



Witness Protection
Annual Report
2006–07

Witness Protection Act 1994

Report on the operation of the Act

to 30 June 2007

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Minister's Introduction

I am pleased to submit the annual report on the operation of the National Witness Protection Program under the provisions of the *Witness Protection Act 1994* for the 2006–07 financial year.

The report sets out the provisions of the legislation and relevant activity for the reporting period. The costs of the program are shown in the Appendix to this report.

The task of providing witness protection is a highly sensitive area of law enforcement and I commend those agents involved with the administration and maintenance of the program.

This report has been prepared to provide as much detail as possible without prejudicing the effectiveness of the security of the National Witness Protection Program (NWPP).



David Johnston

Minister for Justice and Customs

Senator for Western Australia

30 August 2007

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Introduction

In 1988 the Parliamentary Joint Committee on the National Crime Authority inquired into Witness Protection in Australia. The Parliamentary Joint Committee recommended that the Australian Federal Police (AFP) operate an expanded national witness protection role and the *Witness Protection Act 1994* (C'th) (the Act) was drafted. The Act created the National Witness Protection Program (NWPP) and gave the Commissioner of the AFP responsibility for the maintenance of the program.

The Act received Royal Assent on 18 October 1994 and commenced operation on 18 April 1995.

Subsection 30(2) requires that an annual report be prepared which advises both Houses of Parliament on the general operations, performance and effectiveness of the NWPP. The report must be prepared in a manner that does not prejudice the effectiveness or security of the NWPP.

The Act provides 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
- (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.

In providing that protection and assistance the NWPP employs operating methodologies designed to ensure the safe integration of witnesses, and their families participating in the program, back into the community. Relocation, re-identification or a change of identity are strategies used in the management of witness protection operations to provide security for witnesses/participants. The AFP does not publish details of the NWPP in annual reports for the safety of those witnesses included in the NWPP and for the integrity of the program itself.

The Act contains regulatory mechanisms for maintaining the integrity of the NWPP.

e Act

The Act requires the AFP Commissioner to maintain the NWPP. In so doing, the Commissioner can enter into arrangements with an 'approved authority', which includes State and Territory Commissioners of Police and the Chairman of the Australian Crime Commission, to enable protection and assistance to be provided to witnesses involved in operations run by those organisations. NWPP operational costs are shared between the AFP and the approved authority referring the witness for protection and assistance.

Section 3 of the Act sets out the threshold criteria for a person to be considered a 'witness'. A person being assessed for inclusion in the NWPP is described as a 'witness' and a 'witness' becomes a 'participant' once he or she has been accepted into the NWPP.

A 'Commonwealth participant' is a person who gives or agrees to give evidence in relation to a Commonwealth offence, a Royal Commission or other Commonwealth Commission of Inquiry or a Federal Parliamentary Inquiry. He or she may also be a person who is a foreign citizen or resident who is participating in the NWPP under sections 10 or 10A of the Act.

Section 5 prohibits witnesses being included in the NWPP as a means of encouraging or rewarding them for giving evidence or making a statement.

Sections 7–10A, 18 and 19 provide the AFP with statutory procedures to govern the placement of witnesses in, and their removal from, the NWPP, including the signing of memorandums of understanding, the creation of new identities where necessary and the restoration of former identities.

Section 11 establishes a Register of participants who are or who have been in the NWPP. The register must contain certain information, including the person's name and new identity, where applicable, and details of offences for which the participant has been convicted.

Section 20 and 27 provide mechanisms to ensure that participants do not use their new identity to avoid civil or criminal liability.

Section 22 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 24 safeguards the integrity of

Commonwealth identity documents (eg. tax file numbers, passports). It provides that identity documents for persons in State/Territory witness protection programs will not be issued after the Act has been in force for 12 months unless there is complementary legislation in place in the relevant State or Territory and there are Ministerial arrangements in place with the relevant State/Territory relating to the issue of Commonwealth identity documents.

Amendment to the Act and related matters

The Australian Federal Police Legislation Amendment Act 2000, which commenced on 2 July 2000, amended the Act so as to affect the manner in which Australian Federal Police employees are now described.

On 27 June 2002 the Act was further amended to provide for the inclusion of persons in the NWPP at the request of the International Criminal Court (Section 10A). The process for consideration for the inclusion of a nominated person in the NWPP is similar to the process for consideration for the inclusion of foreign nationals or residents in the NWPP.

There were no amendments to the Act during this reporting period.

Administration of the NWPP

The Commissioner administers the NWPP through the Witness Protection Committee and the Coordinator, Witness Protection. The Witness Protection Committee comprises the Deputy Commissioner, to whom a number

of responsibilities are delegated, and two senior AFP officers—the National Manager, Protection and the National Manager, Border and International Network. The Manager Close Protection attends Committee meetings in an advisory capacity.

The Witness Protection Committee makes recommendations on the entry and exit of witnesses to and from the program and on the conditions of their entry and exit. The Coordinator, Witness Protection, is responsible for the day-to-day operations of the NWPP.

General operations of the NWPP

The NWPP provides an environment in which participants are able to give evidence in criminal trials, which involve a significant degree of criminality at both the Commonwealth and State levels, without fear of retribution. The majority of participants in the NWPP have been accepted into the program because of their involvement as witnesses in prosecutions relating to organised, large-scale importation of illegal drugs or corruption matters.

In the financial year ending 30 June 2007 the NWPP managed 28 active witness protection operations providing protection and assistance to 75 people. These included:

- one operation that commenced with two persons admitted to the program
- three operations that concluded and five participants departed the NWPP

The duration of participation in the program varies considerably, according to

circumstances. Multiple trials and continuing court delays hinder the early re-assimilation of some witnesses into the community. Participation in the NWPP is generally related directly to the duration of the court proceedings, and for security reasons, legal proceedings involving protected witnesses do not receive any listing priority.

The AFP's role in law enforcement is at the national and international level as well as the community policing level in the ACT. The ACT does not have a separate witness protection scheme and any witnesses who fall under the *Witness Protection Act 1996* (ACT) are assessed for inclusion in the NWPP.

Any costs incurred as a result of this arrangement are subject to the policing arrangement between the AFP and the ACT Government.

The AFP hosted the annual Australasian Heads of Witness Protection Forum in Canberra between the 19th June and 21st June 2007. The conference was attended by Police from Australian State Police Forces as well as overseas representatives from:

- Canada
- Germany
- Hong Kong
- New Zealand
- United Kingdom
- United Nations Office on Drugs and Crime (UNODC).

and observers from:

- China
- Indonesia
- Malaysia

Integrity and accountability of the NWPP

Safeguards in the Act assist in ensuring the integrity and accountability of the NWPP are maintained. AFP members and staff members deployed to the NWPP hold or occupy designated positions which have national security clearance at the level of Top Secret or Secret or positions of trust clearance at the level of Highly Protected.

The Coordinator, Witness Protection presents applications for the placement of persons in the NWPP to the Witness Protection Committee. Officers investigating the criminal matters to which the protection and assistance of the witness relates, as well as those Witness Protection members preparing submissions to the Committee, are not involved in the decision-making process for that person's placement in the NWPP. This separation of responsibilities assists in ensuring that decisions are made objectively.

In deciding whether to include a witness in the NWPP, the Commissioner must consider:

- whether the witness has a criminal record and whether that record indicates a risk to the public if the witness is included in the NWPP
- whether there are any viable alternative methods of protecting the witness
- any psychological or psychiatric examination which has been conducted to determine the witness' suitability for inclusion in the NWPP
- the seriousness of the offence to which any relevant evidence or statement relates and the nature of the perceived danger to the witness.

A person will not be included in the program unless he or she has signed a memorandum of understanding setting out the basis of his or her participation.

Sections 8, 18 and subsection 25(3) of the Act provide that key functions, such as placement in and removal from the NWPP, may not be delegated below the position of Deputy Commissioner of the AFP.

A participant may be removed from the program or protection and assistance may be terminated where

- the participant deliberately breaches a term or terms of the memorandum of understanding
- the participant has knowingly given information to the Commissioner that is false or misleading in a material particular
- the integrity of the NWPP is likely to be compromised by a participant's conduct or threatened conduct
- because of the passage of time and successful relocation and integration of a witness into a new community, he or she is no longer in a high risk category.

The participant will be advised of any such decision before protection or assistance is withdrawn. Protection and assistance under the NWPP must, however, be terminated if the participant requests termination in writing pursuant to Section 18.

Exercise of the Commissioner's powers under section 27

Section 27 was included in the Act as a result of concerns of the Senate Standing Committee on Legal and Constitutional Affairs that arose in 1994 before the legislation was enacted. That Committee believed that the course of justice might be affected by the inability of an interested party to cross-examine a witness with a new identity about his or her prior convictions for the purpose of testing his or her credibility.

Section 27 provides that, if a participant (or a former participant) with a new identity is to be a witness in a criminal proceeding using that new identity and the person has a criminal record under his or her former identity, the person must notify the Commissioner that he or she will be a witness in the proceeding. The Commissioner may then take any action he or she considers appropriate in the circumstances, including disclosing to the court, the prosecutor and the accused person or that person's legal representative, the criminal record of the participant or former participant.

The Commissioner was not required to take action under section 27 during the reporting period to disclose to a court the criminal record of a current or former participant giving evidence under a new identity.

A Skills Maintenance Training Program (SMP) was introduced to continue to enhance operational members Witness Protection skills and performance during the reporting period. All operational members are required to undertake the SMP as a bi-annual qualification.

During the reporting period all members of Witness Protection were the subject of AFP anti corruption strategies including drug testing in accordance with Section 40M of the *AFP Act 1979*. There were no adverse findings reported.

Complaints/review of decisions

The protection of information relating to participants in the NWPP is of paramount concern; therefore decisions made under the Act are not subject to the *Administrative Decisions (Judicial Review) Act 1977*.

AFP officers administering the NWPP are subject to the same obligations as other members of the AFP. Should a complaint be received, the complaint will be dealt with in accordance with the *AFP Act 1979*. Complaints against them may also be the subject of investigation by the Commonwealth Ombudsman under the *Ombudsman Act 1976*. To facilitate the investigation of such complaints, the Ombudsman has a right of access to the relevant program documents. Further, in 1997 the Act was amended to enable participants, former participants or persons who had been assessed for placement on the NWPP to make disclosures for the purposes of making a complaint or to provide information to the Ombudsman under

either the Ombudsman Act or the *AFP Act 1979*.

The Commonwealth Ombudsman did not receive any complaints relating to the administration of the NWPP in the financial year 2006–07.

Subsections 18(3) and 19(3) of the Act also provide for the review by the Commissioner of decisions by the Deputy Commissioner to remove a person from the program involuntarily or to restore a person's former identity. Upon receiving notification of the decision, the participant may apply to the Commissioner for a review of that decision.

In the financial year 2006–07 the Commissioner was not required to review any decisions made by the Deputy Commissioner to remove a person from the program involuntarily or to restore a person's former identity.

Performance and effectiveness of the NWPP

The NWPP provided protection and assistance 75 people during the reporting period.

In addition, 14 people were assessed for inclusion in the NWPP during the period; one application is ongoing and 11 persons did not meet the necessary criteria.

Attempts have previously been made to intimidate participants and there have been occasions where this has occurred in the court environment. No witness called to give evidence has failed to do so as a result of intimidation or personal attack. There were no recorded

instances of direct physical attack on any participant in the NWPP in the reporting period.

During the reporting period there was one instance of an attempted extortion being made against a family member of a former participant. This action resulted in the former participant's re-inclusion into the NWPP.

Section 28 of the Act protects a Commonwealth participant's identity during court proceedings. Where the identity of such a participant is in issue or may be disclosed during court proceedings the court must hold the proceedings that relate to the identity of the participant in private. The court must also make a suppression order relating to publication of such of the evidence given so as to ensure that the identity of the participant is not disclosed.

This is an important element of the work of the NWPP with operational members promoting the interaction between counsel and the courts for the acquisition of such orders. Several suppression orders were obtained during the reporting period.

Complementary witness protection legislation

Section 24 of the Act provides that, once 12 months have elapsed since 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. (No other documents are currently prescribed.) The purpose of section 24 is to protect the integrity of key Commonwealth documents which are needed in order for witnesses to establish new identities.

Where jurisdictions have enacted complementary legislation, details of the relevant arrangements, declarations by the Commonwealth of complementary witness protection laws and declarations by other jurisdictions of the Commonwealth Act as a complementary witness protection law are:

Northern Territory—The *Witness Protection (Northern Territory) Act 2002* (NT Act) is in force.

- The NT Act has been declared a ‘complementary witness protection law’ under section 3 of the Act.
- The Act has been gazetted to be a ‘complementary witness protection law’.

Australian Capital Territory—The *Witness Protection Act 1996* (ACT Act) is in force.

- The ACT Act has been declared a ‘complementary witness protection law’ under section 3 of the Act.
- The Act has been gazetted to be a ‘complementary witness protection law’.
- Section 24 arrangements have been signed.

New South Wales—The *Witness Protection Act 1995* (NSW Act) is in force.

- The NSW Act has been declared a

‘complementary witness protection law’ under section 3 of the Act.

- The Act has been declared a ‘complementary witness protection law’ under section 3 of the NSW Act.
- Section 24 arrangements have been signed.

South Australia—The *Witness Protection Act 1996* (SA Act) is in force.

- The SA Act has been declared a ‘complementary witness protection law’ under section 3 of the Act.
- The Act is a ‘complementary witness protection law’ by virtue of the definition of that term in the SA Act and a separate declaration is therefore not required.
- Section 24 arrangements have been signed.

Victoria—The *Witness Protection Act 1991* (Victorian Act) is in force.

- The Victorian Act has been declared a ‘complementary witness protection law’ under section 3 of the Act.
- The Act has been declared a ‘complementary witness protection law’ under section 3 of the Victorian Act.
- Section 24 arrangements have been signed.

Western Australia—The *Witness Protection (Western Australia) Act 1996* (WA Act) is in force.

- The WA Act has been declared a ‘complementary witness protection law’ under section 3 of the Act.

- The Act is a 'complementary witness protection law' by virtue of the definition of that term in the WA Act and a separate declaration is therefore not required.
- Section 24 arrangements have been signed.

Tasmania—The *Witness Protection Act 2000* (Tasmanian Act) is in force.

- The Tasmanian Act has been declared a 'complementary witness protection law' under section 3 of the Act.
- The Act has been gazetted to be a 'complementary witness protection law'.
- Section 24 arrangements have been signed.

Queensland—The *Witness Protection Act 2000* (Queensland Act) is in force.

- The Queensland Act has been declared a 'complementary witness protection law' under section 3 of the Act.
- The Act has been declared by regulation to be a 'complementary witness protection law' under section 3 of the Queensland Act.
- Section 24 arrangements have been signed.

Inclusion of foreign nationals or residents in the NWPP

The Act enables the inclusion of foreign witnesses in the NWPP. Such persons may need to live outside their country of origin pending or following a trial.

Under section 10 and 10A of the Act, foreign nationals or residents can be considered for inclusion in the NWPP at the request of an

appropriate authority of a foreign country (foreign authority) or the International Criminal Court (ICC). While the primary role of the NWPP is the provision of long-term protection by change of identity and relocation, foreign witnesses can be offered short-term protection in certain circumstances. This is an example of international cooperation in the fight against serious and organised crime and has the potential to be used in counter-terrorism activities and the pursuit of transnational criminal objectives.

Consideration for the inclusion of foreign witnesses in the NWPP is a two-stage process involving both the Minister and the AFP Commissioner. If the Minister is satisfied that the foreign authority has provided all material necessary to support the request for the inclusion of a foreign citizen or resident in the NWPP and that it is appropriate in all the circumstances to refer the request from the foreign authority to the Commissioner, then the Minister will refer that request.

If the Commissioner decides that the witness is suitable for inclusion in the NWPP and the Minister, after considering a report from the Commissioner recommending inclusion of the witness in the NWPP, has decided that it is appropriate in all the circumstances that the witness be included in the NWPP, the Commissioner is to include that person in the NWPP provided that two further conditions are satisfied. First, that the person has been granted a visa for entry to Australia and second, that the Commissioner has entered an arrangement (which includes procedures under which the foreign authority pays the costs associated with providing protection

for the nominated person and any associated persons) with the foreign authority for the purpose of making services under the NWPP available to the authority.

The AFP received a number of informal inquiries from foreign law-enforcement agencies regarding the NWPP during the reporting period. Information allowing an application to be prepared for inclusion in the NWPP was provided for their consideration.

Other overseas agencies have also made initial approaches to the Australian Government seeking to establish protocols for the relocation and re-identification of witnesses in Australia. These approaches are being fully assessed by a number of government departments.

Details of the actual movement of witnesses into or out of Australia cannot be reported without the possibility of compromising either the safety of the individuals concerned or the integrity of the NWPP. Two international witnesses were included into the NWPP under Section 10 during the reporting period.

Relocation of Australian witnesses overseas

If it is considered necessary to relocate witnesses overseas (who are on either the NWPP or State or Territory witness protection programs), the Commonwealth Government would negotiate the relocation with the relevant foreign government.

Details of the actual movement of witnesses into or out of Australia cannot be reported without the possibility of compromising either the safety of the individuals concerned or

the integrity of the NWPP. The movement of witnesses into or out of Australia remains an active element of the NWPP.

Finance

The NWPP is administered and operated by the AFP. Basic administration costs and the base salaries of members and staff members involved in witness protection activities are met from within the AFP budget.

Other agencies with witnesses in the NWPP are, by arrangement with the AFP, responsible for all other costs including those related to the security and subsistence needs of their witness and the composite payments, taxes, travel and accommodation expenditure by AFP witness protection federal agents who supervise the agency-sponsored witness.

The AFP is responsible for costs associated with AFP sponsored witnesses in the NWPP.

A table of costs for each financial year and part-year of the life of the NWPP is in Appendix 1. The figures do not include the base salaries or composites of the Witness Protection personnel operating and administering the program.

Appendix 1 Table of expenditure

National Witness Protection Program

1 July 2006–30 June 2007		\$
Total expenditure		1,940,731.32
Less amounts recovered		1,166,439.88
Total Commonwealth expenditure on NWPP		74,291.44

The sum of \$81,952.94 was recovered from the National Illicit Drugs Strategy funding.

Total expenditure in previous years		\$
1 July 2005 – 30 June 2006		952,612.39 ¹
1 July 2004 – 30 June 2005		1,667,826.70 ²
1 July 2003 – 30 June 2004		2,160,809.62 ³
1 July 2002 – 30 June 2003		647,524.25 ⁴
1 July 2001 – 30 June 2002		773,948.32 ⁵
1 July 2000 – 30 June 2001		1,080,173.75 ⁶
1 July 1999 – 30 June 2000		1,512,714.02 ⁷
1 July 1998 – 30 June 1999		668,289.55
1 July 1997 – 30 June 1998		1,379,938.00
1 July 1996 – 30 June 1997		1,024,100.00
1 July 1995 – 30 June 1996		1,729,500.00
19 April 1995 – 30 June 1995		292,400.00

Footnotes

¹\$77,369.55 was recovered from NIDS funding

²\$39,051.17 was recovered from NIDS funding

³\$66,903.39 was recovered from NIDS funding

⁴\$10,938.20 was recovered from NIDS funding

⁵\$60,267.00 was recovered from NIDS funding

⁶\$11,598.99 was recovered from NIDS funding

⁷\$609,816.00 was recovered from NIDS funding

The Act commenced on 18 April 1995

