



AFP

AUSTRALIAN FEDERAL POLICE



Witness Protection

**ANNUAL REPORT
2010-11**

WITNESS PROTECTION ACT 1994

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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 2010–11 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 of 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.



Brendan O'Connor

Minister for Home Affairs and Justice

Introduction

In 1988 the Parliamentary Joint Committee on the National Crime Authority inquired into witness protection in Australia. The committee recommended that the Australian Federal Police (AFP) perform an expanded national witness protection role and the *Witness Protection Act 1994 (Cth)* (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; or
- (b) persons who have otherwise given or agreed to give evidence in relation to a criminal offence; or
- (c) persons who have made a statement in relation to an offence; or
- (d) persons who may require protection and assistance for any other reason; or
- (e) persons who are related to or associated with such persons.

In providing that protection and assistance, the NWPP employs operating methods designed to ensure the safe integration of witnesses and their families participating in the program back into the community. 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.

The 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, the Chief Executive Officer of the Australian Crime Commission and the Integrity Commissioner 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' means a person who is a participant in relation to an offence against a law of the Commonwealth or a Royal Commission under the *Royal Commissions Act 1902* or an inquiry instituted by a house of the parliament or a person who is a foreign citizen or resident who is participating in the NWPP under sections 10 or 10A of the Act.

A 'state participant' means a person who is a participant in relation to a state offence that may or may not have a federal aspect or in relation to a commission of inquiry under a law of a state.

A 'territory participant' means a person who is a participant in relation to an offence against the law of a territory or a commission or inquiry under a law of a territory.

Section 5 prohibits witnesses being included in the NWPP as a reward or as a means of persuading or encouraging the witness to give evidence or make a statement.

Sections 7, 8, 9, 18 and 19 provide the AFP with statutory procedures to govern the inclusion of witnesses in the NWPP, including the signing of memoranda of understanding and the termination of inclusion in the NWPP.

Sections 10 and 10A provide for the inclusion of foreign nationals or residents in the NWPP at the request of foreign law enforcement agencies or the International Criminal Court.

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.

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

Section 22, 22A and 22B create offences relating to disclosure of information without lawful authority about Commonwealth, territory or state participants and create 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. It provides that identity documents for persons in state or territory witness protection programs will not be issued unless there is complementary legislation in place in the relevant state or territory and there are ministerial arrangements in place with the relevant state or territory relating to the issue of Commonwealth identity documents.

Amendment to the Act and related matters

There have been no legislative amendments to the Act within the reporting period.

Administration of the NWPP

The AFP Commissioner administers the NWPP through the Witness Protection Committee and Coordinator Witness Protection. The Witness Protection Committee comprises the AFP Deputy Commissioner National Security, to whom a number of responsibilities are delegated and two senior AFP officers, being the National Manager Protection and National Manager Serious and Organised Crime. The Manager Close Protection attends committee meetings in an advisory capacity.

The Witness Protection Committee makes recommendations on the inclusion and exit of witnesses to and from the program and on the conditions of their inclusion and exit. 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 that 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 crime, large-scale importation of illegal drugs or corruption matters.

In the financial year ending 30 June 2011 the NWPP managed 10 active witness protection operations providing protection and assistance to 14 people.

One assessment was commenced for inclusion into the NWPP and this assessment is ongoing. Three operations concluded, with three participants departing the NWPP.

The duration of participation in the program varies considerably according to circumstances. Multiple trials and continuing court delays impact upon the early reintegration 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.

Integrity and accountability of the NWPP

Safeguards in the Act assist in ensuring the integrity and accountability of the NWPP are maintained. AFP employees deployed to the NWPP either hold or occupy designated positions which have national security clearance to the level of Top Secret.

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 *Australian Federal Police Act 1979*. There were no adverse findings reported.

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 inclusion 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's suitability for inclusion in the NWPP
- 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.

The Commissioner's powers under sections 6, 8, 14, 16, 18, 20, 27, 27A and subsections 12(2) and (3) may only be delegated to the position of Deputy Commissioner of the AFP. The Commissioner's powers and functions under subsections 13(5) and (7) may only be delegated to a deputy commissioner or assistant commissioner (or a person holding an equivalent or higher rank) 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

or

- due to the passage of time and the 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 of the Act.

Section 27 was included in the Act as a result of concerns in 1994 of the Senate Standing Committee on Legal and Constitutional Affairs 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 made no disclosures under section 27 during the reporting period.

Complaints/review of decisions

As the protection of information relating to participants in the NWPP is of paramount concern, 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. If a complaint is received, it will be dealt with in accordance with the *Australian Federal Police Act 1979*. Complaints against officers 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. The Act enables participants, former participants or persons who have or are undergoing assessment for inclusion in the NWPP to make disclosures for the purposes of making a complaint or to provide information to the Ombudsman under either the *Ombudsman Act 1976* or the *Australian Federal Police Act 1979* and to the Integrity Commissioner under the *Law Enforcement Integrity Commissioner Act 2006*.

The Commonwealth Ombudsman undertook one section 8 investigation relating to the administration of the NWPP in the financial year 2010–11. This matter is ongoing.

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

In the financial year 2010–11 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

Previously, attempts have been made to intimidate participants, some of which have occurred within the precincts of a court. 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.

Section 28 of the Act protects participants' identities during court proceedings. Where the identity of such a participant is in issue or may be disclosed during court proceedings the court must, unless it considers it is not in the interest of justice to do so, hold in private that part of the proceedings that relates to the identity of the participant. The court must also make such orders that relate to the suppression of publication of the evidence given before it to ensure that the matter referred to is not made public where that publicity may compromise the security of the witness.

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.

AFP Witness Protection members are required to undertake the Skills Maintenance Training Program each year to maintain and enhance operational witness protection skills and performance.

AFP Witness Protection members participated in national and international witness protection conferences to allow the AFP to benchmark its witness protection activities against other agencies.

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.

All jurisdictions have enacted complementary legislation¹, which has been declared 'complementary witness protection law' under section 3 of the Act and signed section 24 arrangements are in place with the exception of Tasmania and the Northern Territory.

Inclusion of foreign nationals or residents in the NWPP

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

Under sections 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. This has the potential to be used in counter-terrorism activities and the pursuit of transnational criminal objectives in the fight against serious and organised crime.

Consideration for the inclusion of foreign witnesses in the NWPP is a two-stage process involving the Minister for Home Affairs and Justice 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

¹ Northern Territory - *Witness Protection (Northern Territory) Act 2002*, Australian Capital Territory - *Witness Protection Act 1996*, New South Wales - *Witness Protection Act 1995*, South Australia - *Witness Protection Act 1996*, Victoria - *Witness Protection Act 1991*, Western Australia - *Witness Protection (Western Australia) Act 1996*, Tasmania - *Witness Protection Act 2000* and Queensland - *Witness Protection Act 2000*.

Commissioner recommending inclusion of the witness in the NWPP, also decides 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:

- 1) that the person has been granted a visa for entry to Australia
- 2) that the Commissioner has entered an arrangement (which includes the foreign authority paying 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 that foreign authority.

During the reporting period the AFP provided information to foreign law enforcement agencies regarding the operation and application processes of the NWPP.

International agencies have also made approaches to the Australian Government seeking to establish protocols for the relocation and re-identification of witnesses in Australia which are being fully assessed by the appropriate government agencies.

Details of the nature or origin of these inquiries or the actual movement of witnesses into or out of Australia or arrangements entered into between Australia and other governments cannot be reported without the possibility of compromising either the safety of the individuals concerned or the integrity of the NWPP.

During the reporting period the AFP participated in a number of international law enforcement forums specialising in witness protection. The NWPP representatives have also hosted other international law enforcement agencies and provided advice on the governance and operational arrangements of the NWPP in Australia to assist these law enforcement agencies implement similar programs.

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 Australian 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 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 any operational expenses incurred 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 the appendix of this report. The figures do not include the salaries of the Witness Protection personnel operating and administering the program.

Expenditure

National Witness Protection Program: expenditure

1 July 2010 – 30 June 2011

AFP expenditure on NWPP	\$974 316.78
Less amounts recovered	\$384 644.34
Total AFP expenditure on NWPP	\$589 672.44

The sum of \$12 958.35 was attributed to the National Illicit Drugs Strategy funding (recovered).

Total expenditure in previous years¹

Financial year	Expenditure (not minus costs recovered) \$	Recovered from NIDS funding
1 July 2009 – 30 June 2010	1 245 358.72	31 752.57
1 July 2008 – 30 June 2009	1 570 620.88	28 443.15
1 July 2007 – 30 June 2008	1 047 748.52	18 493.74
1 July 2006 – 30 June 2007	1 940 731.32	81 952.94
1 July 2005 – 30 June 2006	952 612.39	77 369.55
1 July 2004 – 30 June 2005	1 667 826.70	39 051.17
1 July 2003 – 30 June 2004	2 160 809.62	66 903.39
1 July 2002 – 30 June 2003	647 524.25	10 938.20
1 July 2001 – 30 June 2002	773 948.32	60 267.00
1 July 2000 – 30 June 2001	1 080 173.75	11 598.99
1 July 1999 – 30 June 2000	1 512 714.02	609 816.00
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 ²	292 400.00	

¹ Figures provided are as at 30 June 2011.

² The Act commenced on 18 April 1995.



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