

# 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 re-assimilation 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>

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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

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2 AFP, Submission volume, p. 9

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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

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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 McCreadie 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.

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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:

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10 Submission volume, p. 18

11 This matter is the subject of litigation.

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

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