

CHAPTER 6

WITNESS PROTECTION

Provisions in the Bill

6.1 Schedule 3 of the Bill would amend the *Witness Protection Act 1994* (WP Act). The Explanatory Memorandum notes that:

The *Witness Protection Act 1994* provides a statutory basis for the NWPP. The NWPP provides protection and assistance to people who are assessed as being in danger because they have given, or have agreed to give, evidence or a statement on behalf of the Crown in criminal or certain other proceedings, or because of their relationship to such persons. For example, if a person gives evidence in a serious or high profile criminal trial, that person's security, and that of their family, may be at risk as a result.¹

6.2 The Commissioner of the AFP maintains the NWPP and decides whether to include a witness in the NWPP and what assistance is necessary to protect a witness included in the NWPP. This assistance can include providing the witness with a new identity or relocating the witness.²

6.3 The key amendments in Schedule 3 of the Bill would:

- (a) extend the availability of protection under the NWPP to former participants and related persons; and
- (b) extend the scope of non-disclosure offences.³

6.4 At present, the WP Act only distinguishes between a person's 'former identity and his or her 'new identity'.⁴ Schedule 3 of the Bill would also update the concept of identity under the WP Act to take into account that a participant in the NWPP may be provided with more than one identity in addition to his or her original identity (for example where the person is relocated under a new identity but is recognised and must be provided with a further new identity).⁵

1 Explanatory Memorandum, p. 93. Unless otherwise specified, references to provisions or proposed provisions in this chapter are references to provisions or proposed provisions of the WP Act.

2 Sections 4, 8 and 13; Explanatory Memorandum, p. 93.

3 Explanatory Memorandum, p. 93.

4 Explanatory Memorandum, p. 94.

5 Explanatory Memorandum, pp 94, 96 and 97. See particularly Items 2, 3 and 7 of Schedule 3 which would insert new definitions of 'current NWPP identity', 'former NWPP identity' and 'original identity' in section 3.

6.5 Finally, Schedule 3 would make various amendments to close potential gaps that exist in the WP Act in relation to protection of state and territory witnesses included in the NWPP, and their obligations under the NWPP.⁶

Availability of protection to former participants and related persons

6.6 The Bill would insert new subsection 13(5) in the WP Act to allow the AFP Commissioner to provide protection and assistance:

- to former participants in the NWPP, where it is necessary and reasonable for their protection, without formally re-including them in the NWPP; and
- to someone whose relationship with a former participant is such that the Commissioner is satisfied that it is appropriate to provide that assistance.⁷

6.7 The Explanatory Memorandum outlines why this amendment is required:

The operation of the current definitions in the [WP]Act relevant to section 13 precludes assistance from being provided to persons who have left the NWPP.

There can be circumstances, however, where a witness requires further protection or assistance after leaving the NWPP. For example, a former participant may need to be relocated if he or she is recognised by someone who was aware of his or her original identity. Under the current provisions of the [WP] Act, once participants have left the NWPP, they are unable to obtain assistance without undergoing a formal assessment to rejoin the NWPP. This delay could endanger former participants.⁸

6.8 In addition, this amendment would also allow assistance to be provided to relatives, friends or other associates of the former participant including people the former participant has met since leaving the program.⁹ The Explanatory Memorandum gives the example that, if a former participant decides to marry, his or her spouse may at some stage require protection and assistance as a result of the relationship with the former participant.¹⁰

Non-disclosure offences

6.9 Existing subsection 22(1) of the WP Act makes it an offence to disclose:

- information about the identity or location of a person who is or has been a Commonwealth participant in the NWPP; or
- information that compromises the security of such a person.

6 Explanatory Memorandum, pp 94 and 98-99. See particularly Items 10, 11 and 13 of Schedule 3 which would insert: new definitions of ‘State participant’ and ‘Territory participant’ in section 3 of the WP Act; and a new section 3AB to define a ‘State offence that has a federal aspect’.

7 Item 22 of Schedule 3; Explanatory Memorandum, pp 95 and 102.

8 Explanatory Memorandum, p. 102.

9 Explanatory Memorandum, p. 95.

10 Explanatory Memorandum, p. 102.

6.10 The Explanatory Memorandum notes that:

This offence does not distinguish between instances where the person disclosing the information is reckless as to whether there is a risk that the disclosure will compromise the security of an individual and those not involving this aspect of potential harm.¹¹

6.11 In addition, subsection 22(2) makes it an offence for a person who is or has been a Commonwealth participant, or a person who has undergone assessment for inclusion in the NWPP as such a participant, to disclose certain information about the NWPP (such as information about how the NWPP operates).

6.12 Both the offences created by section 22 apply only in relation to Commonwealth participants in the NWPP.¹²

6.13 Item 52 of Schedule 3 would repeal the existing offences at section 22 and replace them with three separate sets of offences, which will apply to disclosure of information about:

- Commonwealth or Territory participants, and people undergoing assessment for inclusion in the NWPP as such participants (proposed section 22);
- State participants, and people undergoing assessment for inclusion in the NWPP as such participants (proposed section 22A); and
- the NWPP (proposed section 22B).¹³

6.14 The main changes introduced by these provisions would be:

- (a) to provide for a higher maximum penalty for offences where there is a risk that the disclosure will compromise the security of an individual involved in the NWPP;¹⁴
- (b) to extend the offences so that they apply to disclosures relating to, or made by:
 - (i) State and Territory participants; and
 - (ii) people undergoing assessment for inclusion in the NWPP.¹⁵

11 Explanatory Memorandum, p. 95.

12 Explanatory Memorandum, p. 95.

13 Explanatory Memorandum, pp 95 and 108.

14 The penalty for these offences would be a maximum of 10 years imprisonment: proposed subsections 22(3) and (4) and 22A(3) and (4). Offences not involving this element would have a maximum penalty of two years imprisonment: proposed subsections 22(1) and (2), and 22A(1) and (2).

15 Explanatory Memorandum, pp 95-96, 109 and 117. Proposed subsections 22(2) and (4), and 22A(2) and (4) would create offences relating to disclosures regarding people undergoing assessment for inclusion in the NWPP. Proposed subsection 22B(1) would extend the scope of the existing offence under subsection 22(2) to include disclosures by State and Territory participants and people undergoing assessment for inclusion in the NWPP.

6.15 In addition, the Bill would extend the scope of the existing offence under subsection 22(2) with respect to disclosures of information about how the NWPP operates or officers involved in the NWPP. At present, this offence is limited to people who are or were Commonwealth participants in the NWPP or have undergone assessment for inclusion as a Commonwealth participant.¹⁶ Proposed subsection 22B(2) would make it an offence for a person who does not have a connection to the NWPP to disclose such information where there is a risk that the disclosure will:

- adversely affect the integrity of the NWPP; or
- compromise the security of an officer who is, or has been, involved in the NWPP.

6.16 The Explanatory Memorandum states that:

This amendment recognises that there could be instances of people not directly involved in the NWPP nevertheless finding out information about the NWPP that, if disclosed, could adversely affect the integrity of the NWPP and endanger participants and others involved in the NWPP through their work.¹⁷

6.17 Proposed sections 22, 22A and 22B would all provide that a disclosure of information is not an offence if the disclosure has been:

- authorised by the AFP Commissioner;
- made for the purpose of making a complaint or providing information to the Ombudsman;
- made to ACLEI for the purpose of referring to the Integrity Commissioner an allegation or information that raises a corruption issue; or
- made for the purpose of giving information that raises an AFP conduct or practices issue, or investigating or resolving such an issue.¹⁸

Issues raised in submissions

6.18 The Police Associations supported the proposed amendments to the WP Act and noted that:

[Australian Federal Police Association] members working within the AFP Witness Protection programme perform an important and dangerous role on behalf of national and international law enforcement agencies. These amendments strengthen protections for those AFP employees and are welcomed by our membership.¹⁹

6.19 The AFP stated that the proposed amendments would ‘increase the efficiency of the NWPP, improve the overall operations of NWPP and ensure the integrity of

16 Explanatory Memorandum, p. 118.

17 Explanatory Memorandum, p. 118.

18 Proposed subsections 22(5), 22A(5) and 22B(3); Explanatory Memorandum, pp 111, 116 and 118-119.

19 *Submission 3*, p. 3.

NWPP.²⁰ Mr Quaedvlieg of the AFP told the committee that an internal review of the NWPP revealed that many of the provisions that enabled the AFP to provide protection to witnesses were dated:

...for example, ...the construct of what we today call ‘identity’ is a lot more fluid than what it was when the provisions were originally struck for the protection of witnesses. The amendments look to give us some increased flexibility and contemporaneity around the way witnesses are actually managed, to enable us to safeguard them against threat or risk.²¹

6.20 Similarly, Professor Broadhurst and Ms Ayling submitted that the amendments will enhance the WP Act and, in particular, that the increased penalties for disclosure offences will assist in increasing confidence in the NWPP.²²

6.21 Liberty Victoria opposed the insertion of proposed section 22C which would provide that that the non-disclosure offences at proposed sections 22, 22A and 22B apply to the disclosure of information to a court, tribunal, a Royal Commission or any other commission of inquiry. Liberty Victoria argued that:

...preventing disclosure to superior courts and Royal Commissions runs counter to the principle of the rule of law and more broadly government accountability. Liberty is confident that such forums are capable of keeping such information secret. It is of great concern to Liberty that the executive arm of government would have the final say when it comes to such a serious and important protective regime.²³

6.22 Liberty Victoria also submitted that, given the possibility for accidental or unknowing disclosure, the disclosure offences under proposed sections 22, 22A and 22B should require knowing or reckless disclosure of information.²⁴ However, the Explanatory Memorandum states that the offences require that the disclosure be intentional.²⁵

20 *Submission 10*, p. 11. See also Mr Quaedvlieg, AFP, *Committee Hansard*, 29 October 2009, p. 3.

21 *Committee Hansard*, 29 October 2009, p. 4.

22 *Submission 6*, p. 2.

23 *Submission 11*, p. 3.

24 *Submission 11*, p. 3.

25 Explanatory Memorandum, pp 109-118. This is not clear on the face of the provisions but section 5.6 of the Criminal Code applies automatic fault elements to offences that do not specify fault elements. In the case of physical elements that consist of conduct (such as disclosing information), the fault element is intention.

