

1994

**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA**

**SENATE**

**WITNESS PROTECTION BILL**

**EXPLANATORY MEMORANDUM**

(Circulated by authority of the Minister for Justice,  
the Honourable Duncan Kerr MP)





## OUTLINE.

The Witness Protection Bill 1994 has 9 main purposes:

to establish a National Witness Protection Program (NWPP) to be operated by the Australian Federal Police to enable witnesses to give evidence without the fear of retribution and for persons who because of their association with the witness need protection;

to provide the AFP with statutory procedures for governing the placement and removal of witnesses from the NWPP, including new identities and the restoration of former identities;

to enable foreign witnesses to be placed on the NWPP following a request from the appropriate authority of a foreign country to the Minister and in such a case the Minister has the final decision whether the person should be included on the NWPP;

to set out the matters to be covered in the memorandum of understanding between the Commissioner of the AFP and the witness, including the granting of financial assistance;

to require a witness to make full disclosure to the AFP of all rights and obligations and for procedures where the witness is ready to shelter behind his/her new identity to avoid/escape rights and obligations;

to provide for the establishment of a electronic Register of persons on the NWPP, including the information required to be held on the Register and the documents required to be held with the Register and access to the Register and documents.

procedures governing the disclosure of information about persons on the program to courts, tribunals and other bodies;

offences and penalties for those offences relating to authorized disclosure about the NWPP, persons on the program, being assessed for the program and persons no longer on the program; and

consequential amendments to the Administrative Decisions (Judicial Review) Act 1977, the Australian Federal Police Act 1979 and the Marriage Act 1961.

### Financial Impact

The Bill does not have a financial impact.

### Abbreviations

The following abbreviations are used in this Explanatory Memorandum:

AFP                      Australian Federal Police;

Commissioner      Commissioner of the AFP;

NWPP                  National Witness Protection Program.

## NOTES ON CLAUSES

### **Clause 1      Short Title**

Contains the short title.

### **Clause 2      Commencement**

Provides for the Act to commence on a day fixed by Proclamation or six months after the day on which it receives Royal Assent.

### **Clause 3      Interpretation**

Contains definitions of terms used in the Act. These include definitions of "participant" as a person who has been included in the National Witness Protection Program (NWPP). "witness" is defined to mean a person who may require protection under the NWPP because he/she has given, or agreed to give, evidence for the Crown whether Commonwealth, State or Territory or otherwise has agreed to give evidence, has made a statement to the AFP or an approved authority or because of his or her relationship to, or association with such a person or for any other reason may require protection or assistance.

### **Clause 4      Establishment of the NWPP**

Subclause (1) requires the Commissioner of the AFP to establish a NWPP to provide protection and assistance to witnesses. It is to be run by AFP members/staff members who hold or occupy designated positions, which are positions which have national security or positions of trust clearance of highly protected. These positions are defined in Clause 3.

Subclause (2) The States and Territories may make complementary laws providing for the protection of witnesses. This subclause enables the AFP Commissioner to use powers and functions conferred on him/her by these laws.

### **Clause 5      Inclusion in NWPP deemed not to be a reward for giving evidence**

This clause provides that inclusion of a witness on the NWPP is not to be done as a reward or as a means of persuading or encouraging him or her to give evidence or make a statement.

### **Clause 6      Arrangements with approved authorities**

Subclause (1) provides that approved authorities (as defined in clause 3) such as the NCA or State/Territory Police Commissioners may make arrangements with the AFP Commissioner to provide the authority with Witness Protection services.

Subclause (2) provides that such arrangements must include agreements on cost sharing with the authority. They may also include the provision of information which would enable the Commissioner to decide whether the person should be included in

the NWPP and what type of protection is appropriate, as well as confer powers on the Commissioner under complementary witness protection laws

Subclause (3) provides that where a function has been granted to the Commissioner under an arrangement for provision of services relating to a State/Territory offence, those services can only be exercised to the extent authorised by the State/Territory concerned.

#### **Clause 7      Witnesses to disclose certain matters before being included in the NWPP**

Subclause (1) contains a general direction to the Commissioner that he/she should not include a person on the NWPP unless he/she is satisfied that the person has disclosed all relevant information to the Commissioner.

Subclause (2) does not limit subclause (1) but details some of the types of information which a person may have to provide to enable the Commissioner to judge whether or not he/she should be included in the NWPP. The disclosure of relevant information is necessary to prevent witnesses from trying to evade their legal/financial obligations. Personal matters, such as custody of/access to children and medical conditions requiring on-going treatment which could affect a person's participation in the NWPP, must also be disclosed. The list in subclause (2) is not exhaustive and the Commissioner may consider other matters relevant to a particular case.

Subclause (3) enables the Commissioner to require the witness to undergo medical/psychiatric examination or make such other necessary enquires or examinations. The results of medical/psychiatric examinations are to be made available to the Commissioner.

#### **Clause 8      Selection for inclusion in the NWPP**

Subclause (1) provides that the decision as to whether or not a witness should be included in the NWPP and becomes a participant is solely the responsibility of the Commissioner, even in cases where an approved authority such as the NCA or a State Commissioner has requested that a witness be placed on the program.

Subclause (2) provides that in addition to the Commissioner deciding whether or not a witness should be included in the NWPP, the witness must also agree to be included and must sign a memorandum of understanding acknowledging his/her obligations. (See Clause 9). Where a witness is under 18 or is not legally capable of signing such an agreement, a parent, guardian or carer may sign a memorandum of understanding on his/her behalf.

Subclause (3) lists a number of matters which the Commissioner must consider when deciding whether or not a witness should be included in the NWPP. The list is not exhaustive and the Commissioner may take other relevant matters into account.

Subclause (4) provides that if information on the matters in subclause (3) is not available or is insufficient, the Commissioner must not include a witness in the NWPP.

Subclause (5) provides that once a participant has turned 18, he/she may be asked to sign a memorandum of understanding.

## **Clause 9            Memorandum of understanding**

Subclause (1) provides that a memorandum of understanding is an agreement between the Commissioner and the participant which sets out the basis on which a participant is included in the NWPP. It includes what type of protection and assistance is to be provided. If a participant breaches his/her memorandum of understanding, he/she may be removed from the NWPP.

Subclause (2) details additional terms and conditions which may be included in a memorandum of understanding. If a participant commits an offence, engages in activities forbidden by his/her memorandum of understanding, such as gambling, or compromises the operation of the NWPP, protection may be withdrawn. The participant must agree not to jeopardise the protection being provided and must follow reasonable directions given to him/her by the Commissioner. These directions may include undergoing medical, psychological/psychiatric tests with the results being made available to the Commissioner and undergoing counselling for drug and/or alcohol problems.

The memorandum of understanding must also list a person's legal/financial obligations, including maintenance payments, tax liabilities or any other debts and include an agreement as to how these obligations are to be met. Details of any financial support to be provided by the Commissioner may also be included in the agreement.

In addition, the participant will be required to disclose to the Commissioner details of any criminal charges or civil or bankruptcy proceedings commenced after he/she enters the NWPP.

Subclause (3) requires that the memorandum of understanding is to be signed in the presence of an AFP member or a staff member who holds a designated position.

Subclauses (4) and (5) state that a participant is to be informed when the Commissioner signs the memorandum of understanding, as the date of signature is the date on which the witness is included in the NWPP and becomes a participant.

Subclause (6) allows amendments to be made to the memorandum of understanding by varying, adding or removing clauses. The amendment takes effect on the day on which it is received by the participant.

Subclause (7) provides that an amendment to a memorandum of understanding must not remove the mandatory matters which must be included in a memorandum of understanding and which are set out in subclause 9(1).

## **Clause 10            Inclusion of foreign nationals in NWPP at the request of foreign law enforcement agencies**

Subclause (1) sets out the procedures where the Minister receives a request from an appropriate authority of a foreign country for the inclusion of a person who is a citizen or resident of that country on the NWPP. If the Minister is satisfied that there is sufficient material to support the request and that it is appropriate to do so the Minister is to refer the request to the Commissioner.

Subclause (2) provides that where the Commissioner receives such a request consideration for placement is to be the same as for a witness.

Subclause (3) enables the Commissioner to seek additional material to assess the application.

Subclause (4) sets out the procedures for placement of such a person on the NWPP. These procedures are:

the Commissioner decides that the person is suitable for inclusion on the NWPP; and

after considering the Commissioner's recommendation that the person be included on the NWPP the Minister decides, that it is appropriate in all the circumstances that the person be included in the NWPP; and

the Commissioner has entered into an arrangement with the appropriate authority for the provision of services, and

the person has been granted an entry visa

Subclause (5) covers matters to be included in the arrangement for the provision of services with the appropriate authority. These matters include the costs of provision of resources and training costs.

## **Clause 11      Register of participants**

Subclauses (1) and (2) require the Commissioner to maintain a Register of participants, which may be kept electronically.

Subclause (3) sets out the matters which must be kept on the Register, including the old and new identities of participants, their addresses, details of any convictions and the date on which the persons cease to be participants.

Subclause (4) states that the Register must also contain details of any circumstances where the Commissioner has given the participant permission under section 16 not to disclose his/her former identity where otherwise he/she would be required to do so.

Subclause (5) requires the Commissioner to keep the original memorandum of understanding for each participant and copies of any new birth certificates issued under the NWPP and any permission under section 16 not to disclose his/her former identity. He/she must also keep any documents used to establish a new identity and which a former participant has been required to return under subsection 19(2). These documents are to be kept in conjunction with the Register.

## **Clause 12      Access to Register**

Subclause (1) states that access to the Register, and the documents required to be kept in conjunction with the Register is restricted to AFP members/staff members who hold or occupy designated positions and who have been authorised by the Commissioner to have such access.

Subclause (2) requires the Commissioner to grant the Commonwealth Ombudsman, or person authorised by him/her who has the relevant security clearances to have access to the Register and associated documents for the purposes of an investigation under Part III or IV of the Complaints (Australian Federal Police) Act 1981.

Subclause (3) states that the Commissioner may allow a person other than a person covered by subclause (2) to have access to the Register and accompanying documents, if he/she considers that it would be in the interests of justice to do so. The purpose of this clause is to enable, for example, the police investigating the murder of a participant to have access to the relevant documents.

Subclause (4) requires that the relevant approved authority be advised by the Commissioner of any access granted to the Register under subclause (3), including the name of the person to whom access was granted, the information the person had access to and the reasons for the access.

### **Clause 13      Action where a witnesses is included in the NWPP**

Subclause (1) requires that, while a person is being assessed for inclusion in the NWPP or once they have been included, the Commissioner will take any action which he/she considers necessary to protect the witness and his/her own staff.

Subclause (2) sets out the action which may be taken, including applying for any documents which would protect or allow the witness to establish a new identity. Whilst the witness completes the necessary forms for the new documents, the purpose of this clause is to enable the member to approach the relevant agencies for the document. It may also include allowing members or staff members who hold designated position within the AFP to use assumed names while carrying out their duties under the NWPP. It may also be necessary to relocate the witness, provide him/her with accommodation, financial assistance to meet reasonable living expenses and assistance in obtaining employment etc.

Subclause (3) precludes documents being provided to a witness which show him/her to have qualifications which he/she does not have or to be entitled to benefits to which he/she would not otherwise be entitled.

Subclause (4) requires that Commonwealth officers who provide documents to enable the creation of a new identity must have an appropriate security or position of trust clearance.

### **Clause 14      Special provision in case of marriage of participant**

This clause is designed to assist participants who have been provided with a new identity and who wish to marry or re-marry. Under the Marriage Act 1961, people wishing to marry must produce all relevant documents to the celebrant. This could cause considerable difficulties for some participants, as it may not be possible for them to produce all the necessary documentation in their new names.

Such documents show that the person is of marriageable age and that his/her previous spouse is dead or has been divorced. If the Commissioner is satisfied of the identity of the participant and the legality of the intended marriage, the Commissioner may present a certificate to a Registrar of Births, Deaths and Marriages stating that he/she



has received evidence of these facts from the participant. There is also an amendment to the Marriage Act 1961 in the Schedule to the Bill.

#### **Clause 15      Dealing with rights and obligations of participant**

Subclause (1) states that, where a witness has outstanding rights or obligations, the Commissioner is to take reasonable steps to ensure that the matters are dealt with according to law. These outstanding rights or obligations may arise under law or equity. If a witness is subject to legal restrictions, the Commissioner is to take reasonable steps to ensure that he/she complies with those restrictions.

Subclause (2) states that a participant who has to attend a court may be provided with protection.

Subclause (3) provides that if the Commissioner finds that a participant is using his/her new identity to avoid obligations incurred under his/her former identity or to avoid complying with restrictions imposed on the person under his/her former identity, the Commissioner shall notify the person in writing that he/she is satisfied that this is so.

Subclause (4) provides that unless the participant agrees to deal with his/her obligations, or comply with any restrictions, the Commissioner may take any action which he/she considers reasonably necessary to ensure that they do so.

Subclause (5) states that in cases where another person is seeking to enforce rights against the property of the participant, the Commissioner may inform the person of property owned by the participant under his/her former identity.

#### **Clause 16      Non-disclosure of former identity of participants**

Subclause (1) states that a participant is not required to disclose his/her former identity in circumstances where he or she would otherwise be required to do so under Commonwealth law, if the Commissioner has given him/her permission not to do so. The form of these permissions will be in the Regulations. The purpose of this clause is to ensure that the Commissioner keeps an oversight of when participants are to get the benefit of this protection.

Subclause (2) provides that where the Commissioner has given such permission, the participant may lawfully claim that his/her new identity is his/her only identity.

Subclause (3) provides that Commonwealth officers who have access to NWPP information or documents must not disclose any such information, except if authorised to do so by the Commissioner. This clause also applies to former Commonwealth officers.

Subclause (4) enables a participant not to have to reveal his/her former identity to a Commonwealth officer, if under complementary State/Territory legislation the Commissioner has approved that they are not required to do so.

Subclause (5) provides that regulations may be made for the issuing of a prescribed form by which the Commissioner may permit non-disclosure of former identities under subclauses (1) and (4).

## **Clause 17      Special commercial arrangements by Commissioner**

The purpose of this clause is to recognise that it may be necessary for the Commissioner to enter into special arrangements with a person under which a participant may obtain benefits under a contract without the person disclosing his/her former identity. For example, when a person applies for insurance, the failure to make a full disclosure of the required information can result in the rejection of a claim against the insurance. This clause will facilitate special arrangements being made to deal with such matters.

## **Clause 18      Cessation of protection and assistance**

Subclause (1) lists the conditions under which a participant ceases to be protected or assisted under the NWPP. Where the participant requests to be removed the Commissioner must terminate the protection. Other grounds for possible removal include - the circumstances which gave rise to the need for protection ceasing to exist, the person breaches his/her memorandum of understanding or an undertaking given to the Commonwealth or a State/Territory, or where the participant's continued placement on the NWPP cannot be justified on reasonable grounds. Participants who knowingly gave false or misleading information to the Commissioner or whose behaviour is likely to compromise the NWPP may also cease to be protected. Even where one of the grounds for termination has been established the Deputy Commission has to be of the opinion that in all the circumstances protection and assistance should be terminated. Circumstances may arise where the grounds for termination exist but the threat to the participant still exists. In such a case protection could be still required.

Where a participant is removed from the NWPP, a Deputy Commissioner must make this decision. This requirement is to enable the participant to appeal to the Commissioner against a termination.

Subclause (2) requires the Deputy Commissioner to take reasonable steps to notify the participant of his/her decision under paragraph (1)(b) and notify the relevant approved authority of the decision.

Subclause (3) gives the participant 28 days after receiving the notice to appeal to the Commissioner for a review of the decision.

Subclause (4) enables the Commissioner to uphold, dismiss or vary the decision. The participant must be advised in writing of that decision. Before making that decision he/she must give the participant a reasonable opportunity to state the grounds of his/her appeal.

Subclause (5) sets out when assistance is terminated. Different procedures are necessary depending upon whether the participant's whereabouts are known or not and if he/she has appealed or not.

Subclause (6) requires that where the participant is a foreign witness the Commissioner must notify the Department of Immigration and Ethnic Affairs, in writing of the termination.

## **Clause 19      Restoration of former identity**

Subclause (1) states that when a Deputy Commissioner has decided to discontinue a participant's placement on the NWPP, he/she may decide to restore the participant's former identity.

Subclause (2) requires the Deputy Commissioner to take reasonable steps to notify the former participant of his/her decision.

Subclause (3) enables a participant whose former identity a Deputy Commissioner proposes to restore to apply in writing to the Commissioner to review the decision.

Subclause (4) requires the Commissioner to review the decision of the Deputy Commissioner and must either confirm, vary or reverse it. The participant must be informed in writing by the Commissioner of his/her decision. The Commissioner must also give the participant a reasonable opportunity to state his/her case.

Subclause (5) provides that if the Commissioner or Deputy Commissioner has notified a participant in writing that he/she is to be restored to his/her former identity, the participant must return all documents provided to him/her to establish a new identity within seven days of receiving the notice. If he/she fails to do so without reasonable excuse, a penalty of 10 penalty units applies.

## **Clause 20      Provision of information to approved authorities**

This clause provides for procedures which are to apply when the Commissioner is informed that a participant, who has been provided with a new identity, is under investigation or has been arrested or charged with an offence for which the maximum penalty is more than one years' imprisonment. In such cases, the Commissioner may release information to an approved authority, such as a State police force, on the participant's new identity, location and their criminal record and fingerprints. In addition, the Commissioner may also authorise the members/staff members to be interviewed by an officer from an approved authority or by another member of the AFP.

## **Clause 21      Officers protected from suit in respect of decisions under Act**

This clause deals with legal liabilities. The Commissioner or his/her delegates and other persons performing functions in connection with the NWPP are not liable to civil or criminal proceedings under Commonwealth law in relation to actions done or omitted in good faith in the exercise of a power conferred by this Act.

## **Clause 22      Offences**

Subclause (1) provides a maximum penalty of 10 years' imprisonment for the unauthorised disclosure by a person of the identity, location or other information which would compromise the security of a participant.

Subclause (2) provides a maximum penalty of 5 years' imprisonment for a participant or a person who has been assessed for inclusion in the NWPP who, without the Commissioner's permission, discloses the fact that he/she is/was a participant or was assessed for inclusion in the NWPP. The same penalty applies to a participant who

reveals information on the working of the NWPP or who discloses information about any member/staff member of the AFP involved in the NWPP.

### **Clause 23      Payments under NWPP not able to be confiscated**

Subclause (1) enables the Commissioner to certify in writing what amount of money has been paid to a participant under the NWPP.

Subclause (2) provides that this certified amount of money is not subject to confiscation or restraint or for the payment of pecuniary penalties under Division 3 Part XII of the Customs Act 1901, the Proceeds of Crime Act 1987, the Crimes (Superannuation Benefits) Act 1989 or the Australian Federal Police Act 1979.

### **Clause 24      Restriction on issue of birth identity documents**

Subsection (1) provides that after the end of 12 months after the commencement of the Act Commonwealth identity documents must not be issued to a person on a State/Territory witness protection program unless:

- there is an arrangement in force between the Minister and the relevant State Minister; and
- a complementary witness protection law is in force in that State.

Subsection (2) provides that arrangements may include the procedures for issuing of such documents and guidelines for the issuing of those documents.

### **Clause 25      Delegation**

Subclause (1) permits the Commissioner to delegate his/her powers under this Act by a signed instrument to a designated AFP officer or staff member subject to the exceptions in subclause (3).

Subclause (2) states that a designated AFP officer or staff member may exercise powers delegated by the Commissioner under complementary State legislation.

Subclause (3) states that the Commissioner's powers in relation to making arrangements with approved authorities for inclusion of people in the NWPP (Clause 6), deciding whether or not a person will be included in the NWPP (Clause 8), allowing access to the Register and associated documents by a nominated person Subclauses 12(2) & (3), providing a certificate that the person is eligible to marry (Clause 14), granting permission to a participant not to disclose the existence of a previous identity (Clause 16), discontinuing a participant's protection (Clause 18), and disclosing his/her previous identity and whereabouts in the event of his/her committing a criminal offence (Clause 20) can only be delegated to a Deputy Commissioner of the AFP.

### **Clause 26      Commissioner and members not to be required to disclose information**

Subclause (1) provides that subject to subsection (3), except where it is necessary to do so for the purposes of the Bill, the Commissioner or a member/staff member is not required to produce any documents or divulge to a court, tribunal, Royal Commission

or an approved authority during proceedings or hearings any information which has come to his/her notice in carrying out functions under the NWPP.

Subclause (2) provides that subject to subsection (3), except where it is necessary to do so for the purposes of the Bill the Commonwealth Ombudsman or member of his or her staff not required to produce any documents or divulge to a court, tribunal, Royal Commission or an approved authority during proceedings or hearings any information which has come to his/her notice in carrying out functions under the NWPP.

Subclause (3) enables a member or a staff member to disclose to a judge or magistrate the person's location and circumstances where that information is necessary to determine a proceeding, under Commonwealth law e.g. access proceedings under the Family Law Act 1975. The information must be provided in chambers and can only be given to the judge or magistrate.

Subclause (4) provides that information given to the judge or magistrate under subclause (2) can only be disclosed in accordance with the Act.

#### **Clause 27      Identity of participants not to be disclosed in court proceedings etc.**

Unless it considers that it would be contrary to the interests of justice, in a situation where the identity of a participant in the NWPP is at issue or may be disclosed, a court, tribunal, Royal Commission or other commission of inquiry must hold that part of the proceedings in private and must make an order for the suppression of publication of evidence to ensure that the participant's identity is not disclosed.

#### **Clause 28 Transitional**

Subclause (1) states that Authorities which are now prescribed authorities under subsection 8(2A) of the Australian Federal Police Act 1979 are deemed to have been declared "approved authorities" for the purposes of this Act.

Subclause (2) provides that persons who were, immediately before the commencement of the Act, in the AFP program known as the Witness Protection Program become participants from that date.

#### **Clause 29      Amendments of other Acts**

This clause details the Acts which are amended in the Schedule.

#### **Clause 30      Regulations**

Allows the Governor-General to make regulations permitted to be prescribed and required to give effect to the Act.

#### **Schedule**

The Schedule to the Bill makes consequential amendments to the Administrative Decisions (Judicial Review) Act 1977, the Australian Federal Police Act 1979, and the Marriage Act 1961.

The effect of these amendments is:

- . to exempt decisions relating to the National Witness Protection Program from review under the Administrative Decisions (Judicial Review) Act 1977;
- . to the repeal the arrangement provisions with approved authorities in subsection 8(1) of the Australian Federal Police Act 1979 as they will be relocated in Clause 6 ;
- . to amend the secrecy provision (s.60A) in the Australian Federal Police Act 1979 to enable the Commissioner to authorise the members/staff members to be interviewed, for example, by an officer from the Commonwealth Ombudsman's office in relation to an investigation under the Complaints (Australian Federal Police) Act 1981 or by a state police officer in a murder investigation;
- . to enable the Commissioner to issue a certificate which a Registrar or marriage celebrant can treat as satisfying the requirements of section 42 of the Marriage Act 1961 as to the identity and marital status of the parties.



