

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.¹

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.²

1 National Crime Authority, submission volume, pp. 20-21

2 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.³

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.⁴

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.⁵

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.⁶

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.⁷

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.⁸ 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.⁹ 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 Sommervilles 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'.¹⁰

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 Sommerville tax bill may have related to this concept, especially given the revelations of Mrs Meredith in relation to Mr Sommerville's business dealings.¹¹

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.¹²

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.¹³

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 Sommerville 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 Sommerville, 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.¹⁴

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.¹⁵

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.¹⁶

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.¹⁷

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.