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.[1] In discharging this responsibility regard must be had, however, to a number of prescriptive legislative requirements. In particular, when an approved authority[2] 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
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> (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
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> (c) the seriousness of the offence to which any relevant evidence or statement relates; and
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> (d) the nature and importance of any relevant evidence or statement; and
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> (e) whether there are viable alternative methods of protection the witness; and
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> (f) the nature of the perceived danger to the witness; and

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1 *Witness Protection Act 1994* (Cth), section 8(1)

2 *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.[3] 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.[4]

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.[5]

3.6 In the year ending 30 June 1999, one NWPP operation was voluntarily terminated and no operations were involuntarily terminated.[6]

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.[7]

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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.[8]

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.[9]

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 kept 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.[10]

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'.[11]

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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.[12]

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.[13]

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.[14]

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.[15]

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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.[16]

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.[17]

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.[18]

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.[19]

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

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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?[20]

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[21] 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?[22]

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

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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.[23]

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.[24]

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.[25]

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.[26]

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.[27]

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:

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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.[28]

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.[29] 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.[30]

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.[31] 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.[32]

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.[33]

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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.[34]

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.[35] 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.[36]

3.33 The Committee would also expect that the Senate Standing Committee for the Scrutiny of Bills would baulk at the concept of such an open-ended administrative discretion being granted to the Commissioner of the AFP.[37]

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

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34 Evidence, p. 4

35 Western Australia Police Commissoner, 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.