of the victims, witnesses or their next of kin. Life and health are protected by the constitution as the most important goods a person can possess. A threat to them is every behaviour (act, abandonment) that aims to illegally violate them. The presented bill distinguishes non-aggravated (the condition of protection during legal proceedings) and high risk (the condition of personal protection and aid in changing the whereabouts) to life and health of both victims and witnesses. The differentiation in non-aggravated and high risk will be done based on presumptions provided by the bill in Art. 2. Accordingly, in estimating the level of risk to life and health of witnesses and victims and their next of kin considered are their specific circumstances and personal properties, level of connection with the perpetrator, kind and circumstances of crime and motives of the perpetrator.

In personal protection and help with changing one's whereabouts, it is important that they both should be available in serious cases when risk to witnesses and victims is real. The legislator assumed that these are cases when the first recognition takes place in a provincial court and in justified situations also in other cases. However, it seems that more emphasis should be placed on the level of danger the protected person can feel, not on the type of court appropriate in the first instance.

III

Means of help and protection are disposed by the appropriate Commander of Police. The initiative of applying those means — according to Art. 12 § 1 of the bill, can be placed not only by the proper body (con-

ducting investigation, verifying and preparatory proceedings and court) but also by the victim or witness. It is worth noting that when it is not claimed by the victim or witness, their approval is needed to apply for protection.

The application should correspond to the general requirements described in Art. 119 § 1 c.c.p. Moreover, the proposed bill provides additional, special requirements for the application — it should specify why providing help and protection for the person is necessary.

The proposed bill does not determine any deadline for applying for help and protection. Analysis of the bill proves only that it can be held during investigation or verifying proceedings but also after the beginning of the trial, during preparatory proceedings and juridical proceedings.

The application is not binding — a bylaw concerning applying for help and protection is issued by the appropriate Commander of Police, no longer than 14 days since obtaining the application, after careful examination of the circumstances to determine if the means of help and protection are relevant to the level of risk. His decision is immediately announced to the protected person and the body that requested help.

A person denied help and protection can apply again within 7 days since receiving denial. There is also the possibility to change the decision, when during the legal proceedings new circumstances occur and a threat to life and health appears. However, as stated in Art. 12 § 6 of the bill, if no new circumstances occur, applying for protection again will not be considered. The proposers of the application should be informed about it.

Applying for help or protection also requires a written commitment from the person who is going to be the subject of aid, that he will respect the rules and recommendations connected with receiving protection as well as fulfilling duties resulting from laws and valid rulings — in case of help with changing their whereabouts. This commitment should be signed after the protected person is presented the rules and recommendations, what means of help and protection and how they are going to be applied.

The commitment should be placed in writing according to the rules of procedural documents (Art. 119 c.c.p.). This is important because, in a

case where the protected person does not sign it despite calling, the agreed means of help can be overruled (bill, Art. 17 § 1 point 3). The Commander of Police, who disposes help and protection, can overrule it when the protected person fails to place written commitment and also when:

- the circumstances that justified protection and help cease to exist;
- the protected person baselessly avoids testifying during legal proceedings that are the purpose of the protection he receives;
- the protected person claims the protection to cease.

Moreover, the Commander of Police can overrule protection and help when:

- the protected person is going to be charged for false testimony during legal proceedings that are the purpose of protection he receives;
- the protected person purposefully misled or dissimulated important information about circumstances that were the basis for helping him;
- the protected person violated rules of protection and help;
- the protected person misused means of help and protection;
- in case of overruling help and protection for the protected person, they also no longer apply to his next of kin.

However, if the overruling is caused by the following reasons:

- the protected person baselessly avoids testifying during legal proceedings that are the purpose of protection she or he receives;
- the protected person is going to be charged for false testimony during legal proceedings that are the purpose of protection she or he receives;
- the protected person purposefully misled or dissimulated important information about circumstances that were the basis for helping him or her;
- the protected person is bound to return an amount of received financial help.

The presented bill gives also an opportunity to change the means of protection and help as well as the amount of financial help according to the circumstances.

Means of protection and help are applied for a period stated in a by-law about those means. If the circumstances justifying help and protection do not cease to exist, the Commander of Police, on request of a pro-

tected person or court or body responsible for legal proceedings, with the agreement of the protected person, can issue a bylaw extending protection and aid for a specified period of time.

IV

The proposed bill will also change the *Code of Criminal Procedure* in terms of witness protection. First of all, it provides witnesses' personal details. Currently the witness can use assurance of data privacy based on Art. 191 § 3 c.c.p., which provides restriction of his details regarding his place of residence to the exclusive knowledge of the state prosecutor and court, when there is justified concern that violence or unlawful threat can be used against the witness or his next of kin in connection with his actions. In this case procedural documents are delivered to the witness's workplace or other address indicated by him. The decision to use this procedure belongs to the witness himself, who — according to the law — can restrict only his address and only when there is concern of using violence or unlawful threat against him or his next of kin in connection with the legal procedure he is involved. The risk must be real and the legal body does not have to obey the witness's request if the witness is unable to prove the existence of risk⁹. However, if the witness does not use this possibility, their personal details are in case files, available for the perpetrator. The proposed change is positive — Art. 148 c.c.p. § 2a is going to state that in protocol there will not be information about the address and workplace of people involved in legal proceedings (name and surname are not restricted). Information about whereabouts will be in an annex to the protocol available only for the body conducting proceedings. At the same time it allows disclosure of these data if it is important to close the case.

Secondly, Art. 253 c.c.p. makes a significant change in the information given to the victim. He should be informed not only about overruling, end or change of temporary arrest but also about the perpetrator's es-

⁹ E. Gruza, *Ocena wiarygodności zeznań świadków w procesie karnym. Problematyka kryminalistyczna*, Kraków 2003, p. 188.

cape (unless he renounces this right). In justified cases such notice will also be given to the witness.

Another change to the *Code of Criminal Procedure* Art. 300, is enlarging the scope of legal information that the victim or witness can obtain before first testimony, about available means of help and protection. No doubt, this solution will secure using all forms of help and protection for the victim, witness and their next of kin during the trial, as they may not know what kind of assistance and protection they can claim.

Also worth noting is a change in 390 § 2 c.c.p. which will allow the hearing in a way described in Art. 177 § 1a c.c.p., when there is a fear that the presence of the accused may influence witness testimony.

V

To sum up, fighting crime, especially the most dangerous — organised crime, with conventional means is not always sufficient. Witnesses are afraid to testify as it may put their life, health and other belongings in danger. That is why it is so important to provide for them a feeling of safety and physical comfort according to their role as a witness. As E. Kowalewska-Borys said, it is true that issues of the legal situation of victims and witnesses, their protection and rights were always in the second place in comparison to the legal situation and rights of the accused¹⁰.

Unfortunately, there is still lack of complex solutions regarding the means and ways of help, standardised in one legal act aimed at protecting both witnesses and victims, when their life and health are in danger in connection with testifying against the perpetrator or just because of being involved in criminal proceedings. The current system of assistance and protection refers mostly to state's evidence. After all, the need to provide means and ways of help for witnesses and victims is a result of reality — the dynamic growth of organised crime causes witness' intimidation in order to make them cancel or change their testimony. Taking all this into consideration, the legislative initiative — the *witnesses and vic-*

¹⁰ E. Kowalewska-Borys, *Świadek koronny w ujęciu dogmatycznym*, Kraków 2004, p. 245.

tims protection and assistance bill reserves positive evaluation as it creates a complex legal act, dedicated to the protection of victims and witnesses whose life and health are in danger.

Summary

Combating crime using conventional methods is not always sufficient. Witnesses concerned about their life, health, or other goods do not always want to testify. Therefore, it is very important to ensure the sense of safety and mental comfort while they fulfil the role of a witness. Unfortunately, there are still no comprehensive solutions concerning the means and manner of support which would be regulated within the framework of a legal act aimed at protecting the witness and victim in a situation of risk derived from the provision of testimony charging the offender.

Under these circumstances, the fact that on 15th July 2014, at its meeting, the Council of Ministers adopted a draft *Act on protection and aid to victims and witnesses* whose purpose is to establish comprehensive legal regulations concerning the victims and witnesses whose life and health may be at risk, should be regarded as a positive phenomenon.

The subject of this paper is an analysis of the regulations contained in the said Act. The paper focuses on the presentation and evaluation of the means ensuring protection and help which may be applied in the situation of risk to life and health of the witness and the victim. It also discusses the premises and manner for granting the aid as envisaged in the newly drafted act.

Keywords: witness, witness protection, help for witness, criminality, organised crime.