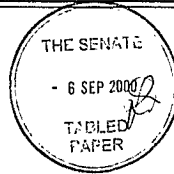


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*Mary Evans*



**Parliamentary Joint Committee on the  
National Crime Authority**

# **WITNESSES FOR THE PROSECUTION**

*PROTECTED WITNESSES IN THE  
NATIONAL CRIME AUTHORITY*

**SEPTEMBER 2000**

**Parliament of the Commonwealth of Australia**

**WITNESSES FOR THE PROSECUTION**

**PROTECTED WITNESSES  
IN THE NATIONAL CRIME AUTHORITY**

**A report by the Parliamentary Joint Committee on the  
National Crime Authority**

**SEPTEMBER 2000**

**MEMBERSHIP OF COMMITTEE**

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Senator George Campbell, Deputy Chairman

Senator Kay Denman

Hon Graham Edwards, MP

Senator Jeannie Ferris

Senator Brian Greig

Mr Gary Hardgrave, MP

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## DUTIES OF THE COMMITTEE

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The *National Crime Authority Act 1984* provides:

55. (1) The duties of the Committee are:

- (a) to monitor and to review the performance by the Authority of its functions;
- (b) to report to both Houses of the Parliament, with such comments as it thinks fit, upon any matter appertaining to the Authority or connected with the performance of its functions to which, in the opinion of the Committee, the attention of the Parliament should be directed;
- (c) to examine each annual report of the Authority and report to the Parliament on any matter appearing in, or arising out of any such annual report;
- (d) to examine trends and changes in criminal activities, practices and methods and report to both Houses of the Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the Authority; and
- (e) to inquire into any question in connection with its duties which is referred to it by either House of the Parliament, and to report to that House upon that question.

(2) Nothing in this Part authorises the Committee:

- (a) to investigate a matter relating to a relevant criminal activity; or
- (b) to reconsider the findings of the Authority in relation to a particular investigation.

## SUMMARY OF FINDINGS

- The Committee received evidence that effective witness protection is vital to the operation of law enforcement agencies, including the National Crime Authority (NCA) (para. 1.2).
- The National Witness Protection Program (NWPP), which provides witness protection services for the NCA, is well run and there are only a small number of areas of its administration in need of attention (Preface, p. xv).
- The length of participation in witness protection is generally related to the duration of related court proceedings, but those proceedings involving protected witnesses do not receive listing priority. In view of the substantial lifestyle restrictions imposed on participants in witness protection programs, the Committee believes that giving listing priority in such circumstances is an issue worthy of examination by the appropriate authorities (para. 1.32).
- The introduction of the legislative scheme in 1994 seems to have led to an appropriate level of certainty in the administration of the NWPP. In particular, the requirement for participants to enter into a memorandum of understanding with the Program's administrators appears to ensure that there are now no grounds for confusion on either side (para. 2.55). However, the administrators of all witness protection programs should immediately redraft any memorandum of understanding where there is any doubt about the taxation implications of payments being made (para. 4.29).
- The importance of the Commonwealth Ombudsman in the NWPP's accountability process cannot be overstated. The Committee found that, while participants on the NWPP may be properly advised of their right to raise complaints with the Ombudsman, those applicants who are rejected may not be as well advised of this right. The Committee is reassured that the Commonwealth Ombudsman has undertaken to address this issue (para. 2.57).
- The effectiveness of witness protection in Australia is particularly dependent on close cooperation between law enforcement agencies and authorities at all three tiers of government. The Committee urges the maximum cooperation by relevant authorities with the NWPP's administrators in assisting them to secure, for instance, necessary documentation to validate a program participant's new identity (para. 2.58).
- There is a clear need for the issue of the relationship between witness protection and family law to be settled and the Committee urges the Government to give priority attention to this issue (para. 3.37).

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### Introduction

At its meeting on 16 March 2000 the Committee gave consideration to the issue of witness protection. The Committee was aware that several incidents involving witnesses, both protected and not, had occurred in the immediately preceding period. These incidents fell both within State jurisdictions and that of the NCA.

In the former category the Committee was aware of the murder of Vicki Jacobs in Bendigo, Victoria, in June 1999 after she had given evidence against her former husband and an accomplice in a South Australian murder case. Her murder was described at the time by an investigating officer of Victoria Police as 'one of the most calculated, brutal crimes we've seen in this State in recent times'.<sup>1</sup> It was reported that Ms Jacobs had rejected several offers by South Australian police to join its witness protection program because she had not wanted the lifestyle restrictions that would come with living under protection for herself and her six year old son.<sup>2</sup>

There was considerable controversy in Western Australia in relation to the death of protected witness Andrew Petrelis in November 1999. Mr Petrelis died before he was able to give evidence.<sup>3</sup> On 2 December 1999 the Western Australian Minister for Police, the Hon Kevin Prince MLA, appointed a senior barrister to conduct a review of the Western Australian Police Service's Witness Protection Program. The management of Andrew Petrelis by the Witness Protection Unit was a particular focus of the review. The inquiry report was tabled in the Western Australian Parliament on 9 August 2000. The report found deficiencies in the handling of Mr Petrelis's case and made 41 recommendations for action or reform.

In relation to the NCA, the Committee's attention was drawn to an item on the *Sunday* program in November 1999 which aired allegations of improper treatment of an NCA protected witness.

1 Reported in *Police raid bikie gang in search of murder probe clues*, AAP, 13.7.99

2 *The Australian*, 15 June 1999, p.1

3 The people who Mr Petrelis was due to give evidence against were subsequently acquitted.

Finally, the Committee had regard to the fact that in 1988 one of its predecessor committees had conducted a comprehensive inquiry into the issue of witness protection and that its report<sup>4</sup> had led directly to the introduction at the Commonwealth level of the *Witness Protection Act 1994* and to mirror legislation in several States and the Australian Capital Territory. While there is a requirement to table an annual report on the operations of the Commonwealth Act, of which there have been three such reports tabled to date,<sup>5</sup> its application to the NCA's operations had not specifically been examined.

In view of these several factors, the Committee felt that it was appropriate and timely that it should examine in detail the efficiency and effectiveness of the NCA's witness protection arrangements. The purpose of the inquiry was to seek to enable the Committee to assess as comprehensively as possible the present practices and procedures of the NCA's witness protection arrangements, without compromising or prejudicing the operational security which necessarily attaches to this important area of law enforcement activity.

#### Terms of reference

The Committee adopted the following terms of reference for its inquiry:

The Parliamentary Joint Committee will inquire into the National Crime Authority's arrangements for witness protection, with particular reference to:

- (a) the efficiency of the witness protection program administered by the Australian Federal Police on the National Crime Authority's behalf;
- (b) whether the criteria used to offer witness protection, and to discontinue that protection, are appropriate, especially having regard to the social impacts on participants in the program; and
- (c) whether payments made to protected witnesses are administered effectively, especially the payment of taxation liabilities.

The inquiry is being conducted under paragraphs 55(1)(a) and (d) of the *National Crime Authority Act 1984* which provides the Committee with authority to monitor and review the NCA's performance of its functions and to examine the environment in which the NCA operates, with a view to reporting to both Houses of Parliament any reforms it believes should be made to the NCA's functions, structure, powers and procedures.

<sup>4</sup> *Witness Protection*, Report by the Parliamentary Joint Committee on the National Crime Authority, AGPS Canberra, Parliamentary Paper No. 193/88, tabled on 26 May 1988.

<sup>5</sup> The Act received Royal Assent on 18 October 1994 and commenced on 18 April 1995. A report on the operations of the Act during the years ending 30 June 1995, 30 June 1996 and 30 June 1997 was tabled on 28 October 1997. A report on the operations of the Act during the year ending 30 June 1998 was tabled on 8 December 1998. The annual report on the operations of the Act for 1998-99 was signed by Minister for Justice and Customs, Senator the Hon Amanda Vanstone, on 6 December 1999 and tabled in the Senate on 15 February 2000.

#### The inquiry

The Committee's inquiry was advertised in the national press on 18 March 2000. The Committee received 15 submissions, of which four were accorded confidential status. Details of submitters are shown in Appendix 1.

The Committee conducted a public hearing in Canberra on 23 June 2000 with representatives of three key agencies. Details of the hearing are detailed in Appendix 2. Evidence was also taken in camera. While this evidence is not expressly cited or referred to in this report, it played an important role in framing the Committee's understanding of the issues.

#### The report

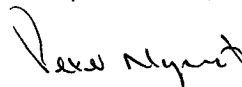
The report sets out general background information in relation to the operations of witness protection in Australia in Chapter 1, before outlining the Committee's deliberations on each of its terms of reference in the succeeding chapters.

It is the finding of this report that the National Witness Protection Program, which provides witness protection services for the NCA, is well run and that there are only a small number of areas of its administration in need of attention. The Committee would hope that its discussion in this report of the issues associated with witness protection will prove of value to the public debate and that the public will be assured that they can have confidence in the general efficiency and effectiveness of the Program.

#### Acknowledgements

The Committee wishes to express its appreciation to submitters and personal witnesses to its inquiry, especially for their efforts in seeking to provide the Committee with frank responses into matters of some sensitivity.

The Committee also wishes to recognise the efforts of its Secretary, Michael McLean, and its Principal Research Officer, Yvonne Marsh, in assisting it with the conduct of this inquiry.



Peter Nugent MP  
Chairman



## CHAPTER 1

### INTRODUCTION

#### The NCA and witness protection

1.1 Section 34 of the *National Crime Authority Act 1984* gives the NCA a statutory basis to provide witness protection. It states:

Where it appears to a member that, by reason of the fact that a person:

(a) is to appear, is appearing or has appeared at a hearing before the Authority to give evidence or to produce a document or thing; or

(b) proposes to furnish or has furnished information, or proposes to produce or has produced a document or thing, to the Authority otherwise than at a hearing before the Authority;

the safety of the person may be prejudiced or the person may be subjected to intimidation or harassment, the member may make such arrangements (including arrangements with the Minister or with members of the Australian Federal Police or of the Police Force of a State) as are necessary to avoid prejudice to the safety of the person, or to protect the person from intimidation or harassment.

1.2 Mr Peter Lamb, the NCA's General Manager Operations, told the Committee about the significance of witness protection:

Effective witness protection is vital to the operation of law and order enforcement agencies, including the NCA. The information provided to the NCA by many people is of prime importance in the assembly of briefs and admissible evidence against principals of organised crime. Such information is more likely to be forthcoming if persons giving it can be assured of their and their family's safety. The objective of witness protection programs is to provide protection and assistance to high-risk witnesses in relation to serious criminal offences and to provide an environment in which the witnesses may give evidence without fear of retribution. The objectives include reassimilation of the participant and his family into the community when evidentiary commitments are finished.

... law enforcement agencies, including the NCA, would find it very difficult to work effectively if they were not able to offer witness protection in the circumstances where it is warranted. Although it is but one of the tools available to law enforcement, it is considered an essential element.<sup>1</sup>

---

1 Evidence, pp. 1-2. Mr Lamb has retired since representing the NCA at the Committee's hearing.

## Background

1.3 The provision of some form of witness protection has no doubt operated since time immemorial. The earliest known witness protection program was the Witness Security Program established in the United States in 1970. However, it was probably the Stewart Royal Commission in February 1983 that highlighted the need in Australia for better use to be made of informers in attacking organised crime and, accordingly, for the minor players to be given the incentive to inform on the organisers. Justice Stewart, for example:

... recommended that informers should be cultivated and used as a means of obtaining crucial evidence against principal offenders, and accordingly, informers and witnesses should be afforded adequate welfare and security to protect them against reprisals.<sup>2</sup>

1.4 At that time, arrangements for witness protection were a matter for individual police forces. Witness protection was managed as part of the normal policing function and was fairly ad hoc in its use involving, perhaps, increased guarding in the witness's own home and, occasionally, temporary relocation to a motel or a country town.

1.5 By the early 1980s only the Australian Federal Police and the NSW and Victorian police services had seen the need to establish formal witness protection arrangements. Their approaches at that time differed, however, with some placing an emphasis on a 24 hour protection approach, while others preferred relocating witnesses under new identities.

### *Inquiry by the Parliamentary Joint Committee*

1.6 In April 1987 the Committee resolved to conduct an inquiry into witness protection in Australia with the following terms of reference:

- (i) the nature of witness protection and its role in the fight against organised crime;
- (ii) the extent to which witness protection is an essential requirement of successful organised criminal investigation and prosecutions;
- (iii) the extent to which organised crime witnesses are presently protected and the nature, adequacy and cost of current arrangements; and
- (iv) the options available to the Government to improve witness protection.

The inquiry had been prompted by a comment in the NCA's 1985-86 annual report that there was a need for the formation of a national scheme to coordinate witness protection arrangements throughout Australia.

1.7 The Committee received 42 submissions, including from a small number whose identities were suppressed. It held seven days of in camera hearings in Canberra, Sydney, Melbourne and Brisbane, including taking evidence from 14 witnesses who were either protected witnesses in jail, under police protection, or who had been declined protection despite being subject to threats and harassment. With the approval of the relevant NSW

Minister, the Committee visited and took evidence in the Witness Protection Unit (now called Special Protection Unit) at Sydney's Long Bay Correctional Complex.

1.8 The Committee reported in May 1988. Its eight recommendations are reproduced in Appendix 3.

1.9 The Government response was tabled on 7 November 1988. It was generally accepting of the Committee's recommendations, while noting that some matters would necessarily involve discussions between the Commonwealth, State and Territory governments.

### *Witness Protection Act 1994*

1.10 Some six years after the tabling of the PJC's report, the Government introduced the Witness Protection Bill 1994. The *Witness Protection Act 1994* received Royal Assent on 18 October 1994 and commenced on 18 April 1995. The objective of the Act is to provide a statutory basis for the provision of protection and assistance to:

- (a) persons who have given or agreed to give evidence on behalf of the Crown in criminal or prescribed proceedings and persons who have otherwise given or agreed to give evidence in relation to a criminal offence; or
- (b) persons who have made a statement in relation to an offence; or
- (c) persons who may require protection and assistance for any other reason;

who are perceived to be in danger by reason of their testimony, or by having made a statement, and persons who are related to or associated with such persons.

1.11 The main features of the Act are that:

- it provides the AFP with statutory procedures to govern the placement of witnesses on, and their removal from, the National Witness Protection Program (NWPP), including the signing of memorandums of understanding, the creation of new identities (where necessary) and the restoration of former identities (sections 7-10, 18-19);
- it establishes a Register of participants who are or who have been on the NWPP, which must contain certain information, including the person's name and new identity (where applicable) and details of offences of which the participant has been convicted (section 11);
- it safeguards the integrity of Commonwealth identity documents (eg tax file numbers, passports) as it provides that identity documents for persons on State/Territory witness protection programs will not be issued after the Act has been in force for twelve months unless there is complementary legislation in the relevant State or Territory in place and there are Ministerial arrangements in place with the relevant State/Territory relating to the issue of Commonwealth identity documents (section 24);
- it provides mechanisms to ensure that participants do not use their new identity to avoid civil or criminal liability (sections 20 and 27);

- witnesses may not be included in the NWPP as a means of encouraging or rewarding them for giving evidence or making a statement (section 5); and
- it creates offences relating to divulging information without lawful authority about Commonwealth participants and creates offences that apply to participants in the event that they disclose information related to the NWPP (section 22).<sup>3</sup>

1.12 In 1997 the Act was amended to provide that participants in the NWPP could make disclosures for the purpose of making a complaint or providing information to the Commonwealth Ombudsman. The *Freedom of Information Act 1982* and the *Archives Act 1983* have also been amended to ensure that documents that refer to or disclose details of participants in the NWPP are not subject to release.

#### Administration of the National Witness Protection Program

1.13 Under the Act, the Commissioner of the AFP is to maintain the NWPP. The Commissioner administers the program through the Witness Protection Committee and the Director of Witness Protection. The Witness Protection Committee (WPC) comprises the AFP's Deputy Commissioner, to whom a number of responsibilities are delegated, and two other senior AFP officers (the General Manager, National Operations, and the General Manager, Protective Security). The WPC makes recommendations about the entry and exit of witnesses to and from the program and the conditions of their entry and exit. To determine whether a person should be nominated for entry into witness protection, the WPC assesses:

- the potential witness's ability to give evidence consistent with his or her statement (including an assessment of the value of the person as a witness or informant); and
- an assessment of the real and potential threats to the person.

1.14 The Commissioner can enter into arrangements with an 'approved authority', which includes State and Territory Commissioners of Police and the Chairperson of the NCA, to enable protection to be provided to witnesses involved in operations run by those organisations. Operational costs are shared between the AFP and approved authorities.

1.15 The operation of the NWPP is based on relocation, change of identity and integration of witnesses back into the community.

1.16 A person who is being assessed for inclusion in the NWPP is described as a 'witness' in the Act (section 3). A 'witness' becomes a 'participant' once he or she has been accepted on the NWPP. A 'Commonwealth participant' is a person who is a participant in relation to a Commonwealth offence, a Royal Commission or other Commonwealth commission of inquiry, a federal parliamentary inquiry or a person who is a foreign citizen or resident who is participating under section 10 of the Act.

1.17 In its four full years of operation,<sup>4</sup> total annual expenditure under the NWPP has declined from an initial \$1.7 million to around \$0.7 million now. After reimbursement from

3 From: *Witness Protection Act 1994: Report on the Operation of the Act to 30 June 1999*, p. 2., tabled in the Senate on 15 February 2000

4 The Act commenced on 18 April 1995

non-Commonwealth agencies, the total Commonwealth expenditure on NWPP in 1998-99 was \$446,342.

#### Complementary witness protection legislation

1.18 Section 24 of the Witness Protection Act provides that after April 1996 (viz. once 12 months had elapsed since the commencement of the Act), Commonwealth identity documents must not be issued for a person who is on a State or Territory witness protection program unless there is a complementary witness protection law in force in the State or Territory and there is an arrangement in force between the Commonwealth Minister and the relevant State or Territory Minister. Commonwealth identity documents are defined to include passports, Tax File Numbers or other prescribed documents (of which there are currently none prescribed).

1.19 NSW,<sup>5</sup> South Australia,<sup>6</sup> Victoria<sup>7</sup> and Western Australia<sup>8</sup> have a declared 'complementary witness protection law'.

1.20 The ACT Minister for Justice and Community Safety, Gary Humphries MLA, informed the Committee in private correspondence on 18 May 2000 that the Territory's *Witness Protection Act 1996* provides for arrangements between the ACT and the Commonwealth whereby the ACT participates in the National Witness Protection Program. He noted that policing services to the ACT are provided by the AFP under an Arrangement between the ACT and Commonwealth Governments.

1.21 Both the Tasmanian Minister for Police and Public Safety, David Llewellyn MHA and Commissioner of Police, Commissioner R McCreddie advised the Committee in submissions in April 2000 that the Tasmanian Government had introduced witness protection legislation into Parliament which would be complementary to that of other jurisdictions.<sup>9</sup> The legislation has since been passed by the Tasmanian Parliament and received Royal Assent in June.

1.22 Witness protection in Queensland is administered by the Criminal Justice Commission. The Commission's Chairperson, Mr Brendan Butler SC, wrote to the Committee on 19 April 2000 to inform it that the Commission did not intend to place a submission before the Committee unless invited to respond to specific issues. The Committee is aware that Queensland's *Criminal Justice Act 1989* contains provisions in Part 2 Division 10 which relate to witness protection. It does not qualify as complementary witness protection law. A comprehensive witness protection bill is, however, currently before the Queensland Parliament.

5 *Witness Protection Act 1995 (NSW)*

6 *Witness Protection Act 1996 (SA)*

7 *Witness Protection Act 1991 (Victoria)*

8 *Witness Protection (Western Australia) Act 1996.*

9 Submission volume, pages 4 and 6

1.23 The Commissioner of the Northern Territory Police, Brian Bates, advised the PJC in private correspondence on 28 March 2000 that witness protection legislation was currently being developed in the Territory. It is understood that that process was continuing at the time of finalisation of this report.

#### National Crime Authority arrangements

1.24 In its submission to the PJC, the NCA advised the Committee that it makes use of the NWPP under a Memorandum of Understanding with the AFP. Under the MOU any nomination for a person to be included in the program must be approved by the Commissioner of the AFP and persons accepted into the program must sign an agreement setting out the terms and conditions of their participation in the program.

1.25 The NCA submission went on to state that:

Investigation staff who deal with a witness are not involved in the decision-making process for placement of the witness on the witness protection program and can only contact the witness through those running the program. While the investigation staff are at arms length from the witness, there is still a requirement that they maintain close liaison and co-operation with the scheme. The witness must still be available to the investigators for matters connected with the investigation.<sup>10</sup>

1.26 However, it is one part of the controversy exposed in the *Sunday* program of 28 November 1999 (referred to in the Preface) that an NCA investigator gave undertakings to a protected witness, allegedly with the senior management's approval, that his financial position would not be adversely affected by his giving evidence. It has been alleged that these undertakings were subsequently rebutted by the NCA.<sup>11</sup> As will be shown in Chapter 4, if the incidents complained of did take place, they preceded the passage of the Witness Protection Act in 1994 which clarified and codified the program's administration.

1.27 Any nominations for witness protection must be approved by the NCA's General Manager Operations and the Authority itself before a submission is made to the AFP in accordance with the terms of the MOU. The NCA is usually consulted about a decision to terminate a person's participation in the scheme. However, the final decision is wholly at the discretion of the AFP.

1.28 The Authority provided the Committee with the following table detailing the number of persons who have entered protection and the total cost of protection for the past five years.

	Number of Witnesses Entering Witness Protection	Total Cost of Witness Protection
1994-95	9	\$490,000
1995-96	1	\$220,000
1996-97	1	\$146,000
1997-98	3	\$253,000
1998-99	3	\$107,000

1.29 It will be apparent from the table that the cost of witness protection is variable. It is dependent on a number of factors including the level of protection required, the length of time the person is in witness protection and the personal circumstances of the person, such as whether family members are involved.

1.30 Given the uncertain nature of the requirement from year to year, the NCA faces difficulty in accurately budgeting for witness protection expenses. The Commonwealth does not provide a separate appropriation to the NCA for witness protection costs - they need to be funded from the NCA's overall operating costs budget.

1.31 The NCA was also unable to quantify the average time a person spends in protection. Some witnesses may be under constant guard for a short time and some may be moved interstate with a new identity and then monitored regularly. This latter arrangement may extend over many years. Given the small number of NCA witnesses involved in the NWPP, no 'average' length of term would be statistically meaningful.

1.32 However, the Committee notes that the length of participation in the NWPP is generally directly related to the duration of the related court proceedings, and multiple trials and continuing court delays have hindered the early re-assimilation of some witnesses into the community. It is also noted that: 'Legal proceedings involving protected witnesses do not receive listing priority.'<sup>12</sup> The Committee did not examine this issue in the context of this inquiry but it is a matter which is, in the Committee's view, worthy of examination by the appropriate authorities.

<sup>10</sup> Submission volume, p. 18

<sup>11</sup> This matter is the subject of litigation.

<sup>12</sup> *Witness Protection Act 1994: Report on the Operation of the Act to 30 June 1999*, p. 3

**CHAPTER 2**

**EFFICIENCY OF THE NATIONAL WITNESS  
PROTECTION PROGRAM**

**Introduction**

2.1 The principal purpose of the Committee's inquiry is to examine the NCA's arrangements for witness protection. Although the NCA has statutory authority under section 34 of the *National Crime Authority Act 1984* to set up its own witness protection facilities, it informed the Committee that:

... the Authority does not have sufficient resources to do so, except for short periods while other long term arrangements are made. It is consequently reliant on existing witness protection programs which have been established in Australia by a number of police services. In the past the NCA has used both AFP and State Police witness protection programs. However, the NCA's current policy is to use the AFP program.<sup>1</sup>

2.2 The Committee was aware of this policy in framing its terms of reference, which refer specifically to the efficiency of the National Witness Protection Program (NWPP) administered by the Australian Federal Police (AFP). It should be noted that the NCA also submitted that its use of the AFP program is not necessarily exclusive. Where the NCA is in a joint operation with a single State police service, it may be more appropriate to use the State witness protection scheme if required. The Committee's inquiry has, however, concentrated on the operations of the NWPP with only passing reference to the operations of State programs.

2.3 In practice, the NCA and the AFP have a Memorandum of Understanding (MOU) which governs the NCA's use of the AFP program.<sup>2</sup> Under that MOU, any person wanting to be included in the program must be approved by the Commissioner of the AFP and those persons accepted into the program are required to sign an agreement setting out the terms and conditions of their participation in the program.<sup>3</sup> The AFP advised the Committee that since its establishment the NCA has referred twenty-four of its witnesses to the AFP for assessment and possible inclusion in the NWPP. Seven of those applications were unsuccessful. Of the

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1 Submission volume, p. 17

2 Australian Federal Police, submission volume, p. 12: The AFP and the NCA first entered into an MOU in 1985. Prior to the enactment of the *Witness Protection Act 1994*, a more detailed MOU was formulated and agreed to on 13 April 1995. On 3 February 1999, an updated MOU was entered into that addressed finances, applications for inclusion of a witness into the NWPP and cessation of protection and assistance. Attached to the MOU are a Schedule of Procedures for Financial Adjustment and an estimated Schedule of Agreed Costs.

3 National Crime Authority, submission volume, p. 17

seventeen successful applications, the time the witness remained on the NWPP ranged from one week to just over three years.<sup>4</sup>

#### The view of relevant law enforcement agencies

2.4 There was unanimity among those members of the law enforcement sector that participated in the inquiry that the program of witness protection in Australia is working effectively. A typical comment to the Committee in this respect was that of Mr David Lewellyn MHA, Tasmanian Minister for Police and Public Safety, in the following terms:

... those programs in existence throughout Australia, including that of the Australian Federal Police, are providing satisfactory services for those participants within the program as well as in providing services on behalf of the National Crime Authority.<sup>5</sup>

2.5 The NCA and the AFP, the two agencies most directly affected by the Committee's inquiry, also both expressed strong support for the current arrangements. The NCA submitted that:

The NCA has used and continues to use the witness protection schemes offered by a number of Australian police services. The NCA considers the AFP scheme is well run and efficient and is satisfied with the performance and professionalism of all those schemes that provide a service to the NCA.<sup>6</sup>

2.6 The AFP expressed the view that the codification of the witness protection arrangements in 1994 had been a positive step in enabling the AFP to assume an expanded national protection role.<sup>7</sup> The codification followed the recognition that it was necessary for witnesses to be adequately protected to enable the giving of evidence that would assist the prosecution of major offenders in organised crime.<sup>8</sup>

2.7 Subsequent to the receipt of these comments by the Committee, the report of the independent inquiry into the Western Australian Witness Protection Program established following the death of protected witness Andrew Petrelis, which was tabled in the Western Australian Parliament on 9 August 2000, was critical of several aspects of its administration. Criticisms included inadequate staff selection and training, inadequate sharing of information, and inadequate staffing and budgets. Police Commissioner Barry Matthews reportedly established a working party to examine and implement the report's 41 recommendations.<sup>9</sup>

4 Australian Federal Police, submission volume, p. 13

5 Submission volume, p. 4. See also, Tasmania Police, submission volume, p. 6

6 Submission volume, p. 18

7 The Committee's 1988 report, *Witness Protection*, recommended that the AFP should assume such a role (see Appendix 3).

8 Evidence, p. 23 per Mr Heggie

9 *WA asks Qld govt to grant Petrelis inquest*, AAP, 9.8.2000.

#### The view of the Commonwealth Ombudsman

2.8 The Commonwealth Ombudsman, Mr Ron McLeod, similarly expressed support for the current arrangements. The Commonwealth Ombudsman has jurisdiction over the investigation of complaints made against actions of the AFP under the *Complaints (Australian Federal Police) Act 1981*, which includes the actions of AFP officers administering the NWPP. Mr McLeod expressed his support for witness protection programs in the following terms:

In my view, the proper administration of law enforcement requires a Program of the kind established by the Act. The cooperation of people with detailed information about criminal activity is undeniably part of the means to fight crime.<sup>10</sup>

before adding that:

We have an insight into the management of the program but only through the actual complaints that are lodged with us. While we have built up over time some understanding and knowledge of the administrative arrangements, we could not claim to have full knowledge of the program or of its administration in the broad. But we have had some insight into it through the investigation of the occasional complaints that we get. In the course of looking at those complaints - with that qualification I have just mentioned - we have not discerned any significant concerns with the way the program is managed. It seems to us that it has generally been an effectively managed program.<sup>11</sup>

2.9 Mr McLeod told the Committee that the bulk of the complaints had been concerned with the adequacy of compensation payments made to NWPP participants or arose out of personal relationships. These issues are addressed in detail elsewhere in this report.

#### Compared to witness protection overseas

2.10 Comparisons were drawn between the NWPP and witness protection programs overseas, which were favourable to the NWPP. The NCA's General Manager Operations, Mr Peter Lamb stated:

I have been fortunate to see Witness Protection Programs in the USA, Northern Ireland and places like that, and let me say that the federal Witness Protection Program and, indeed, the others [the State programs] are second to none.<sup>12</sup>

2.11 The success of the NWPP was partly attributed to the fact that the NWPP and those in the States and Territories are much smaller than the overseas programs and therefore easier to manage. To date, organised crime and terrorism have not penetrated Australian organisations to the level that perhaps they have in other countries.<sup>13</sup> Further, witness protection programs were developed in Australia with the benefit of hindsight from the

10 Commonwealth Ombudsman, submission volume, p. 28

11 Evidence, p. 17

12 Evidence, pp. 4-5

13 Evidence, p. 5 per Mr Lamb

experiences of overseas jurisdictions. The Australian experience in witness protection has therefore not had to be ground-breaking:

They have taken the good things from other systems and, from my point of view, they have advanced those to a level that is probably second to none.<sup>14</sup>

2.12 The introduction of legislative witness protection programs continues around the world, with its recent introduction in places as diverse as Hong Kong, Brazil, South Africa and Zambia.

2.13 Italy has one of the more substantial witness protection programs, with an estimated membership of some 1100 'pentiti'; former mafia members who have agreed to cooperate with investigators in return for judicial leniency. The Italian parliament is understood to be examining the rules for the use of 'pentiti' evidence by magistrates, because of concerns about their reliability.<sup>15</sup> The Committee was assured that, in contrast to Italy, the Australian experience has been that witnesses have delivered on their commitments and there has been no occasions of false evidence or backdowns from commitments by witnesses in the program:

Some perform better than others, and as times get closer to their appearance in courts they become a little bit more agitated and more concerned. But, at the same time, I know of no appearance where that has happened.<sup>16</sup>

Further:

The Italians went from ground zero with nothing - with no witness protection, with no capacity to offer indemnities even. They went from ground zero to that in about nine years, so you can see that with the ability to provide indemnities and to provide protection they were able, once and for all, to get a pretty good feel for the way that the Mafia and the 'ndragheta and the Camorra operated. They were pushed very strongly into that position by the Americans and the results have been nothing short of outstanding.<sup>17</sup>

2.14 One related aspect of arrangements under the Commonwealth's Witness Protection Act is that, although the NWPP has no overseas jurisdiction, the AFP is able to provide protection of witnesses from overseas within Australia. Those instances arise from a government-to-government process.<sup>18</sup> Similarly, were it necessary to relocate an Australian witness overseas, it would be a matter for government-to-government request and agreement.<sup>19</sup>

14 Evidence, p. 5 per Mr Lamb

15 *After acquittal, Andreotti awaits second judgement*, Reuters, 27.9.99

16 Evidence, p. 6 per Mr Lamb

17 Evidence, p. 7 per Mr Lamb

18 Evidence, p. 29 per Mr Heggie

19 Evidence, p. 35 per Mr Heggie

### Practical operation of the NWPP

2.15 In this section of the report, the Committee will describe the evidence it received about the detailed operations of the NWPP in practice.

#### *Background of witnesses*

2.16 Mr Lamb told the Committee that, based on his 40 years experience in policing:

The majority of people that enter the Witness Protection Program ... are primarily criminals. They are usually criminals of some standing, albeit not principals, of course, but they are people from the criminal milieu. In a majority of cases I would suggest that they would be people who are career criminals and who have positioned themselves somewhere about the middle level of the criminal structures. Very few people in any program are innocent bystanders.<sup>20</sup>

He described their motivation for joining the program in the following terms:

Most of the people that go into the Witness Protection Programs are not doing so because they are providing information in the interests of the community. They are, in the main, people who find themselves caught, literally, and who are in a position to give evidence about the principals or the conduct of other people who hold a more senior position in the criminal world.<sup>21</sup>

#### *Admission of a witness to the NWPP*

2.17 The submission of the Australian Federal Police gave a detailed account of the process by which witnesses are placed on the NWPPP. Although seeking placement in the program is a voluntary decision of the potential witness, the AFP Commissioner has the sole responsibility for deciding whether a witness is accepted.

2.18 When agencies such as the NCA make application for assessment of a person for inclusion in the program, they must complete a witness profile that serves as a basis for the assessment. A comprehensive report, including a threat assessment and a description of the circumstances that give rise to the threat, is required. The Director, Witness Protection then conducts a comprehensive assessment of the witness, including a taped interview of the potential witness and possibly of the investigating officers and others. The Director's report is referred to the Witness Protection Committee, which considers and makes recommendations on the application. One of the members of the committee is the Deputy Commissioner, who has the delegated power of the Commissioner.

2.19 The Act specifies the criteria which the Commissioner must consider before deciding whether to include a witness on the program. This aspect of the process is considered in detail in Chapter 3. Acting Director of Witness Protection for the AFP, Mr McGeachie, also told the Committee that when a participant is interviewed and assessed for consideration by the Witness Protection Committee, part of that process is being interviewed by the Australian Taxation Office. This issue is addressed in Chapter 4.

20 Evidence, p. 2

21 Evidence, p. 2

2.20 Mr Lamb told the Committee that, from the NCA's perspective, the assessment has to be very cautiously made by all involved and that is not only the officers making an assessment:

In the context of the NCA, it comes right up through the system to me and then to the Authority members themselves. But, at all times, the investigation teams are conferring with DPP and they are certainly in the loop. They are part of the judgment process, and indeed they have to carry forward the indemnification process if we are going down that road. So there is a whole range of other people involved who have to make judgments about whether it is appropriate for this person to go in or whether it is even worthy to consider this person for that sort of a process.<sup>22</sup>

2.21 Mr Lamb stressed that potential protected witnesses would normally be identified by the NCA in the course of the initial formal interview of a person involved in an investigation of criminal activity. The prospect of protection cannot be advanced at that stage by the investigating officer because that would be capable of being seen as an inducement. The Act specifically excludes the inclusion of a witness in the NWPP as a reward or as a means of persuading or encouraging the witness to give evidence.<sup>23</sup> However, if the investigating officer is of the view that the witness may be capable of giving viable evidence supportive to the prosecution:

We would tell them [the AFP or the State police] after our deliberations whether we deemed it appropriate or whether we thought that the evidence was sufficient to warrant it—there is a whole range of things—as I said, with DPPs and internally. We would say to them that we are of the view that they should be afforded the opportunity to go into the Witness Protection Program.<sup>24</sup>

2.22 Mr Lamb noted that, in making those judgments, there is always an element of risk:

... most of these people are career criminals. ... A lot of them have had lifestyles that cannot be provided by way of the Witness Protection Program and they come from milieus that they feel more comfortable with than where they are going to, so there are all those things impacting on them at that time. But we, in a general sense, say to them, "Your whole life is going to change. Indeed if you want to stay in the program you are going to have to change."<sup>25</sup>

... It is a very fine balancing act, and it all has to be done in a very constrained legal environment. The offering of inducements, the development of indemnities—all of that has to be done in a very considered and transparent fashion. All of those things in this day and age are discoverable by the courts. So it is not just a balancing act; everything has to be done in a very considered and step-by-step process... If we have selected them right at the outset, if we have gone for the right targets to turn, then nine times out of 10 they are more frightened of other people

22 Evidence, p. 12

23 *Witness Protection Act 1994*, section 5

24 Evidence, p. 14 per Mr Lamb

25 Evidence, pp. 10-11

than they are of us. If they turn and want to live a secure life in the future and get on with their life, then they are more inclined to play the game.<sup>26</sup>

2.23 In summary, Mr Lamb stressed:

... these people are criminals. They are career criminals, most of them of some standing in the criminal milieu. Some have been very violent criminals, some have been very successful, international criminals. So, yes, it is a true balancing act.<sup>27</sup>

2.24 Although the arrangements for selection of witnesses for inclusion in the NWPP are administered by the AFP, and the AFP indicated to the Committee in its submission that *referrals of seven potential witnesses from the NCA for inclusion in the NWPP had been rejected*, Mr Lamb said that he knew of no instance where a witness selected by the NCA and identified as being central to their case, had been denied access to the NWPP:

I must say, where we have said that it is absolutely essential to our case, I know of no occurrence where that person has been denied access to the program.<sup>28</sup>

#### Financial considerations

2.25 *Witness protection can be extremely expensive and manpower intensive. Many witnesses are under serious threat or danger of threat. This means around the clock protection by a rotating team usually with three or four officers present at the same time. Elaborate arrangements have to be made whenever the witness is moved and great care has to be taken in the selection of accommodation.*

2.26 When making judgments about whether it is appropriate to put somebody into the NWPP, consideration is given to the cost of providing that protection. Mr Lamb said that the NCA only considered putting people into witness protection in the most serious of cases because *it is a labour intensive and costly function and its costs must be met from the NCA's general budget.*<sup>29</sup>

#### Levels of security

2.27 Mr Lamb was asked whether security levels change in relation to the degree of importance of the witness. He replied in the following terms:

... the AFP are probably in a far better position to answer that question than I am but, *from my own point of view, there have been occurrences where people have gone in at one level and been elevated to another level because of what we have learnt in the meantime by virtue of the investigations. The security levels are dependent upon the level of threat that is determined. All of those things are taken*

26 Evidence, p. 11

27 Evidence, p. 12

28 Evidence, p. 3

29 Evidence, p. 12



into account by the Australian Federal Police. They have criteria, they have a procedure and they have a practice that they employ.<sup>30</sup>

### Staffing

2.28 The NWPP is run by AFP members and staff members who hold or occupy 'designated positions', that is positions which have national security clearance or positions of trust clearance at the level of highly protected. The appointment of officers to staff the NWPP is a formal process that involves the gazettal and advertising of positions followed by a selection process to ensure that 'the best people are selected'.<sup>31</sup> Importantly, therefore, only officers interested in working in the field choose to be part of the selection process. Officers have to be aware that they may be away from their home and family for some time and their willingness to travel is taken into account during the selection process.

2.29 Selected officers are dedicated to that task for a period of up to four years, subject to their normal career opportunities for promotion and the like.<sup>32</sup> They are centrally located in Canberra although the actual protection may take place anywhere in Australia. A designated team will generally look after a particular witness, so that the witness develops a level of confidence in the people they are dealing with. The officers will temporarily relocate with the witness, but would not normally reside with them.

2.30 All members of the AFP's witness protection unit have to complete a close personal protection officer's course of five weeks duration. There is also specific witness protection training. Members of the unit have to undertake psychological assessment in relation to their emotional and psychological suitability prior to taking up their duties in the witness protection area. Also, they are required annually to re-certify on various parts of the close protection course.<sup>33</sup>

2.31 The NCA's submission noted that it is well documented that persons in a closely protected situation develop relationships with their protectors: 'sometimes a friendship, sometimes of hate'. It is also well recognised that those providing protection are prone to succumb to what is described as the 'Stockholm Syndrome' which leads them to irrationally side with every grievance of the protected witness.<sup>34</sup>

2.32 Acting General Manager of Protective Security for the AFP, Mr Robert Heggie, told the Committee that:

We have no record in nine years of instances of members who we feel have succumbed to this syndrome. In fact, the short periods of close protection that witnesses are given are interspersed with long periods where there may be no

30 Evidence, p. 4

31 Evidence, p. 29 per Mr McGeachie

32 *ibid.*

33 Evidence, p. 22 per Mr Heggie

34 Submission volume, p. 16

contact between a participant and members of witness protection, so we do not feel there is a long time together where these things can develop.<sup>35</sup>

2.33 While the AFP has utilised officers who have been in the area and who may know the particular witness or have had previous dealings with them, it does not otherwise have a pool of people on call for witness protection for security reasons.

2.34 The submission of the Commonwealth Ombudsman had noted that there had been one complaint that was substantiated which led to AFP officers being counselled about their relationship with a witness. Senior Assistant Ombudsman Mr Philip Moss was able to confirm for the Committee that the incident preceded the introduction of the legislative scheme.

2.35 Mr McLeod described his experiences as a former Inspector General of Intelligence and Security of a similar program operated by ASIO:

... I have had some involvement in that jurisdiction which emphasised ... the critical importance of ensuring at the outset that when these arrangements are set up, the nature of the responsibilities and the obligations between the carer, the police force, on the one hand and the member of the program on the other, are very carefully defined and understood. Because of the circumstance ... where people are living in very close association with each other, there is a natural tendency for the carers to be drawn into the personal lives and the management of the personal circumstances of the member of the program... The people involved in the management of these programs do need to be always mindful that their responsibilities are essentially to care for the protection and the security of these people, not to be responsible for managing their personal lives. That is a difficult task and it is often the source of some of the conflicts and difficulties that do arise in these arrangements. Ultimately, these people still have personal lives to live and personal issues that they need to address. I think there does need to always be a clear understanding that there is a distinction between the official obligations of the carers towards these people and those matters that should properly not be interfered with and left to the individuals themselves.<sup>36</sup>

2.36 In summary Mr McLeod noted that:

I think with the AFP, because of the nature of the program, with it being very closely protected even within the AFP itself, you do need to have very dedicated and committed people who are familiar with the challenge that they have to manage. It raises a whole range of issues that are quite distinct from the normal experiences that many police officers would normally be exposed to.<sup>37</sup>

### *Differences in State and Territory legislation*

2.37 As outlined in Chapter 1, not all States and the Territories have legislation which is necessarily complementary to the Commonwealth's. Tasmania until very recently and the Northern Territory, for example, have not had formal witness protection programs and some

35 Evidence, pp. 22-23

36 Evidence, p. 19

37 *ibid.*

of the States, such as Victoria, have a different statutory basis.<sup>38</sup> The Committee was informed by the AFP that the national program did not require complementary legislation in the States or Territories for it to operate.<sup>39</sup>

2.38 Mr Lamb told the Committee, in answer to a question about whether this situation caused the NCA operational difficulties:

No, it does not. It is similar to all the other different circumstances that the NCA has to work in. The NCA is a national agency, it has the capacity and the legislative base to be a multi-jurisdictional type agency. A lot of the work we do is with partner agencies and, therefore, if it was in conjunction with the Victoria Police, for instance, and we were looking at matters that were contrary to Victorian legislation, then we would probably use the Victorian program. The Victorian part of the task force that is working with us would be the ones that would be instrumental in developing the path for the individual to go into the program.<sup>40</sup>

2.39 The AFP confirmed that the question as to which program a particular witness is placed on is a matter determined by the investigators involved in each case.<sup>41</sup> The AFP generally does not work with state or territory jurisdictions and nor do the States involve the AFP when managing programs in their own jurisdictions. Where a NWPP program is being managed within a particular jurisdiction the AFP maintains regular contact with relevant local police personnel, however. The AFP does not run programs for any states or the Northern Territory.

2.40 The general issue of the reputation, and hence integrity, of witness protection programs in Australia was raised, based on the revelation that in the Petrelis case in Western Australia a protected witness's new identity was able to be found by police officers accessing the police database system who, it is alleged, improperly passed on those details. The concern was that if the integrity of any one Australian witness protection program was undermined, it would reflect adversely on the integrity of all such programs, including the Commonwealth scheme. Naturally, potential witnesses considering going into a witness protection program would require fairly emphatic assurances as to their security and they may not make fine distinctions between 'good' and 'less good' programs.

2.41 Mr Heggie confirmed:

If the program does not have integrity, it is not really a Witness Protection Program.<sup>42</sup>

Mr Heggie acknowledged that there may be some potential damage to the integrity of the NWPP by problems in the States but he was prepared to 'stand by the integrity of our program'. Mr Heggie noted it was not the role of the AFP to counsel those officials involved

38 This issue is discussed in detail in Chapter 3.

39 Evidence, p. 23 per Mr Heggie

40 Evidence, p. 13

41 Evidence, p. 23 per Mr Heggie

42 Evidence, p. 30

in other programs in relation to their conduct, although conferences are held from time to time to discuss 'different things' but never operational matters involving witnesses.<sup>43</sup>

#### Accountability

2.42 In relation to witness protection programs, there is considerable tension between notions of confidentiality and the need for transparency and accountability in public administration. The Parliament has recognised that tension by requiring the Commissioner to keep the Minister informed of the general operations, performance and effectiveness of the NWPP and for the tabling of an annual report on the operations of the Act, but without prejudicing the effectiveness or security of the NWPP.

2.43 The Commonwealth Ombudsman, who plays an important role in the NWPP's accountability process as the primary independent arbiter of the manner in which the program is being administered, agreed that the objective of confidentiality is paramount in a witness protection program. Mr McLeod told the Committee:

Ultimately, I think these issues involve a careful judgment about balance. The whole purpose of setting up a program of this kind, which is extremely expensive to set up and administer, is to provide safety, security and a proper sense of protection to people who have put themselves at risk in the interests of assisting the course of justice. If the program is to be effective, I think that objective has got to be seen to be paramount. Having said that, I think the program does involve the potential for a significant invasion by officialdom into the private lives of citizens. It can involve participants in the program having to accept considerably restrained normal rights that we all enjoy.<sup>44</sup>

2.44 Mr McLeod said that in a contemporary environment you do need to have appropriate accountability mechanisms to ensure that people in the program are properly protected. There needs to be proper accounting for the way in which police officers or officials perform their responsibilities, because in a program of this kind they have extended powers over individuals:

To be able to do that, I think involves a widening of the net, to some degree, of the people who have got a genuine need to know about the circumstances of people placed in the program. For example, an office like mine has a need to know, and I think that is appropriate. But, at the same time, the wider you open the net, the greater are the potential risks that the program is going to be compromised.<sup>45</sup>

2.45 As noted above, in the Petrelis case the witness's new identity was compromised by officers accessing the general police computer system. Mr Heggie told the Committee that he was unaware of any instances where members of the AFP or any Commonwealth agency had leaked any information relating to the NWPP. He added that there had been cases of people

43 Evidence, p. 30 per Mr McGeachie

44 Evidence, p. 20

45 Evidence, p. 20

being charged under section 22 of the Act for unlawful disclosure but they were not officials involved in the administration of the program.<sup>46</sup>

2.46 One of the recommendations of the recent inquiry into Western Australia's witness protection program was that one of the officers alleged to have accessed Andrew Petrelis's details on the police computer system should be investigated and, if possible, charged as a matter of priority.<sup>47</sup> While the Committee did not take evidence in this respect, it would expect that any similar incident in relation to the operations of the NWPP should be referred immediately to an appropriate investigatory area within the AFP.

2.47 Mr McLeod's view was that the statutory law can play an important part in placing limitations on the actions of people who do have access to information about the NWPP. In relation to his officers, for example, their access is controlled by legislative prescription, which he supports as entirely appropriate. He noted that there had been no complaints from participants in the NWPP about their dealings with officers of the Australian Taxation Office, a concern which had been referred to in the Victorian Government's submission.

2.48 He added that:

Again, it gets back to knowledge in the community about the role of my office. But any member of the community, whether they are on the Witness Protection Program or not, has got full access to my office if they have concerns about their treatment by members of the Australian Taxation Office. We deal with many complaints about the Taxation Office because it is a big office that affects us all, touches us all. I think that is just another example of how there needs to be a balance between rights and protections on the one hand and issues of proper public accountability on the other.<sup>48</sup>

2.49 In relation to complaints about the NWPP, Mr McLeod wrote in his submission that:

*Our records indicate that prior to the commencement of the Act, my Office received a small number of complaints about the management of protected persons by the AFP. Several complaints have been made since the Act came into operation. The latter complaints have concerned domestic issues arising between complainants and their partners or former partners who are participants in the Program, or the adequacy or lack of compensation payments made to participants in the Program. One of these complaints was substantiated in that AFP officers were counselled about their relationship with the witness and about discussing the complaint with the complainant. A more serious allegation in the same complaint that AFP officers assisted the Program participant to avoid criminal prosecution was not substantiated.*

*Another complaint concerned the removal of a participant from the Program. In that matter, the complainant who had had a long period as a participant in the Program sought a review of the terms of the resettlement package. The complaint did not require a remedy.*

46 Evidence, p. 30

47 *West Australian*, 10 August 2000

48 Evidence, p. 20

None of the complaints received by my Office since the commencement of the Act concerns a refusal to accept a person under the Program or the proper administration of payments made to participants in the Program.<sup>49</sup>

2.50 The AFP has agreed with Mr McLeod's Office that any Memorandum of Understanding between a participant in the Program and the AFP will include a clause which acknowledges the participant's right to make a complaint to the Ombudsman if the participant is not satisfied with any aspect of his or her treatment under the Program. Mr McLeod noted in discussion with the Committee that:

We have not had any complaints from people who have been rejected for inclusion in the program. But I would have to say in that respect that I would not be confident that people who might have been rejected for inclusion in the program would necessarily have a full understanding that they would have the right of complaint to my office if they were concerned about the decision. While the members who are part of the program provide advice, as part of the guidelines that the Australian Federal Police use to administer the program, to the participants, that my office exists as an external source for the lodgment of complaints that might occur about conditions while they are on the program, there is not the same type of information—to us at least—that is readily available to people who might be interacting on the fringes of the program but not as part of it. Perhaps if there is a concern there—and your inquiry has served to remind us of that—I think we should be reminding both the National Crime Authority and the Australian Federal Police that if they are dealing with people who are seeking access to the program and who are denied that opportunity, there would be some advantage in those two organisations as a matter of course advising the people concerned that, if they have any concerns with that decision, they do have recourse to my office.<sup>50</sup>

#### The need to know

2.51 As cited above, Mr McLeod noted that his officers are subject to a legislative regime in relation to their access to NWPP information. Naturally, if witness protection is to succeed, and a protected witness is to successfully reintegrate into the community after completing their obligations, their new identity must not become public knowledge. A simple listing of some of the more obvious tasks involved in changing the identity of a family is illustrative of the extent of the potential for problems in this respect. At the Federal level: Tax File Numbers, passports, Medicare, and Centrelink. At the State level: births, deaths and marriages certificates, house title, car registration, driving licences, school and other qualifications. Local government has rates accounts. Non-government agencies may include bank accounts, stocks and shares, clubs and professional associations and motoring organisations.

2.52 Speaking from the perspective of the AFP, Mr McGeachie stressed that:

Nobody would know the new identity other than those people on a need to know basis. ... It would only be those immediate people within the witness protection

49 Submission volume, p. 28

50 Evidence, p. 17

area that would know. ... Mr Heggie, as the acting general manager, does not know where the witnesses are.<sup>51</sup>

2.53 In relation to the risks from a large number of people in the community knowing of the change of identity, and the quality of their records, Mr Heggie added:

Mainly in the creation of new identities is where other agencies may become involved. It is only very particular parts of those agencies that the AFP deals with and has been dealing with since before the inception of the act. We have not had any problems in that area.<sup>52</sup>

He noted that where there had been a security breach it was generally committed by the witness.

#### Summary

2.54 This analysis suggests that the NCA's policy of using the NWPP to provide its witness protection requirements is justified. The Committee received no adverse comment about the Program's operations. It therefore makes the finding that, on the basis of the material available to it during this inquiry, the administration of the NWPP is sound and is a credit to all who are involved in its processes.

2.55 The introduction of the legislative scheme in 1994 seems to have led to a desirable and proper level of certainty in the administration of the NWPP. The clear requirement for participants to enter into a memorandum of understanding with the Program's administrators would appear to ensure that there are no grounds for confusion on either side. The Committee notes that this was one of the contentions in the Sommerville case, which of course had commenced prior to the introduction of legislation. While not suggesting that the administrators of their program may not have adequately explained to the Sommersvilles the terms and conditions of their protection, it appears that any such problems should no longer occur.

2.56 The importance of the role of the Commonwealth Ombudsman cannot be overstated. As stated in Mr McLeod's submission:

... my Office fills the gap by providing Program participants with a lawful avenue to pursue complaints that respects the special issues of privacy they face and which is able to apply its influence and persuasive powers to government agencies. Also, my Office has developed a sensitivity to the special demands of law enforcement which enables it to bring a proper balance to its dealings with these cases.<sup>53</sup>

2.57 The Committee's discussions with Mr McLeod noted that unsuccessful applicants for the NWPP may not be fully aware of their rights to raise concerns with the Ombudsman's Office. The Committee would imagine that persons who are seeking to enter the program but who are rejected may feel some considerable anguish at that decision. This is only a small

51 Evidence, p. 27

52 Evidence, p. 31

53 Submission volume, p. 29

flaw in the operations of the Program and the Committee is reassured that Mr McLeod gave an undertaking that he would seek to address the situation.

2.58 The effectiveness of witness protection in Australia is particularly dependent on close cooperation between law enforcement agencies and authorities at all three tiers of government. Notwithstanding that at present there are no particular problems identified that adversely impact on the AFP's witness protection program, the Committee urges the maximum cooperation with the AFP by relevant authorities in assisting them to secure, for instance, necessary documentation to validate a program participant's new identity.

## CHAPTER 3

### THE CRITERIA UNDERPINNING WITNESS PROTECTION

3.1 The Committee's second term of reference requires it to examine whether the criteria used to offer witness protection, and to discontinue that protection, are appropriate. The Committee was of the view that this issue should be examined in detail because of the social impacts on participants in the program and, similarly, the implications for them once protection ceases.

#### The criteria for inclusion on the NWPP

3.2 Under the Commonwealth's *Witness Protection Act 1994*, the Australian Federal Police Commissioner has sole responsibility for deciding whether to include a witness in the NWPP.<sup>1</sup> In discharging this responsibility regard must be had, however, to a number of prescriptive legislative requirements. In particular, when an approved authority<sup>2</sup> makes application to the Commissioner for inclusion of a witness in the National Witness Protection Program (NWPP), the Commissioner is compelled to consider matters listed in section 8(3) of the Act before deciding whether to include a witness in the program. The statutory criteria are:

- (a) whether the witness has a criminal record, particularly in respect of crimes of violence, and whether that record indicates a risk to the public if the witness is included in the NWPP; and
- (b) if a psychological or psychiatric examination or evaluation of the witness has been conducted to determine the witness's suitability for inclusion in the NWPP – that examination or evaluation; and
- (c) the seriousness of the offence to which any relevant evidence or statement relates; and
- (d) the nature and importance of any relevant evidence or statement; and
- (e) whether there are viable alternative methods of protection the witness; and
- (f) the nature of the perceived danger to the witness; and

<sup>1</sup> *Witness Protection Act 1994* (Cth), section 8(1)

<sup>2</sup> *Witness Protection Act 1994* (Cth), section 3: An approved authority is a Commissioner of a State or Territory Police Service, the Chairperson of the NCA, or an authority or body of the Commonwealth or of a State or Territory authorised to conduct inquiries or investigations into criminal conduct, misconduct or corruption and is gazetted as an approved authority for the purposes of the Act.

(g) the nature of the witness's relationship to other witnesses being assessed for inclusion in the NWPP;

and may have regard to such other matters as the Commissioner considers relevant.

3.3 *Strict criteria are applied to the admission of a witness to the NWPP, including an assessed risk of probability that a person will suffer death, injury or significant property damage. Partners or children may also be admitted by reason of their relationship with the principal. While placement in the NWPP is voluntary, once admitted the witness is required to adhere to all reasonable instructions in respect of the witness's safety and welfare.<sup>3</sup> A person may be refused entry to the program if members of the Witness Protection Section fear that the person's entry could affect the integrity of the program. Independent risk assessments of each applicant are undertaken as part of the approval process and reviews are conducted to monitor current circumstances of the witness. The inclusion of a witness in the NWPP is not to be done as a reward or as a means of persuading or encouraging the witness to give evidence or to make a statement.<sup>4</sup>*

#### Discontinuation

3.4 The criteria used to discontinue protection are also governed by the Witness Protection Act. Section 18 of the Act contains provision for discontinuation of protection at two levels. Where the witness requests in writing that the protection cease, the Commissioner *must* terminate the protection and assistance provided by the NWPP.

3.5 The Act also sets out a range of circumstances whereby the Deputy Commissioner may terminate protection if deemed warranted in the circumstances of the case. The most obvious circumstance is that the need for protection and assistance no longer exists because of the passage of time and the successful relocation and integration of a witness into a new community. Protection may also be discontinued where the participant has breached a term of the memorandum of understanding that they had signed upon admittance to the NWPP, the discovery that a participant has knowingly given information to the Commissioner which is false or misleading in a material particular, or where the integrity of the NWPP is likely to be compromised by a participant's conduct or threatened conduct.<sup>5</sup>

3.6 In the year ending 30 June 1999, one NWPP operation was voluntarily terminated and no operations were involuntarily terminated.<sup>6</sup>

#### Discussion

##### *The need for criteria*

3.7 The Victorian Witness Protection Act provides the Chief Commissioner of Police with an unfettered discretion in deciding whether to accept a witness into the State Program.<sup>7</sup>

3 Australian Federal Police, submission volume, p. 11

4 Australian Federal Police, submission volume, p. 12

5 In its 1994 report entitled *The National Crime Authority and James McCartney Anderson*, Parliamentary Paper 29/94, at page 92, a predecessor PJC was critical of the failure of the NCA to terminate Anderson's witness protection arrangements earlier than it had, on the basis of his failure to observe the conditions of the protection agreement. The incidents preceded the passage of the legislative scheme in 1994.

6 *Witness Protection Act 1994: Report on the Operation of the Act to 30 June 1999*, p. 4

In its submission, the Victorian Government raised concerns that the inclusion of criteria in the Commonwealth legislation meant that the national system is therefore not uniform and that the NWPP is too restrictive. In this context, a witness included in the Commonwealth Program may be deemed otherwise unacceptable and denied entry into Victoria's. These differences militate against the promotion of the national complementary witness protection scheme, the purpose of which is to facilitate the security of persons who are, or have been, witnesses in criminal proceedings, whether Commonwealth, State or both.<sup>8</sup>

3.8 Responding to whether the NCA shared the Victorian Government's concerns, Mr Peter Lamb, NCA General Manager Operations said:

We have had no problem with any [witness protection program], to be quite frank with you. You would know only too well that, in our federal-state arrangements, the states are at liberty to do whatever they wish to do in that context. We have not had any problem with any program. Those questions would be better posed to the Australian Federal Police and/or the Victorians themselves. We have no problem with either program and we have used both programs.<sup>9</sup>

3.9 Referring to the criteria in the Commonwealth legislation, Commonwealth Ombudsman Mr Ron McLeod said that although he had not examined the criteria in section 8(3), at first reading they appeared to be an appropriate set of considerations that should properly be in mind when a decision is made on a matter of this nature. In comparison, the 'carte blanche' approach in Victoria appeared to him to run contrary to the general approach adopted by the Commonwealth Parliament to matters that touch on public accountability:

It seems to me that to give complete authority to a police commissioner without any checks and balances or without any guidance from the parliament, is perhaps an old-fashioned way of approaching this. The Commonwealth Parliament, particularly, in many areas deals with situations where there is considerable encroachment by officialdom into the private lives and rights of citizens. When that occurs it is almost invariably accompanied by a carefully developed, thought through and argued accountability framework to ensure that unelected officials are not given very powerful powers to be exercised without any proper controls and mechanisms to ensure accountability. If I were arguing for one system or the other, I would clearly throw my weight behind the Commonwealth legislation.<sup>10</sup>

3.10 As noted above, the AFP's submission indicated that seven of 24 witnesses referred by the NCA for inclusion in the NWPP had been rejected. The main reason for their rejection was that they had not met the criteria set out in the Act. In particular, it was suggested that the most common reason for persons having been rejected was that they were in jail or would most likely go to jail. Mr Heggie said that, in such an environment, they are 'just not protectable'.<sup>11</sup>

7 *Witness Protection Act 1991* (Vic), section 3B

8 Victorian Government, submission volume, p. 41

9 Evidence, p. 3

10 Evidence, p. 21 per Mr McLeod

11 Evidence, p. 23

### Discontinuation

3.11 The Committee also pursued with witnesses the issue of removal of witnesses from the Witness Protection Program should they engage in further criminal activity. Mr Lamb said it would be a matter for the managers of the program and the investigating authority that had the jurisdiction for the criminality that was alleged to have been committed to determine the level of threat, whether it still remained and whether the witness's conduct was such that he should be removed from the program:

All of those people would have a role in determining what happened as a result of any criminality that he might get involved in. From my past experience there have been occurrences of that here. It is one of the major problems of the US program and other programs around the world. However, the program, as it is in Australia, is managed very well. The people are very competent and they get onto it very quickly. As I said before, it is a matter for the jurisdiction that has carriage of the investigation of the criminality that the witness is alleged to have committed. They should deal with it in the normal course of events.<sup>12</sup>

3.12 One concern which arose from the Sommerville case was that a witness may misuse the Program to commit further crimes essentially while under police protection. It would appear that Mrs Paula Meredith had apparently no way of determining that the William Marmoth Sherwood who, she claims, fraudulently obtained from her the sum of \$145,000 was the former William Marmont Sommerville, an NCA protected witness. Her lawyer's submission on her behalf states:

Mrs Meredith is extremely disappointed that the processes of the law have been unable to bring the late Mr Sherwood to account either civilly or criminally for his conduct in, what she believes, was a clear fraud committed on her. She believes that the protections put in place to disguise Mr Sherwood's true identity worked to her severe disadvantage in her efforts to have Mr Sherwood called to account for his conduct. She believes that the late Mr Sherwood manipulated his protected witness status to defeat investigations into his conduct. She believes that the NSW Police did not know of Mr Sherwood's background. She believes that had the police known of his background, charges would have been laid.<sup>13</sup>

This case is discussed in greater detail in Chapter 4.

3.13 Mr Lamb noted that such circumstances can arise. However:

The individual would obviously report the loss of that money or that crime. He would report that in the normal course of events and I know of no occurrence where it has not been investigated properly by the agencies to whom he has referred the matter or made his complaint.<sup>14</sup>

The Committee notes that such cases may fall between the cracks, however, because of the question whether the behaviour complained of had involved civil or criminal conduct.<sup>15</sup>

12 Evidence, p. 9

13 Tesoriero Henderson Cotter, submission volume, p. 31

14 Evidence, p. 9

15 Evidence, p. 10 per Mr Lamb

3.14 Mr Lamb noted that the memorandum of understanding signed with witnesses would include provisions setting out grounds for removal from the program:

Clearly, we would tell them that they are bound by the agreements that they enter into with the AFP, the Victorian police, the Queensland police or whoever. If they are not prepared to accept those conditions, then the program managers will probably have no alternative other than to release them.<sup>16</sup>

### Social impacts

#### Intact families

3.15 The social impacts on participants in witness protection had been one of the matters of greatest concern to the Committee. Mr McGeachie told the Committee:

It is very difficult on families in the program, but they do survive. Some do not.<sup>17</sup>

3.16 Mr McGeachie stressed that one of the criteria for acceptance into the program is a psychological assessment of all members of the family:

They have access to psychological support all the way through whilst they are on the program. The children, strangely enough, are very easy to give new identities to. ... I refer to children probably from four onwards. They seem to be able to adjust to new names and go to school under those new names. They seem to adjust exceptionally well—more so than the parents.<sup>18</sup>

#### Separated families

3.17 The question of the fate of families that do not survive proved to be the area of greatest concern during the Committee's inquiry. According to the submission of the ACT Bar Association, writing in relation to the operations of the *Witness Protection Act* and the *Family Law Act*:

The two Acts collide at their most basic premises.<sup>19</sup>

3.18 The Bar Association pointed out that the premise of the Witness Protection Act is that there is a real public interest in keeping the identity of key Crown witnesses secret in major trials. To that end it is essential that the identity and location of witnesses on the program be protected at all costs. In particular, the AFP Commissioner is given extensive powers to control the lives of people on the program, including restricting access of family and friends to those on the program.

3.19 The premise of the Family Law Act, on the other hand, is that the best interests of the child are paramount. If parents and children are separated, it is normally the case that the best interest of the children will favour some ongoing contact with both parents. This will continue to be the case if the separation happens because one is on the Witness Protection

16 *ibid.*

17 Evidence, p. 24

18 *ibid.*

19 Submission volume, p. 22

Program and the other is not. However, contact requires the co-operation of the Commissioner of the AFP, who is the only outside person aware of the new identity and location of the person on the program. The Bar Association asked rhetorically:

What if the Commissioner is unwilling or unable to arrange that contact?<sup>20</sup>

3.20 The Bar Association's submission noted that the 'collision' issue had arisen twice in the ACT registry of the Family Court. In the first case the father of a small child was on the program, but the mother and the child were not. In that case, the father sought to make occasional contact with the child. The second case, reported under the name T v F, was almost the reverse situation where the father and the children were on the program and the mother was not. The mother's case went to the Full Court of the Family Court of Australia to seek contact after the Commissioner declined to facilitate contact because of security concerns. In its judgement on 30 June 1999<sup>21</sup> the Full Court held that the power of the Family Court to make such orders was not constrained by any provision in the Witness Protection Act. According to the *Report on the Operation of the Act to 30 June 1999*: 'the effect of that decision will necessitate a review of the provisions of the Act.'

3.21 The ACT Bar Association noted that, in broad terms, the Court upheld the primacy of the Family Law Act, with the welfare and interests of the child given precedence over the security considerations of the Witness Protection Program. It added:

Of course, it is not as simple as this. For example, a security threat to the children that justifies the Commissioner's concerns would equally cause the Court to consider that the welfare and interests of the children are best protected by ensuring that they are as physically safe as it is reasonably possible to make them. This, however, has to be balanced against the emotional needs of the children to have contact with the other parent. The balancing process is immensely difficult, because weighing on one side of the scales may quite literally be the lives of the children themselves. How is the Court to assess that threat in any realistic way, and balance it against the need for contact?<sup>22</sup>

3.22 Commonwealth Ombudsman Mr Ron McLeod noted that it is not unusual that there are clashes between different pieces of legislation where the public interest is expressed differently and that sometimes these clashes can produce difficulties in resolving a particular situation. He said:

Under the Witness Protection Act, as I understand it, there is a provision that does entitle the AFP to make known the fact that a party is part of the program in connection with a court proceeding. I would think that if a matter proceeds to the Family Court it is necessary for the judge to be able to be informed of that in confidence. The AFP should then seek to work through in confidence with the judge how best to make sure that he or she is fully informed so that a proper judicial decision can be taken, but in a manner that protects the need to reveal information that might put at risk the safety of the person on the program. That really depends on the good grace of the learned judge. In a sense, perhaps the best way is to look at these things on a case-by-case basis rather than to anticipate the

20 Submission volume, p. 22

21 (1999) 25 FamLR 36

22 Submission volume, p. 23

myriad different circumstances that might arise theoretically and then seek to create a set of legislative or other arrangements that govern what should or should not be done in a hypothetical situation. I understand that in the United States there are legislative provisions in some jurisdictions that seek to try to provide some guidance to the courts in cases of this kind.<sup>23</sup>

3.23 The ACT Bar Association also referred to the US situation:

In America, however, the relationship between witness protection and family law is specifically set out in the legislation. The American legislation puts the interests of children ahead of the public interest in protecting witnesses, which is the same conclusion reached by the Family Court in Australia. However, the American legislation is quite specific in the way in which witness protection and family law will interact. The Australian position is still quite unclear in a number of important respects.<sup>24</sup>

Its submission concluded:

If there is a clear public good in maintaining a witness protection program, at the very least the AFP needs to be given ample resources to ensure that contact can be facilitated between parents and children who are not all on the program.<sup>25</sup>

3.24 The Committee pursued some of the issues with the representatives of the AFP. The first circumstance raised was where the wife decides to leave the program and discloses details. According to Mr McGeachie:

That has happened. The program is voluntary and they are free to leave at any time, so long as they advise us... That does create major problems. The people may have to be relocated and re-identified again because their identity becomes known. That is where it becomes very costly.<sup>26</sup>

3.25 Similarly, the Committee asked whether persons on the program had entered new relationships. Mr McGeachie said:

Yes it can, and it has happened. ... generally it is the male who is the witness and the family are there because of the family situation. If the family situation breaks down then, a large majority of the time, there is no threat to the partner. Sometimes there is or could be. New relationships do create problems, especially if they are divorced or they are living in a de facto relationship and they want to get married. It can be done.<sup>27</sup>

3.26 Noting the limitless variations, and bearing in mind the concerns of the Bar Association in relation to the demands on AFP resources, the Committee wondered if cost became a consideration in discontinuing protection. Mr Heggie responded that:

23 Evidence, p. 18

24 Submission volume, p. 23

25 Submission volume, p. 26.

26 Evidence, p. 24

27 Evidence, p. 25



Generally, that would not be a factor in deciding. It is the security of the witness which is the factor, not particular family circumstances and difficulties.<sup>28</sup>

#### *Transition back to community*

3.27 One of the major social impacts for participants confronts them when they seek to make the transition back into the community. Mr Heggie stressed that the officers of the NWPP seek to encourage them to take care of their own lives, even while they are participants in the program. That carries on into resettlement when they are going to leave the program for whatever reason.<sup>29</sup> Mr McGeachie added:

From the time they come on to the program, from the time we pick them up and take them to what we consider to be a safe area, we encourage them to assimilate back into the community. If they have been in jail or living a life of luxury, in some cases, then to adjust to their new environment is a gradual process. We monitor their activities very closely. We arrange for psychologists to see the participants and their families. We have regular contact with them by phone and visits. It is a process that may take years. They may be on the program for a number of years before their case is finalised. Generally, by the time that they are ready to leave they are, hopefully, employed and getting along with life and making new friends.<sup>30</sup>

3.28 The Commissioner of the Western Australia Police Service, Commissioner Matthews, also stressed that the successful assimilation back into society by the witness was a prime objective of that State's program.<sup>31</sup> Similarly, the Acting Commissioner of South Australia Police noted that:

The objective of the Witness Protection Section is to ensure the safety and well being of persons accepted onto the witness protection program. The Section plans and executes operations to relocate and re-identify witnesses, to establish a safe and productive existence in a new environment, having taken into account individual personal, social and employment aspirations.<sup>32</sup>

3.29 Mr McGeachie advised that the AFP keeps in contact with program participants once off the program, but that over time the contact decreases. He saw this as proof of the success of the re-establishment process. He added:

There is one or two who have re-offended since the act was brought into being. They were dealt with for the offences that they committed and were subsequently put off the program.<sup>33</sup>

28 Evidence, p. 25

29 Evidence, p. 26

30 *ibid.*

31 Submission volume, p. 3

32 Submission volume, p. 38

33 Evidence, p. 26

3.30 Mr Lamb simply noted:

In short, my observations are that there are problems and that there will continue to be problems, bearing in mind that these people are (a) criminals and (b) have been taken out of the criminal milieu and placed somewhere that is totally foreign to them. Some of them have wives and families that find it difficult to adjust. Therefore, the translation back into the community at some time is quite difficult.<sup>34</sup>

#### **Summary**

3.31 The Committee finds that the legislative scheme underpinning the National Witness Protection Program is appropriate in all respects other than in relation to its *interrelationship* with the Family Law Act.

3.32 The legislation specifies a range of criteria which provides assurance to the general community that the AFP Commissioner has been required to make a properly based determination whether a person should be accepted into protection or not. There was a general consensus among witnesses from the Commonwealth Government sector that the Victorian process of largely unfettered discretion was not preferred. The Committee was also informed by the Commissioner of the Western Australia Police Service that the Witness Protection Act in that State contains comprehensive criteria in relation to both *inclusion* in and *termination* from the State's program which uses very similar terminology to that of the Commonwealth legislation.<sup>35</sup> The submission of the Acting Commissioner of the South Australia Police similarly pointed the Committee to the criteria contained in that State's Witness Protection Act.<sup>36</sup>

3.33 The Committee would also expect that the Senate Standing Committee for the Scrutiny of Bills would balk at the concept of such an open-ended administrative discretion being granted to the Commissioner of the AFP.<sup>37</sup>

3.34 There could be debate, no doubt, about the worth or wisdom of the individual elements of the criteria. But, given that no witness saw fit to question their general effectiveness, it would seem pointless for the Committee to speculate on the need for changes which may, at the end of the day, be no more than cosmetic.

3.35 There is, in the Committee's opinion, a clear need for the issue of the relationship between witness protection and family law to be settled. While the Family Court has expressed its view that the interests of children should take precedence over the public interest in protecting witnesses, it is the Parliament's role and responsibility to make laws in the overall best interests of the community.

3.36 The Committee does not wish to purport to express a settled view in this respect, simply because of the complexities of the issues involved when compared to the level of analysis that it has been able to undertake in the context of this inquiry. In principle, there

34 Evidence, p. 4

35 *Western Australia Police Commissioner, submission volume, pp. 1-2*

36 *South Australia Police Acting Commissioner, submission volume, p. 38*

37 *The Senate Standing Committee for the Scrutiny of Bills did, in fact, criticise aspects of the Bill in Alert Digest 6/94 on related grounds.*

may be grounds for concern that a decision of the Commissioner to refuse a person access to participants in the NWPP may be based improperly on notions of cost or convenience. This would, of course, be unacceptable. Nonetheless, given the very close relationship developed between the protected witness, his family and the officers of the NWPP, the Committee is not necessarily convinced that the Commissioner's judgement may not in fact be more soundly based than that of the Family Court.

3.37 The Committee urges the Government to give priority attention to this issue.

## CHAPTER 4

### PAYMENTS TO WITNESSES

4.1 The Committee's third term of reference concentrates on the issue of whether payments made to protected witnesses are administered effectively, especially in relation to the payment of taxation liabilities. The making of payments to protected witnesses is important in terms of their capacity to provide for themselves and their families while under protection. The level of payments may, however, also bear on their willingness to cooperate with authorities to give evidence, which may lead to argument that evidence favourable to the prosecution had been 'bought' in the process.

#### The making of payments

4.2 The NCA does not make payments directly to protected witnesses. Such payments are made by the AFP. Under its MOU with the AFP, the AFP bills the NCA quarterly in advance for the estimated costs of providing the NCA with witness protection services. These costs include payments made to the witness, including the expenses of any family members accepted into the program, and any additional costs incurred by the AFP in providing witness protection. The costs paid by the NCA do not include the normal salary and overheads for the AFP officers in the witness protection unit. The payments are reconciled at the end of each quarter and the appropriate adjustments made.

4.3 The continuing costs to be paid to the witness are agreed as part of the agreement between the witness and the witness protection scheme. In the normal course of events, costs are agreed with the NCA before they are incurred. In some circumstances this may not be possible and in this case the AFP is able to make the appropriate decisions.

4.4 These arrangements suit the NCA as it is another way of removing day to day contact between the witness and the investigating officers. It is understood that this separation of the witness and the investigating officers is common to all law enforcement witness protection arrangements.<sup>1</sup>

#### Nature and timing of payments

4.5 The AFP's Mr McGeachie told the Committee that:

We pay a subsistence to them to survive on as a weekly amount of money.<sup>2</sup>

<sup>1</sup> National Crime Authority, submission volume, pp. 20-21

<sup>2</sup> Evidence, p. 33

4.6 The Commonwealth Ombudsman indicated that the adequacy of compensation payments made to participants had been a source of complaints to his Office prior to the commencement of the Act, but there had been none since.<sup>3</sup>

4.7 The Committee was told that witnesses may also receive additional security-related payments. These are discussed below, as it appears that they play an important role in the adjudication of taxation liabilities.

4.8 The submission from Mr Geoff Flatman QC, Victorian Director of Public Prosecutions, stated that:

On a general note as prosecutors we see it as desirable that matters such as financial support and relocation of witnesses be left as much as possible until after the completion of proceedings so as not to impinge on questions concerning the witness giving evidence.<sup>4</sup>

4.9 Mr Lamb concurred with this view:

It can be the only option. Defence counsel will automatically look at that as an avenue to exploit. If there is any suggestion that the evidence is tainted by way of inducements and/or looking after a witness in such a way that they can get an angle on it, then of course that will be exploited... It is a balancing act. In a lot of cases defence counsels will argue that the very provision of sustenance and accommodation is in fact an inducement to play the game the way the prosecution wants. However, in most cases we will win the day in that context, but if you start to deal with them in terms of payouts, relocation, severance payments and that type of thing in advance, then that certainly would be deemed to be inappropriate.<sup>5</sup>

4.10 Mr Lamb went on to describe a two-stage process whereby it is the protection of the witness that is the primary concern while the case in which they are to give evidence is proceeding, and matters of relocation and severance payments are only discussed once those court commitments are completed.

4.11 Mr Heggie shared Mr Lamb's concerns about payments being seen as an incentive or inducement to give evidence:

We may have the problem of tainted evidence if we offer rewards before the evidence is given.<sup>6</sup>

He added that the protected witness volunteers to join the program only after having signed an MOU which specifies such matters as the level of subsistence payments. One benefit of the MOU process has been that complaints to the Commonwealth Ombudsman about the level of payments have ceased since their introduction.

3 Evidence, p. 17 per Mr McLeod

4 Director of Public Prosecutions Victoria, submission volume, p. 8

5 Evidence, p. 7

6 Evidence, p. 37. Mr Heggie clarified that he was referring to 'rewards' in a broad sense, not in relation to a formal rewards scheme.

4.12 It has been claimed that some members of the Italian witness protection program have been paid salaries as high as three times that of the average factory worker. As discussed in Chapter 2, the Italian parliament is having to address the problems that have been experienced by magistrates in dealing with the evidence of 'pentiti', because of concerns about their reliability.<sup>7</sup>

#### Taxation

4.13 The particular issue of taxation liability for payments made to protected witnesses was raised by the *Sunday* program which had suggested that an NCA protected witness had incurred, allegedly without his knowledge, a significant tax debt because the income stream that he had received over a lengthy period from his protected witness program had been subsequently classified by the Australian Taxation Office as income and therefore taxable. The claim was that the protected witness had understood the monies received as part of the program were ex gratia payments, not income.

4.14 Authoritative details on the public record in relation to this case are limited although there has been some media coverage. The AFP confirmed that the protected witness in question, who the Committee now knows to be Mr William Sommerville as a result of the media coverage, was not a participant in its program.<sup>8</sup> Mr Lamb was reticent to discuss the case because it preceded his arrival at the NCA and because of concerns about the secrecy provision of the NCA's statute.<sup>9</sup> The NCA is also subject to a suppression order from the NSW Supreme Court in relation to an action against it in the Equity Division by Mr and Mrs Sommerville under their changed names of John and Margaret Gray.

4.15 An investigating officer at the NCA who was involved in the investigation with which Mr Sommerville was cooperating was quoted at length during the *Sunday* program. Former Superintendent Bob Small admitted that he had given Mr Sommerville an undertaking, with the consent of senior NCA management at the time, that he would receive compensation over and above the subsistence payments so that he would not be financially disadvantaged by assisting the NCA. Mr Small also stressed that at no stage were the Sommersvilles made aware of a potential taxation liability arising from the payments they did receive.

4.16 A media item in the *Sun-Herald* on 16 April 2000 suggested that Mr Sommerville had entered the NCA's witness protection program in January 1990 until his removal in August 1997, some three years after he had given the evidence for which he had received protection. At the time of his removal from the program, Mr Sommerville and his wife were receiving \$500 per week for living expenses plus an accommodation and electricity allowance. Neither he nor his wife worked during the period they were under protection, so the bill he received from the ATO in April 1998 for \$127,457 appears to relate to his payments as a protected witness. While it is known that Mr Sommerville was not a participant in the NWPP, it is not on the public record which program he was a participant in. It is a matter for conjecture whether Mr Sommerville had signed an MOU with that program's administrators during his term on the Program, although he made the claim to the *Sunday*

7 *After acquittal, Andreotti awaits second judgement*, Reuters, 27.9.99

8 Evidence, p. 28. It should be noted that the case preceded the establishment of the NWPP in 1994.

9 Evidence, p. 9

program that he had not. Both the *Sunday* program and the *Sun-Herald* article noted that the NCA offered the Sommersvilles an amount of \$45,000 to assist them with their reintegration into the community, which is consistent with the Committee's understanding of the manner in which witness protection programs operate. This amount was, of course, significantly less than their tax bill.

4.17 All persons entering into a witness protection program are subject to an interview by officers of the ATO. Mr McGeachie stated that:

When the ATO interviews a participant, he may have been receiving corrupt money or drug money into the millions. If they assess that as income over the last three years or five years, it is up to the tax department and they may say, 'Yes, that is income, and you have to pay your tax on that.'<sup>10</sup>

The Committee strongly endorses this approach. It is entirely appropriate that those participants who still enjoyed the proceeds of past criminality should forfeit those assets before being permitted to join a witness protection scheme. While it is not known, because of the secrecy surrounding the case, it is possible to speculate that an element of the Sommersville tax bill may have related to this concept, especially given the revelations of Mrs Meredith in relation to Mr Sommersville's business dealings.<sup>11</sup>

4.18 The AFP currently utilises the PIA (Payment in Advance) system to pay tax monthly on subsistence payments made to witnesses. The AFP submitted that it is in the process of clarifying with the Australian Taxation Office (ATO) as to whether security related payments made to witnesses on the NWPP are taxable.<sup>12</sup>

4.19 Mr Lamb stated:

... once a decision has been made by the organisation about whether this person is viable, ... then we would immediately put the individual in touch with the AFP ... We would not be talking to the person about tax at all.<sup>13</sup>

4.20 The Victorian Government submission stressed that Victoria Police does not consider that payments made to protected witnesses constitute assessable income and it has made representations to the ATO in this respect. In response, the ATO has apparently offered some allowance, at least to the extent that such payments:

- (a) are made to a witness as part of resettlement;
- (b) are not made to 'defray living expenses'; and
- (c) do not exceed three months.

10 Evidence, p. 33

11 In an article in the *Sun-Herald* on 23 April 2000 it was reported that Mr Sommersville had used the witness protection scheme to conceal his true identity from a neighbour, Mrs Paula Meredith. Mrs Meredith submitted to the Committee through her lawyers that a William Sherwood had defrauded her of some \$145,000. While she did not refer to him as Sommersville, the connection can be safely implied. See submission volume, pp. 30-37

12 Australian Federal Police, submission volume, p. 13

13 Evidence, p. 14

4.21 It is understood that payments falling outside these parameters are treated as being assessable and hence subject to taxation. The Victorian Government submission drew attention to the practical implications of this ruling for the Victoria Police:

As the provider of witness protection the focus of Victoria Police is and must remain on ensuring the ongoing safety and well-being of those included in its program. In this context the legal issues surrounding tax liability are not only complex and costly for Victoria Police, but stand significantly apart from its primary legislative responsibility of maintaining a scheme critical to the effective administration of the criminal justice system.<sup>14</sup>

4.22 Mr McGeachie added:

I think the problem arises out of other payments that we may pay them from time to time. It is whether it is a security related issue and we believe that there should be no tax, or whether Tax believe that it is not security related and that the participant should pay tax.

... my understanding is that the ATO people have changed the way, over the years, that they treat some of the money that the person receives. At one stage we were only paying tax on their subsistence money. Somebody then said, 'They get an allowance for a telephone and that should be taxable.' We say, 'No, it shouldn't be because it's a security related issue. If he were not on the program there would be no need for him to have a phone.' They are the sorts of problems that occur from time to time.<sup>15</sup>

4.23 The Committee was concerned that these taxation uncertainties may adversely affect a potential witness's enthusiasm for volunteering to join the program. Mr Lamb said:

No, I know of none that has taken that into account at the time. Most are far more concerned about their and their family's personal welfare.<sup>16</sup>

Mr Lamb added that the NCA had not seen a large number of such occurrences, so it was not a matter which would undermine the effectiveness of the witness protection program. Nor did he feel that from a policing point of view it had impacted on it.<sup>17</sup>

#### Summary

4.24 It is clear that the matter of making payments to protected witnesses is potentially fraught with difficulty. The witness, usually a male, is primarily concerned in the short term with the physical welfare of himself and any immediate family members. Therefore, the quantum of any subsistence payments may not be a prime consideration in his decision to volunteer for witness protection.

4.25 Where the witness is a petty criminal giving evidence against his associates in the organisation, the payment of a short-term subsistence allowance, perhaps at or close to the

14 Victorian Government, submission volume, p. 42

15 Evidence, pp. 33-34

16 Evidence, p. 5

17 Evidence, p. 6

level of social security benefits, seems to the Committee to be, in all the circumstances, reasonable.

4.26 This analysis does not adequately provide, however, for the circumstance of the 'whistleblower' who has agreed to give evidence in the public interest. The witness may be an accountant or a lawyer who has inadvertently found themselves in the situation of key prosecution witness. They may not be able to continue in their normal course of employment while under witness protection, perhaps for an extended period, and should not be expected to live in penury as a result. Mr Lamb pointed out that it is a balancing act between providing an appropriate quantum of payment while not providing defence counsel with a basis for arguing that the evidence is tainted. The Committee has no evidence available to it to make a finding that the current approach is not working and that that balance is not being correctly struck.

4.27 The Committee believes that a candidate for a Witness Protection Program has a right to know what payments they can expect to receive and whether they will be held responsible for any associated taxation liabilities. While the MOU between the witness and the law enforcement agency should be definitive in this respect, it is clear that there is an unacceptable and continuing confusion over this issue of taxation liability.

4.28 The Australian Taxation Office has a responsibility to apply taxation law. The Committee accepts that the ATO and not the law enforcement agencies is the expert in this field. A disagreement between the ATO and a member or a section of the community over an interpretation of tax law is hardly news. However, the Australian community expects high standards of ethical behaviour from its law enforcement authorities and would expect them to fully cooperate with the ATO, even if they are in disagreement with its rulings. For its part, if it has not done so already, the ATO should issue a clear and definitive statement of its requirements in relation to payments to protected witnesses.

4.29 The Committee urges the law enforcement authorities to ensure that MOUs with all protected witnesses are immediately redrafted in cases where there is any doubt about the clarity of the taxation implications of the payments being made under the MOU.

## APPENDIX 1

### SUBMISSIONS

1. Commissioner, Western Australia Police Service
2. Confidential
3. Minister for Police and Public Safety, Tasmania
4. Commissioner, Tasmania Police
5. Director of Public Prosecutions, Victoria
6. Australian Federal Police
7. National Crime Authority
8. Confidential
9. The ACT Bar Association
10. Confidential
11. Commonwealth Ombudsman
12. Tesoriero Henderson Cotter
13. Commissioner, South Australia Police
14. Minister for Police and Emergency Services, Victoria
15. Confidential

**APPENDIX 2**  
**WITNESSES AT PUBLIC HEARING**

23 June 2000, CANBERRA

National Crime Authority:

Mr Peter Lamb, General Manager Operations

Commonwealth Ombudsman:

Mr Ronald McLeod AM, Commonwealth Ombudsman  
Mr Philip Moss, Senior Assistant Ombudsman

Australian Federal Police:

Mr Robert Heggie, Acting General Manager, Protective Security  
Mr William McGeachie, Acting Director, Witness Protection

**APPENDIX 3**  
**JOINT COMMITTEE ON THE NATIONAL CRIME  
AUTHORITY**  
**REPORT ON *WITNESS PROTECTION*: MAY 1988<sup>1</sup>**  
**RECOMMENDATIONS**

**The Committee recommends:**

- (a) that the Australian Federal Police should assume an expanded national witness protection role; and
- (b) that a National Witness Protection Liaison Committee be established under the auspices of the Australian Police Ministers' Council to facilitate greater co-ordination and co-operation between the 8 police forces in the provision of witness protection.

**The Committee recommends** that the legislation relating to the registration of births in each State and Territory be amended to provide a mechanism similar to that presently applying in cases of adoption whereby a protected witness may be issued with a birth certificate in a new name which does not indicate that any change of name has taken place. The original birth certificate should be kept in a closed register available only to the protected witness or duly authorised persons.

**The Committee recommends** that complementary State and Federal legislation relating to witness protection should indemnify from any civil or criminal liability persons acting in an official capacity who alter records or issue documents to reflect the new identity of a protected witness.

**The Committee recommends** that complementary State and Federal legislation relating to witness protection should make it a criminal offence for a person to compromise the security of a protected witness by revealing details of the witness' change of identity. An appropriate penalty reflecting the gravity of the offence should be imposed.

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<sup>1</sup> *Witness Protection*, Report by the Parliamentary Joint Committee on the National Crime Authority, AGPS Canberra, Parliamentary Paper No. 193/88, tabled on 26 May 1988.

**The Committee recommends** that, where presently unavailable, appropriate mechanisms be established to handle complaints from persons who believe that they have been unjustly denied protection or who are aggrieved by decisions made by agencies in the administration of witness protection schemes.

**The Committee recommends** that complementary State and Federal legislation relating to witness protection should:

- (a) give clear legislative authority for the protection of witnesses by relocation;
- (b) set out mechanisms whereby protected witnesses may be prevented from evading their civil debts and from avoiding obligations imposed on them by the Family Court;
- (c) ensure that, if a protected witness commits a crime, the witness' criminal record under his or her old identity will be revealed to the responsible investigative agency;
- (d) establish procedures whereby the hearing of cases in which protected witnesses are to testify can be expedited; and
- (e) clarify the law with regard to the suppression of details identifying a protected witness.

**The Committee recommends** that the complementary legislation relating to the interstate transfer of prisoners be amended to specify the protection of a custodial witness as a ground for transfer.

**The Committee recommends** that appropriate steps be taken to ensure:

- (a) that the fact that custodial witnesses serve their sentences under harsher conditions is taken into account in making decisions concerning the release of such witnesses on licence or parole;
- (b) that the families of custodial witnesses are adequately protected; and
- (c) that custodial witnesses are given clear undertakings as to the arrangements proposed for their protection on release.