

# Chapter 1. Introduction

A prominent Australian judge said that ‘a function, without more, of any civilised society is to protect from harm those who serve its institutions, and this includes witnesses in the court system.’<sup>1</sup>

Witness protection programs enable the protection of informants and witnesses in cases involved in the fight against serious and organised crime.<sup>2</sup> While the operation of the programs across Australia consumes personnel and budgets of all Australian police forces, surprisingly little is known about them. There has been no attempt in Australia to systematically analyse their establishment, operation, successes or failures or to assess their effectiveness. This is also true in other countries, for example, Cetin<sup>3</sup> notes that his own research into witness protection arrangements in the United States and Turkey in 2010 ‘... is exploratory in nature’ and Fyfe and McKay<sup>4</sup> said that research into witness protection is in its infancy.

Given Cetin and Fyfe and McKay’s summation and noting the lack of scholarly research in the United States of America, where witness protection was established in 1970, the absence of serious academic investigation in Australia is not a cause of surprise and was expected.

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<sup>1</sup> Parliamentary Joint Committee on the National Crime Authority, Parliament of Australia *‘Witness Protection’* (1988) referring to the submission from the Hon. A. R. Moffitt, 2.

<sup>2</sup> Whistle-blower programs and legislation, witness protection arrangement in respect of custodial matters and witness protection arrangements under migration laws in matters of human trafficking, are not addressed in this research. Those areas, while relevant in terms of the safety and security of persons providing information to authorities, are not the focus of this work.

<sup>3</sup> H.C. Cetin, *The Effectiveness of the Witness Protection Program in the Fight Against Organised Crime and Terrorism: A Case Study of the United States and Turkey* (2010), ii.

<sup>4</sup> Nicholas R. Fyfe and Heather McKay, ‘Police protection of intimidated witnesses: A study of the Strathclyde Police Witness Protection Programme’ (2000) 10 *Policing and Society* 277, 280.

Statutory frameworks for the operation of witness protection programs in Australia came into being from 1994, following the work of the Parliamentary Joint Committee on the National Crime Authority (PJC).<sup>5</sup>

This thesis addresses the deficiency or omission in scholarly investigation into witness protection in Australia by examining witness protection against the six primary themes identified by the PJC.<sup>6</sup> The themes are interpreted, for the purposes of this study, as: (1) the cross-jurisdictional coordination of witness protection arrangements; (2) the inclusion of witnesses in programs;<sup>7</sup> (3) the re-identification of participants included in a witness protection program; (4) the requirement for the confidentiality of the participants and the programs; (5) fast tracking cases involving protected witnesses; and (6) governance and accountability. This thesis contends that there is little accountability for the operators of witness protection programs, although good governance requires transparency and accountability, while still protecting the identity and location of participants in the program.

The central argument of this thesis is that a review of the legislation and the operation of the programs from a national and a jurisdictional perspective in Australia is timely and is required. Whilst reading in this area, it became apparent that there were no scholarly reviews of the witness protection programs and a lack of academic discourse in this area of the law in Australia. The lack of scholarly investigation into witness protection since the passing of the legislation in 1994 means there are significant knowledge gaps in the understanding of witness protection and in its evolution in Australia. This deficit, it is argued, justifies the research.

The level of secrecy that shrouds witness protection programs hampers a robust review and while secrecy regarding the location and identity of the

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<sup>5</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1.

<sup>6</sup> Ibid.

<sup>7</sup> In order to appreciate the issues a participant in a witness protection program must contend with, the thesis contains a scenario as background for the reader, which is included at Annexure 1.

participant is essential, the reasons for that secrecy are less obvious and less justifiable when considering the administration and operation of the programs per se.

This research is ground breaking because no similar studies have been undertaken in Australia. This is both positive and negative for this research. Positive because the thesis will address issues needing attention and is an original work, but negative because little academic research material was available and alternative hypotheses were not established and, therefore, open to debate.

The thesis examined the reports of a range of Australian government inquiries<sup>8</sup> to collect data on the development and operation of protection programs here. These reports and literature from overseas provided context on witness protection in Australia in this thesis. In addition, the thesis explored a number of government reviews<sup>9</sup> to provide a more holistic understanding of issues relating to the operation of witness protection programs. An attempt was made with very limited success to gather data through empirical research.

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<sup>8</sup> G McGrath and D Hailes, 'Project Epsilon: Witness Protection - Interim Report' (National Police Research Unit, September 1984); G McGrath, 'Project Epsilon: Witness Protection Interim Report II - Immediate Measures' (National Police Research Unit, October 1984); Parliamentary Joint Committee on the National Crime Authority, above n 1; Parliamentary Joint Committee on the National Crime Authority, Parliament of Australia, *Witnesses for the Prosecution: Protected Witnesses in the National Crime Authority* (2000); Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the future impact of serious and organised crime on Australian society* (2007); New South Wales, Royal Commission into Allegations of Organised Crime in Clubs (Commissioner: The Honourable Mr Justice Moffitt, 1974); Commonwealth, Royal Commission on the activities of the Federated Ship Painters and Dockers Union (Commissioner: Mr Frank Costigan, QC, 1982-1984); Commonwealth, Royal Commission of Inquiry into Drug Trafficking (Commissioner: The Hon Mr Justice D G Stewart, 1983); Commonwealth, Australian Royal Commission of Inquiry into Drugs (Commissioner: The Hon. Mr Justice E. S. Williams, 1980); Commonwealth, Royal Commission into Drug Trafficking (Commissioner: The Honourable Mr. Justice Woodward, 1979).

<sup>9</sup> Hon Derrick Tomlinson MLC, Parliament of Western Australia, *Interim Report of the Select Committee on the Western Australian Police Service* (1996); Joint Standing Committee on the Corruption and Crime Commission, Parliament of Western Australia, *Inquiry into the Future Operation of Witness Protection Programmes in Western Australia: Interim Report on ACC Reports into the Death of a Protected Witness: Report No. 17* (2006); Len Roberts-Smith RFD QC, 'Review of the Western Australia Police Witness Protection Program' (2000); Office of Police Integrity Victoria, 'Review of the Victoria Police Witness Protection Program' (2005); Parliament of New South Wales, *Review of the Witness Protection Act 1995: A Report by the Minister for Police* (2001).

The research compared witness protection arrangements in the United Kingdom, Canada and the United States of America to those in Australia. Those comparisons enabled analysis of the similarities and differences in the Australian experience. They reinforced specific points made in the thesis. References are also made to programs operating in other countries to support discussion in the thesis on issues such as administrative and legislative arrangements and the location of witness protection programs in law enforcement agencies or other government departments or agencies.

In addressing the legislative and practice and procedure issues, some observations and recommendations are made about possible reforms, both in the operation of witness protection programs and in court procedures. It is anticipated these reforms could lead to greater coordination, facilitation and accountability and more uniform legislation. The recommendations identify arrangements that would potentially be more cost effective and that could encourage greater confidence about safety and security while reducing the time a participant is included in a program.

Despite limitations the study achieves two specific outcomes: it draws together strands of information to build a consolidated and comprehensive picture of witness protection in Australia and it identifies and critically examines witness protection through the prism of the six primary themes set out and explored in the study. It also provides invaluable, and new, feedback from practitioners working in the field that is not available anywhere else.

## **1.1 The context: what is witness protection?**

Witness protection is a systematic method of operation available to police to protect witnesses and informants who come forward to provide evidence and information to assist police investigating serious and organised crime. In the United States of America, witness protection was said to be one of 'the most effective law enforcement tools for organized crime',<sup>10</sup> but problems

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<sup>10</sup> Fred Montanino, 'Unintended victims of organised crime witness protection' (1987) 2(4) *Criminal Justice Policy Review* 392, 405.

emerged in the United States of America because no clear definition of the boundaries of protection were set. The United Nations Office on Drugs and Crime (UNODC) described witness protection as the cornerstone of a successful criminal justice system.<sup>11</sup> The UNODC described<sup>12</sup> witness protection programs as formal covert programs, which have strict admission criteria and provide arrangements for the relocation and re-identification of witnesses who cooperate with law enforcement agencies and whose lives are threatened as a result of that cooperation. For the purposes of this thesis, a witness was described by the PJC, in its 1987/88 report when it said<sup>13</sup> that witnesses could be divided into four categories: someone who observes a crime; the informer; an undercover agent who may or may not be a police officer; or the accomplice in a crime or crimes, who may wish to give Queen's evidence in return for considerations. A list of definitions of common and useful terms used in this thesis can be located at Annexure 2.

Protection arrangements provided by police agencies or protection providers are many and varied. They range from the re-identification and relocation of participants at one end of the spectrum to close personal protection around the clock at the other, with a myriad of alternative arrangements in between. The PJC expressed<sup>14</sup> a clear preference for relocation under a new identity over 24 hour guarding in so-called 'safe houses'. Although the relocation and re-identification of participants may be the most appropriate methodology, operational police officers with the responsibility for planning and providing those arrangements are best placed to make such decisions. The considerations that police have, both short and long term, are those required in the best interests of the safety and security of the participant. The key assumption of witness protection is that informants will be protected from threats and risks arising from their

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<sup>11</sup> [www.unodc.org/unodc/en/organised-crime/index.html](http://www.unodc.org/unodc/en/organised-crime/index.html)

<sup>12</sup> United Nations Office on Drugs and Crime, 'Good Practices For The Protection Of Witnesses In Criminal Proceedings Involving Organized Crime' (2008) 4, 5, 46.

<sup>13</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, citing the opinion of D. H. Peek of Counsel, published as Project Epsilon - Interim Report III (National Police Research Unit, Adelaide, 1984) 5-6.

<sup>14</sup> Ibid 72.

cooperation with law enforcement or judicial authorities and their giving evidence in criminal matters.

Given the financial impact for police force budgets and drastic changes in the lives of the persons concerned, witness protection programs are considered to be a last resort.<sup>15</sup> They are reserved for serious cases in which the witness's testimony is crucial to the prosecution and there is no alternative way of ensuring the security of the witness. Entry into a witness protection program is often managed within legislative frameworks and there must be a real threat to the life or safety of the witness.

A major reason for the introduction of witness protection both in Australia and internationally, was concern about organised crime and bringing criminals to justice.<sup>16</sup> The introduction and use of witness protection programs to protect witnesses and informants has had a positive effect. This is supported by research<sup>17</sup> on the early days of witness protection in the United States of America and the investigation of the Italian mafia in that country. Organised crime, however, has continued to flourish despite the efforts of authorities to disrupt and dismantle it, including through the use of witness protection. Questions arise about the effectiveness of extant witness protection arrangements in Australia, whether they are meeting their objectives and about the strengths and weaknesses, successes and failures of the programs.

Recognising the continued growth of serious and organised crime, the then Prime Minister, Kevin Rudd, integrated serious and organised crime with the national security arrangements in his 2008 National Security Statement.<sup>18</sup>

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<sup>15</sup> Piotr Bakowski, 'Witness protection programmes: EU experiences in the international context' (Library of the European Parliament, 2013); Karen Kramer, 'Witness Protection as a key tool in addressing serious and organised crime' (2010) [http://www.unafei.or.jp/english/pdf/PDF\\_GG4\\_Seminar/Fourth\\_GGSeminar\\_P3-19.pdf](http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_P3-19.pdf).

<sup>16</sup> See Chapter 2 History of Witness Protection.

<sup>17</sup> Fred Montanino, 'Protecting organized crime witnesses in the United States' (1990) 14(1) *International Journal of Comparative and Applied Criminal Justice* 123, 127-128.

<sup>18</sup> Australian Government, 'The First National Security Statement to the Australian Parliament' (2008) [https://www.dpmc.gov.au/media/statement\\_2008\\_12\\_04.cfm](https://www.dpmc.gov.au/media/statement_2008_12_04.cfm).

This initiative ensured national security processes and resources also came into play, whereas previously serious and organised crime had been seen predominately within the law enforcement remit. It is likely to be too early to tell whether the introduction of serious and organised crime into the national security domain has had a positive effect on its disruption. It is unlikely that the results of any national security effort will be made public, but where criminal investigations have been assisted by this intelligence collection, the results should be seen in higher rates of prosecutions. These investigations may or may not result in a higher number of witnesses entering witness protection programs.

Formal witness protection laws have operated in Australia since 1994 with the passage of the *Witness Protection Act 1994* (C'th) and the subsequent passing of complementary laws in each Australian state and territory (although specific legislation was passed in Victoria in 1991).<sup>19</sup> The legislation provides a statutory basis for the inclusion of persons into witness protection and their relocation and re-identification.

Legislation at the Commonwealth, state and territory levels sets out similar requirements and obligations albeit differing in some ways, which are discussed in Chapter 5 of the thesis. Each Australian program operates independently of the others, reflecting the autonomy of the states and territories. The Australian constitution guarantees this independence in respect of law and order and it preserves states' sovereignty.<sup>20</sup> This independence and the secrecy provisions of the various witness protection acts create problems in respect of the national coordination of witness protection arrangements between programs and between states.

While the PJC suggested<sup>21</sup> there was insufficient demand for a national program in Australia, the participation rate for inclusion in witness

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<sup>19</sup> *Witness Protection Act 1991* (Vic).

<sup>20</sup> *Commonwealth of Australia Constitution Act*, Printed on 1 January 2012, Overview and specifically Chapter 5, s 106, Saving of Constitutions, s 107 Saving of Power of State Parliaments and s 108 Saving of State laws.

<sup>21</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, (x), 77 [5.32].

protection programs in Australia is difficult to quantify because New South Wales and Victoria do not make their data on inclusion of witnesses into the program available. Other agencies provide some data through annual reporting, but in most cases it is not possible to be precise about the number of participants included in the program over the life of the program. On the available data it is possible to say that the National Witness Protection Program (NWPP), the Queensland Crime and Misconduct Commission (CMC), South Australia and Western Australia have included over 1,110 participants in their witness protection programs since 1995, although the figure would be higher if a full account of participants in these programs over the past 18 years was provided. The total cost of witness protection from 1995 to 2013 is \$69,288,347.99 or an average of \$62,365.74 per participant. Again though, this figure is deficient because only the NWPP costs are fully disclosed for the period. Partial figures are available for Queensland and Western Australia and only some are available for South Australia. There are no estimates of the participation rate or costs associated with witness protection in New South Wales and Victoria. The Northern Territory and Tasmania, which have legislation and programs, have had no participants in their programs at all. Despite this, both jurisdictions were invited to participate in the research. Caslon noted<sup>22</sup> that in the United States of America, the anticipated rate of persons requiring attention in the federal witness protection program was up to 50 people per year. By 1997, 20 to 25 people per month were being added, along with dependents. The actual participation rate as of 1997 was some 16,000 individuals assisted under the witness protection program in the United States, with a reported 17,100 by late 2004. Extrapolating those figures, the current participation rate in the United States of America could be in the order of 18,671 participants.

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<sup>22</sup> Caslon Analytics, *Secrecy Guide: Witness Protection*  
<http://www.caslon.com.au/secrecyguide19.htm>; [http://archive-  
au.com/page/489125/2012-10-20/http://www.caslon.com.au/secrecyguide19.htm](http://archive-au.com/page/489125/2012-10-20/http://www.caslon.com.au/secrecyguide19.htm);  
<http://apo.org.au/node/19050>.

Witness protection arrangements are increasingly being introduced in other countries.<sup>23</sup> The United Kingdom, for example, passed legislation in 2005 that established the *Serious Organised Crime Agency*, which made provision, for the first time, for the protection of witnesses and other persons in organised crime cases on a national basis.

Law enforcement across jurisdictions today is disjointed in its approach to witness protection and to providing a safe environment from which informants and witnesses in serious and organised crime cases can give information to police. The flow of information is critical to further investigations into the actions of criminal syndicates. This thesis argues that the lack of coordination of witness protection arrangements across Australian jurisdictions needs addressing.

## **1.2 The research problem**

The research seeks to provide a critical examination of witness protection in Australia and to do this the study asks: what is witness protection; why do we need it; what arrangements exist in Australia; how effective is witness protection in Australia; and could Australian authorities do it better? These questions, except for the last, arose directly from the primary themes defined by the PJC.

## **1.3 The background to the research**

The impetus for this study was a significant personal interest in witness protection. The thesis considers what research into witness protection would achieve and discusses whether the current witness protection arrangements are the most effective or whether there are other models that may achieve better outcomes. The gaps in knowledge identified in the research are also grounds for undertaking future scholarly research on the topic of witness protection in Australia.

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<sup>23</sup> Nicholas Fyfe and James Sheptycki, 'International trends in the facilitation of witness co-operation in organised crime cases' (2006) 3(3) *European Journal of Criminology* 319, 320.

While there have been reviews of witness protection in other countries little has been done in Australia. This thesis relied heavily on the work done in government-sponsored inquiries at the Commonwealth level, but also state government reviews of the operation of their programs. Research looking at international studies on witness protection programs in Europe, Britain, the United States of America and Canada was also undertaken to enable comparisons with programs in Australia.

## **1.4 The aim and purpose of the research**

The aim of this research is to raise awareness of, and bring scholarly rigour to, an area of the law not addressed in any great depth by academics, the judiciary or policy makers since the enactment of legislation at the Commonwealth and State and Territory level in the 1990s. The thesis seeks to answer the questions posed by the research problem and to address some of the issues expressed by the argument, that after 30 years, (only 18 of which have been under legislation) it is time for a complete review of the operation of programs at the state, territory and federal level.

An additional rationale for the research and thesis is that while witness protection appears, to date, to have been relatively successful in providing for the safety and security of participants, that security might, in the future, be tested by social media and other technological advances. Social media, facial recognition software and biometrics will make it more difficult to relocate participants. Their identity in a new name cannot be protected from Facebook, Instagram and other social networking mediums. If the participant had a presence in the old name, their new name and subsequently their location could be discovered through a chance photograph being posted online and both instances of the person's photograph being matched up. This issue is explored further in Chapter 9, however, no solutions are proposed in this thesis.

This thesis proposes an alternative model for witness protection at the national, state and territory levels, which may provide better coordination of

the programs through a national approach. A three-tiered structure involving the existing national witness protection program and state and territory level programs is proposed along with a uniform witness protection legislation to support that structure and methodology. This structural arrangement reflects a multi-jurisdictional task force approach in police operations preferred by Justice Woodward.<sup>24</sup> The findings of the PJC<sup>25</sup> are particularly instructive in this context and also informed the development of the alternative model, which is described in more detail in Chapter 9 and at Annexures 11 and 12.

The research and the thesis will hopefully generate discussion leading to reforms of legislation and practice and procedure. The thesis will be provided to the Australian Attorneys General Departments and police commissioners in the hope that the effectiveness of current arrangements will be reviewed with greater knowledge of their strengths, weaknesses, gaps and issues.

## **1.5 Outline of the thesis**

This thesis is divided into 10 chapters. The Introduction, Chapter 1, sets out the context of the research; a statement of the problem and the central argument; the theoretical framework for it; the aims of the research; and a brief description of the research methodologies.

Chapters 2 and 3 cover the history, development and evolution of witness protection programs in Australia, Canada, the United Kingdom and United States of America. They describe what is known about the key themes of witness protection and the sub-sets of witness protection itself, including the emergence of organised crime, as the catalyst that convinced government that such programs were necessary. The Literature Review provides a thematic examination of the available literature from scholarly research in the four jurisdictions.

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<sup>24</sup> Woodward, above n 8, 1611-1612.

<sup>25</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 82 [5.9].

Chapters 4, 5 and 6 explore by way of documentary examination and thematic analysis, the Australian government inquiries into and reviews of the programs, the legislative arrangements and the policy issues surrounding witness protection respectively. Divergences between the various Australian Witness Protection Acts are explored and amendments to the legislation are noted. Comparisons of the legislation in Australia, the United Kingdom, United States of America, Canada and the UNODC Model Witness Protection Bill are discussed.

The research methodologies are explained in Chapter 7 including the application of a mixed methods approach – qualitative and quantitative methods and triangulation for the empirical research – and thematic analysis of relevant documents. The rationale for selecting these methods over other methodologies, the cohorts approached for the empirical research and the reasons for those selections are also described.

Chapter 8 examines and analyses the results of the empirical research. Issues are identified that highlight the conflicts, inconsistencies and impediments to the effective operation of witness protection in Australia. Where empirical data is available, the study identifies what works well and why, and where data is not available it makes observations concerning the limitations this has caused. Witnesses and participants of the witness protection programs were never intended to be included in the study and online surveys were not developed for them to complete. This is, perhaps, an avenue for future research.

The final two chapters, 9 and 10, draw together the issues to provide discussion and conclusions about the information the thesis collected and generated. The thesis puts forward a range of conclusions based on the documentary examination and the limited empirical research.

An evaluation of the effectiveness of the programs was planned, drawing on information elicited from the request for information and that on the public record. This was to be a key component of the research and might have given rise to some discussion about the benefits of witness protection in the fight

against organised crime. The analysis, however, was incomplete because many of the metrics sought were not supplied by the police forces. The limited information available through annual reports to parliaments in the Commonwealth, South Australia, Western Australia and Queensland was used to construct a partial picture of the number of participants in Australian programs and the overall cost associated with their operation. Recommendations for refining the delivery of witness protection and the statutory frameworks that support it are also made in this chapter. Reforming witness protection arrangements and practices in Australia remains a key goal of the thesis and the research.

## **Chapter 2. History of Witness Protection**

This chapter compares the development of witness protection in Australia with reference to its development in the United States of America, Canada and Britain. The four countries chosen for the comparison adopt similar adversarial legal systems rather than the inquisitorial systems adopted in many European countries and in Asia. They run programs as a function of the police forces or law enforcement agencies and each of the countries have programs established at the state, provincial or municipal levels as well as at the federal or national level. All adopted similar legislation albeit with unique provisions that reflect jurisdictional legal systems and customs.

This chapter also refers to the development of witness protection arrangements in Europe, particularly citing the work of the United Nations in reviewing existing arrangements. The United Nations released a model witness protection bill,<sup>26</sup> which set out minimum standards all witness protection legislation should contain. The similarities between the general provisions of the United Nations model bill and the legislation in Australia and the other focus countries are identified in the chapter and also in Chapter 5 of this thesis. The chapter also notes the requirements and elements identified in specific research that have parallels to the Australian legislation. This chapter provides a brief chronology of the key developmental stages of witness protection starting with the 1970 program in the United States of America and concluding with the passage of legislation in Britain in 2005.

### **2.1 Background**

Serious and organised crime has been the catalyst for witness protection the world over in the past forty years. Protecting witnesses in criminal matters is not new for the police or the courts, but the methods have evolved, especially in the case of witness protection programs. Arrangements have been made

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<sup>26</sup> United Nations Drug Control Program, 'Model Witness Protection Bill, 2000' (2000).

in the past to ensure the safety of witnesses in a number of ways and these methods will continue to be used in the foreseeable future. The methods used vary depending on the nature of the prosecution, the threats, real or perceived, to the witness and the value of the evidence the witness is to provide.

Protecting people and property is a fundamental duty of a police officer. The powers and duties of the constable at common law affirms that constables '... were to have a special care for the view of arms and for the preservation of peace'<sup>27</sup> and '... liability for the suppression of crime.'<sup>28</sup> Protecting a threatened witness or any person involved in the justice system is the role of police and by extension, witness protection is a role for police or law enforcement agencies. This responsibility was recognised in countries that established witness protection measures under administrative arrangements, within law enforcement and policing agencies, from 1960 onwards. The programs in the United States of America prior to 1970, and those established in Britain, Canada and Australia before legislation was passed, validated the role of police in protecting intimidated and vulnerable witnesses.

Witness protection is not available to all witnesses, nor is it required in the vast majority of cases. It is a facility reserved for exceptional cases to be used as a last resort where other methods are not available or are not appropriate given the circumstances.<sup>29</sup> Some witnesses will only require protection until the conclusion of a trial and others will need a new identity, relocation and protection for longer periods, some for the rest of their lives.<sup>30</sup>

Witness protection exists with strict governance arrangements and admission criteria because of the cost of operating the program and the profound impact on witnesses becoming participants in a formal witness

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<sup>27</sup> H.B. Simpson, 'The Office of Constable' (1895) 10 *The English Historical Review* 625, 630.

<sup>28</sup> Ibid 635.

<sup>29</sup> Bakowski, above n 15, 2.

<sup>30</sup> Ibid 2.

protection program.<sup>31</sup> Witness protection is often used in cases in which the witness's testimony is crucial to the prosecution and there is no alternative way of ensuring their safety.<sup>32</sup>

Witness protection programs can either be based on legislation or on administrative arrangements within police forces in which case they developed as part of a normal police practice or activity. In Australia, prior to the enactment of legislation in 1994, police had developed various methods of protecting witnesses. In Canada and in Britain witness protection was left to police forces until 1996 in the former case and 2005 in the latter. Witness protection programs are generally run by covert units within the police force and are staffed by specially trained officers. In some countries they are part of the police force, while in others such as Italy<sup>33</sup> they are organisationally separated from the police and are situated, for example, within a ministry of the government, the executive or the judiciary.<sup>34</sup> In some countries, such as Belgium, a multi-disciplinary body operates the program.<sup>35</sup>

While programs can operate equally as well in any of the structures referred to above, some academics argue<sup>36</sup> that the protection arrangements should be dealt with independently of the investigative function. This separation, it is suggested,<sup>37</sup> ensures objectivity and minimise the risk of admission to the program becoming an incentive for witnesses to give false testimony. It is argued that this would also ensure the integrity and independence of the program by removing decision-making about admission and protection arrangements from those investigating the crime the witness is giving evidence about.

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<sup>31</sup> Ibid 1-2.

<sup>32</sup> Ibid 2.

<sup>33</sup> F. Allum and N. Fyfe, 'Developments in State Witness Protection Programmes: The Italian Experience in an International Comparative Perspective' (2008) 2(1) *Policing* 92, 93-94.

<sup>34</sup> Bakowski, above n 15, 5.

<sup>35</sup> Ibid.

<sup>36</sup> Kramer, above n 15.

<sup>37</sup> Ibid.

In its 2008 World Drugs report<sup>38</sup> the UNODC noted that 43 systems were examined in the development of the *Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organized Crime*. Of those, 14 jurisdictions (33% of the countries surveyed) had full-fledged witness protection programs that were able to relocate and change the identity of threatened witnesses. A further 4 jurisdictions, (9% of the survey) had enacted new legislation providing for the establishment of witness protection programs, but the programs were not yet operational. Eighteen jurisdictions (42%) had no established programs, but had provided for some form of security measures such as police measures or procedural in-court protection. The remaining seven jurisdictions (16%) had no witness protection measures at all.<sup>39</sup> It is significant that 36 (84%) of the jurisdictions examined by the United Nations in this study recognised the importance placed on witness protection, of some description, as an element of the criminal justice system in many countries. Almost half (18 or 42%) either had or had legislated for statutory programs, another 18 (42%) might have programs established under administrative arrangements within their police forces or other government structures. It is therefore likely that those 18 countries have arrangements commensurate with early programs in many other countries including Australia.

Serious and organised crime represents a significant problem in the Asia Pacific region, Europe, South America and other parts of the world that affects Australia.<sup>40</sup> Organised criminal activity in Australia during the past two decades has typically mirrored the patterns of development seen in Europe and North America.<sup>41</sup> The types of activities often associated with organised crime include drugs, money laundering, identity crime, people

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<sup>38</sup> United Nations Office on Drugs and Crime, above n 12, 3.

<sup>39</sup> Ibid 3.

<sup>40</sup> Australian Institute of Criminology, 'The Worldwide Fight against Transnational Organised Crime: Australia' (2004) <http://www.aic.gov.au/publications/tbp/tbp009/part9.html>.

<sup>41</sup> Ibid 6.

smuggling, human trafficking, high tech crime and terrorism.<sup>42</sup>

## 2.2 Witness protection in the United States of America

Witness protection evolved into a statutory witness protection program in the United States of America with the passage of the *Organized Crime Control Act 1970*.<sup>43</sup> It began as a program to assist the criminal justice system in that country in the fight against the Italian Mafia, but over time has become a tool in serious and organised crime cases more generally. The *Organized Crime Control Act 1970* was repealed by the *Witness Protection Reform Act 1984*. Witness protection programs operate in the United States of America at the federal and the state levels in much the same way as in many other countries, including Australia.

The Federal Witness Security Program in the United States of America was the first such scheme. The background to the Act was the limited success of law enforcement in tackling Italian-American organised crime in the 1960s. The particular problem was the Mafia code of *omertà*. This code of silence was making it increasingly difficult for authorities to get members of ‘the mob’ to testify.<sup>44</sup> Mafia organisations used *omertà* as a means of maintaining strict control, threatening death to anyone who broke ranks and cooperated with the police. As a result, witnesses did not come forward with information or provide testimony in prosecutions for the state. Key witnesses were lost through the concerted efforts of crime bosses targeted for prosecution.<sup>45</sup> By providing a high level of security to mob witnesses, including relocation and a change of identity, witness protection became the key to breaking *omertà*.<sup>46</sup>

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<sup>42</sup> Ibid 50.

<sup>43</sup> Fyfe and Sheptycki, above n 23, 321.

<sup>44</sup> P Early and G Shur, *WITSEC inside the Federal Witness Protection Program* (2002).

<sup>45</sup> Montanino, above n 10, 392-408.

<sup>46</sup> Fyfe and Sheptycki, above n 23, 321.

Joseph Valachi was the first member of the Italian-American Mafia to break with the code of silence and was the first person to be offered protection in exchange for his testimony.<sup>47</sup> In 1963, prior to the establishment of a legislatively based witness protection program in the United States of America, Valachi testified before a United States of America congressional committee about the inner structure of the Mafia and organised crime. He feared he would be murdered because of his cooperation and consequently went into protective custody in prison where he died in 1971.<sup>48</sup>

While the Mafia was at the height of its power, Congress passed the *Organized Crime Control Act 1970*. Title V of the Act created the Witness Security Program. Under it the United States Department of Justice<sup>49</sup> established the first legally sanctioned procedure for witness protection. The Act enabled the Attorney General to provide for 'the care and protection of witnesses in whatever manner is deemed most useful under the special circumstances of each case.'<sup>50</sup> The Act contained provisions relating to the criteria for inclusion in the program including that the witness must be a witness in a specific case and that there must be evidence that it is in the interests of justice that the witness be protected. The 1970 Act gave the Attorney General authority to provide protection to the witness and his/her family for as long as was deemed appropriate.

While the program was considered a success and one of 'the most effective law enforcement tools for organised crime',<sup>51</sup> problems were identified almost as soon as it was launched. The witness protection program attracted criticism in the media<sup>52</sup> and by some scholars who argued that the cost to

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<sup>47</sup> United Nations Office on Drugs and Crime, above n 12, 7.

<sup>48</sup> Ibid 17.

<sup>49</sup> Montanino, above n 10, 408.

<sup>50</sup> Fyfe and Sheptycki, above n 23, 321.

<sup>51</sup> Montanino, above n 10, 405; Risdon N. Slate, 'The Federal Witness Protection Program: Its evolution and continuing growing pains' (1997) 16(2) *Criminal Justice Ethics* 20, 20 citing Personal Communication, W. M. Dempsey, Public Information Office, U.S. Marshals Service (Aug. 6, 1997).

<sup>52</sup> F. P. Graham, *The Alias Program* (Little Brown, 1977).

society for the success of the program was too high<sup>53</sup> and that the boundaries for protection were unclear.<sup>54</sup> They said<sup>55</sup> that there was little or no provision made for unintended victims of the witness' relocation and there were potential threats posed to the community if the participant committed crimes in the community to which they were relocated.<sup>56</sup> Some participants committed new crimes after being admitted into the program and felony crimes committed by participants drew national attention and brought about extensive adverse media coverage.<sup>57</sup>

The same scholars expressed concerns that those to whom the participant owed a civil obligation in respect of unpaid debts accrued prior to entering the program were disadvantaged and that the participant was able to avoid family law obligations. They identified that staffing and the lack of expertise of officers in the United States Marshal's Service (USMS) led to breaches in security, delays in processing documents needed for new identities and welfare issues for the participant and their families settling into new lives that the Marshal's officers were ill equipped to deal with.

Finally, prior to 1984 an issue had also arisen in respect of a person's constitutional right to protection in the United States of America. Lawson wrote,<sup>58</sup> albeit eight years after the *Witness Protection Reform Act 1984* (USC) was introduced, about the concept of witness protection dating back to 1895 when the courts<sup>59</sup> first grappled with the concept of protecting witnesses who gave evidence and as a result faced 'retributive violence.'<sup>60</sup> The court

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<sup>53</sup> Joshua M. Levin, 'Organized Crime and Insulated Violence: Federal Liability for Illegal Conduct in the Witness Protection Program' (1985) 76(1) *The Journal of Criminal Law and Criminology* 208, 211.

<sup>54</sup> R. J. Lawson, 'Lying, cheating and stealing at government expense: striking a balance between the public interest and the interests of the public in the witness protection program' (1992) 24 *Arizona Law Journal* 1429, 1435-1436.

<sup>55</sup> Slate, above n 51; Lawson, above n 54; Levin, above n 53; Montanino, above n 10.

<sup>56</sup> Levin, above n 53, 211.

<sup>57</sup> *Ibid.*

<sup>58</sup> Lawson, above n 54, 1433-1434.

<sup>59</sup> *In re Quarles and Butler* 185 U.S. 532 (1895)

<sup>60</sup> *Ibid* 535.

identified that the American government's reciprocal duty to protect 'arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action.'<sup>61</sup>

This becomes important in understanding the court's approach in later cases where witnesses to crime, who gave evidence in subsequent prosecutions, sought to assert a right to protection from the government. In *Schuster v City of New York*<sup>62</sup> the court agreed that the government owed a special duty of reasonable care to an individual in some situations, but also noted the common law cause of action against the government for its failure to provide that protection.<sup>63</sup> In *Swanner v United States*<sup>64</sup> the court sought to 'develop standards for measuring government responsibility for the dereliction of its duty to protect.'<sup>65</sup> In the context of witness protection under the 1970 Act, Lawson claimed<sup>66</sup> that due to the government's failure to develop a structured format and selection process for witness protection, boundaries to protection obligations were not clear.<sup>67</sup>

Despite a number of challenges in the courts, it was affirmed that the Attorney General is vested with the broad discretion to determine who would receive witness protection, under what circumstances and what protection measures would be used. In *Garcia v United States*<sup>68</sup> the court reaffirmed the discretionary authority of the Attorney General, but also expressly rejected the idea that by not including a person in witness protection the government had failed in its constitutional duty. Lawson argued<sup>69</sup> that the court went one step further by declaring that any benefits a

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<sup>61</sup> Ibid 536.

<sup>62</sup> 154 N.E. 2d 534 (N.Y. 1958).

<sup>63</sup> Ibid.

<sup>64</sup> 406 F.2d 716, 716 (5<sup>th</sup> Cir. 1969).

<sup>65</sup> Lawson, above n 54, 1434.

<sup>66</sup> Ibid 1435-1436.

<sup>67</sup> *Abbott v Petrovsky* 717 F.2d 1191, 1192 (8<sup>th</sup> Cir 1983).

<sup>68</sup> 459 U.S. 832 (1982).

<sup>69</sup> Lawson, above n 54, 1438.

participant receives are a privilege, not a right. Lawson went on to say<sup>70</sup> that giving evidence, as a government witness, does not entitle the individual to inclusion in the program and that, even once a person is in the program, the government can terminate protection without constitutional implications.<sup>71</sup>

Of the early critics of witness protection, Fred Graham, according to Cetin<sup>72</sup> described the program as ‘an unknown government program formed in duplicity, fraught with bureaucratic incompetence and contemptuous of justice.’ Graham questioned the need for such a secretive program and the need to provide criminals with new identities. He argued that the Act only required governments to provide temporary safe haven for witnesses, but that the expanded authority for the Justice Department to spend funds meant that the program could provide whatever additional protection and assistance it thought necessary. The McClellan Committee inserted the words ‘for the care and protection of such witnesses, to be used in whatever manner is deemed most useful under the special circumstances of each case.’<sup>73</sup> Graham argued<sup>74</sup> that this addition exploited the imprecise language of the Act and created legal and moral problems by erasing the past of many ex-criminals and re-assimilating them back into society.

Against the background of ongoing criticism and public disquiet, two inquiries were undertaken. Firstly the Department of Justice Department established a Witness Protection Review Committee in 1977<sup>75</sup> to review the inadequacies of the program and make recommendations for improvement. Secondly, the Comptroller General of the United States of America<sup>76</sup>

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<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup>Cetin, above n 3, 8.

<sup>73</sup> Graham, above n 52, 43.

<sup>74</sup> Ibid.

<sup>75</sup> Witness Security Program Review Committee, 'Witness Security Program Review reprinted in Witness Protection Program: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 95th Congress, 2nd Session 316' (1978).

<sup>76</sup> The Comptroller General of the United States, 'Changes Needed in the Witness Security Program 7' (1983).

reviewed, in particular, the problems third parties faced as a result of the witness protection program. Congress reviewed<sup>77</sup> the structure and operation of the witness protection program. It focussed on the need to recognise and place a higher value on the rights and interests of the public when those rights and interests conflicted with the purpose of the program.<sup>78</sup> This review led to legislative reform and the *Witness Security Reform Act 1984*, Part F of Chapter XII of the *Comprehensive Crime Control Act 1984* (Pub.L. No. 98-473) was enacted.

The Act required the program to 'provide protection and security by means of relocation'<sup>79</sup> for witnesses who testify against 'persons involved in organized crime activity or other serious offenses.'<sup>80</sup> Through these measures the United States Attorney General guaranteed the protection of witnesses who agreed to testify against members and activities of the organised crime groups. The Act strengthened the admission thresholds by several measures including requiring an evaluation of the threat the witness poses to the community they are relocated into.<sup>81</sup> A memorandum of understanding is now required<sup>82</sup> reinforcing the participants' obligations whilst included in the program and outlining actions to be taken in the case of the participant breaching the MOU.

Offences were created<sup>83</sup> for revealing information about the inclusion of a witness in the program. A compensation fund for victims of crimes committed by participants in the program was established.<sup>84</sup> The rights of other persons, for example in family law matters involving custody and or

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<sup>77</sup> Nicholas Fyfe and James Sheptycki, 'Facilitating witness co-operation in organised crime cases: an international review' (Home Office, 2005) <http://webarchive.nationalarchives.gov.uk/20110218135832/http://rds.homeoffice.gov.uk/rds/pdfs05/rdsolr2705.pdf> 4; Lawson, above n 54, 1432.

<sup>78</sup> Lawson, above n 54, 1446.

<sup>79</sup> U.S Department of Justice, United States Attorneys Manual 9-21.020 (1997).

<sup>80</sup> Ibid.

<sup>81</sup> *Witness Security Reform Act 1984* (USC) ss 3521(c); Lawson, above n 54, 1450.

<sup>82</sup> *Witness Security Reform Act 1984* (USC) ss 3521(d)(1); Lawson, above n 54, 1450-1451.

<sup>83</sup> *Witness Security Reform Act 1984* (USC) ss 3521 (b)(6).

<sup>84</sup> Ibid ss 3525; Lawson, above n 54, 1454.

access/visitation rights and previous debts of the participant, are now ensured.

Assessments of the risk or threat to the witness arising from their participation in the trial and the value of the evidence they would provide to the prosecution case became preconditions of inclusion in the program.<sup>85</sup> A requirement<sup>86</sup> that there must be no other way to reasonably provide for the safety and security of the witness other than to include them in a program was also included. The witnesses' ability to respect the rules of the program and the constraints it imposes as well as a psychological profile of each witness are also now conditions of entry to the program.<sup>87</sup> The Office of Enforcement Operations is required to submit a quarterly report to the Deputy Attorney General detailing the results of the testimony provided by relocated witnesses.

Lawson noted<sup>88</sup> that at one level, these new provisions clearly represent an advance on the original legislation and at another, even with these improvements, the government's policy of witness protection appeared to place harm to the public from organised crime above harm to the public from protecting witnesses.<sup>89</sup> Policy makers, she claimed, were prepared to accept a level of unintended victimisation that might result from a policy of relocating individuals of whom the overwhelming majority were criminals.<sup>90</sup> According to Lawson,<sup>91</sup> the 1984 reform Act largely improved innocent third parties' rights by providing 'a degree of compensation for woeful wrongs wrought by the program.'<sup>92</sup> It 'made the fundamental idea of a formal program to protect and relocate witnesses across the country more palatable

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<sup>85</sup> *Witness Security Reform Act 1984* (USC) ss 3521(c).

<sup>86</sup> Lawson, above n 54, 1450 and see particularly footnote 128 in Lawson's article.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid* 1444.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid* 1455.

<sup>92</sup> Cetin, above n 3, 9.

and somewhat less intrusive.’<sup>93</sup>

In the 1980s, especially under the ‘war on drugs’ policy instituted by the Reagan Administration, eligibility for inclusion in the witness protection program was extended. It came to include not only witnesses of Mafia crimes, but also witnesses of other types of organised crime, such as those involving drug cartels, and violent street, motorcycle and prison gangs.<sup>94</sup>

While the ‘authors of the WPP envisaged that up to 50 people per year would require protection by 1997 some 20 to 25 people per month were being added, along with dependents.’<sup>95</sup> Between 1971 and April 2011 more than 8,300 witnesses (mostly collaborators with justice) and 9,800 of their family members took part in the program. After the inception of witness protection, many witnesses were in dire need of protection from the Mafia. Over 4,000 witnesses and 8,000 family members participated in the program within the first decade.<sup>96</sup> The program itself was so effective in supporting the criminal justice system that the number of participants reached over 7,500 witnesses and their 9,600 family members within three decades.<sup>97</sup> It should be noted that the actual participation rate as of 1997 was some 16,000 individuals who had been assisted under the witness protection program in the United States of America, with a reported 17,100 by late 2004.<sup>98</sup>

The American Federal Witness Protection Program has been described as ‘the paradigm program’<sup>99</sup> on which many other countries’ witness protection programs are modelled. It has become a model for numerous jurisdictions around the world. Canada and Australia operate similar national programs,

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<sup>93</sup> Lawson, above n 54, 1455.

<sup>94</sup> Cetin, above n 3, 11.

<sup>95</sup> Caslon Analytics, above n 22, 4.

<sup>96</sup> Cetin, above n 3; The Comptroller General of the United States, above n 76.

<sup>97</sup> T. Abdel-Monem, ‘Foreign Nationals in the United States Witness Security program: Remedy for Every Wrong’ (2003) 40(3) *American Criminal Law Review* 1235

<sup>98</sup> Caslon Analytics, above n 22.

<sup>99</sup> Roberts-Smith RFD QC, above n 9, 2.

coexisting with those established by individual states.<sup>100</sup> This thesis argues that rather than coexisting, programs in Australia should be integrated into one cohesive activity with limited distinction between the National Witness Protection Program (NWPP) and state and territory programs.

Noting that the witness protection program developed in the United States of America is the model upon which many other programs are based, the key features of the American model are highly relevant. They include: (1) issues to do with the eligibility of a witness for inclusion in the program, the availability of the program to state and local witness protection programs; (2) inclusion in the witness protection program and the psychological testing and evaluation of the witness prior to inclusion in the program; (3) the relocation and re-identification of participants included in the program and related protective measures; (4) the enforcement of rights and obligations of the participant including the enforcement of judgments in civil actions; (5) the protection of the community into which the protected witness is relocated which is assured in civil actions against the relocated participant; (6) the resolution of complaints or grievances of the participant; and (7) the confidentiality of the participant and the program through offences that now exist for wrongful disclosures.

These key features are immediately identifiable in the Canadian, British and Australian programs as will be seen throughout this thesis. They are consistent with the principles of the European witness protection measures and the framework for witness protection programs recommended by the United Nations.<sup>101</sup> It should also be noted that the key features of the American model are, to a significant extent, aligned to the principal themes of this research as identified in Chapter 1, Introduction.

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<sup>100</sup> Don Boudria, 'House of Commons Debates' (1994) 133(072) *House of Commons Hansard* 4495.

<sup>101</sup> See Chapter 2.6 The United Nations Office on Drugs and Crime and witness protection, 50-53, for discussion about witness protection in Europe.

## 2.3 The Canadian experience with witness protection

The Canadian experience with witness protection dates back to 1984 when the Royal Canadian Mounted Police (RCMP) established a witness protection program in response to the priority given to the fight against major national and international drug smuggling rings.<sup>102</sup> Most witnesses entering the RCMP program at that time were involved with drug trafficking, but the program evolved to include participants who had nothing to do with organised crime.<sup>103</sup>

The program was very secretive and was governed by internal RCMP guidelines and policies to protect the operating arrangements as well as the identity of the participant.<sup>104</sup> The RCMP developed expertise in witness protection operations and a cadre of experienced officers and contacts across Canada to support their operations including for relocations and documents to support identity changes.<sup>105</sup> Some provincial and municipal police forces also created and maintained witness protection programs<sup>106</sup> and usually sought RCMP assistance to obtain federal identity documents. The RCMP assisted with relocating witnesses throughout Canada.<sup>107</sup>

While no witnesses were lost during their participation in the program, witness protection was criticised widely on the basis that the program lacked accountability and the administration was poor. Some participants complained that their expectations were not being met<sup>108</sup> and that there was confusion about the nature of the agreement between some protected

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<sup>102</sup> Gregory Lacko, 'The Protection of Witnesses' (Department of Justice Canada, 2004) 3; Boudria, above n 100.

<sup>103</sup> Boudria, above n 100, 4495.

<sup>104</sup> Lacko, above n 102, 3.

<sup>105</sup> Boudria, above n 100, 4496.

<sup>106</sup> The Ontario Provincial Police, the Quebec Provincial Police and a number of municipal police forces have their own witness protection programs.

<sup>107</sup> Boudria, above n 100, 4495.

<sup>108</sup> Ibid.

individuals and the RCMP and what their responsibilities were.<sup>109</sup> Some said the RCMP was failing to respect the protection arrangements and a number of participants publicised their concerns, risking their own safety. Three relatively high-profile cases<sup>110</sup> highlighted problems to do with the shortcomings of the RCMP's witness protection program.

In response to these criticisms and the public disquiet, Member of Parliament, Tom Wappel, introduced a Private Member's Bill, C-206, *An Act to provide for the relocation and protection of witnesses*, into the House of Commons on 1 February 1994. The aim of the Bill was to give the RCMP witness protection program a legislative base and improve its transparency and accountability. In presenting the Bill to the House, Mr Wappel noted that many people had signed petitions asking the House to set up a witness protection program. He said there were ad hoc witness protection programs across Canada, but that his bill proposed to formalise the arrangement and have witness protection administered by the federal government.<sup>111</sup> Whilst the Bill received support in the House of Commons the government sought further information including an assessment of the costs and effectiveness of the modifications recommended by the Bill. In 1995 the Solicitor General tabled Bill C-78, the *Witness Protection Program Act*, in the House of Commons. Bill C-78 was adopted by the Parliament in 1996 and came into force on 20 June 1996.

The *Witness Protection Program Act 1996* provided the legislative underpinning for protection arrangements and authorised the Commissioner of the RCMP to administer the national program.<sup>112</sup> While the Commissioner was made responsible for the administration of the program, he or she was

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<sup>109</sup> Ibid.

<sup>110</sup> Lacko, above n 102, 4-8, citing the circumstances of the concerns raised by Leonard Mitchell, Douglas Jaworski and Marcella Glambeck.

<sup>111</sup> Debates of the House of Commons, Routine Proceedings, 1 February 1994 <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2332268&Mode=1&Parl=35&Ses=1&Language=E>.

<sup>112</sup> *Witness Protection Program Act 1996* (CA) s 4; Lacko, above n 102, 24 and see particularly footnote 86 in Lacko's report.

empowered by the legislation to delegate<sup>113</sup> certain responsibilities to delegates within the RCMP. These delegated responsibilities included the admission of witnesses to the program and the power to terminate protection and assistance arrangements.

The Act provides, at section 24, for the protection of persons either directly or indirectly assisting any law enforcement agency, International Criminal Court or Tribunal where an arrangement or agreement had been reached with the Solicitor General. Protection can be offered to a witness nominated by any Canadian law enforcement agency. The Act makes access to the program possible for foreign witnesses where the RCMP has an arrangement or agreement in place.<sup>114</sup>

Canadian law enforcement agencies can access the program on a cost recovery basis, but once the police force determines a new identity is required for its participant it must submit an application to admit that person to the federal program.<sup>115</sup> Whilst a relevant police force may have admitted the witness into their program this is not an automatic admission to the federal program. The RCMP may refuse to admit the participant into the federal program.<sup>116</sup> The RCMP must undertake an assessment of the suitability of the person to be included in the federal program and the Solicitor General of Canada must consent to the individual's admittance into the program.<sup>117</sup> In the case of foreigners, the consent of the Minister of Citizenship and Immigration is also required.<sup>118</sup> Once accepted, the RCMP's role is to administer the agreement between the foreign country and its witness. Witness protection, in these cases, is provided on a cost-recovery

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<sup>113</sup> *Witness Protection Program Act 1996* (CA) ss 15(a)-(b).

<sup>114</sup> *Ibid* ss 14(2).

<sup>115</sup> *Ibid* ss 14(1)(a)-(b).

<sup>116</sup> *Ibid* ss 10(a).

<sup>117</sup> *Ibid* ss 14(2).

<sup>118</sup> *Ibid*.

basis.<sup>119</sup>

The criteria for inclusion in the program are set out in the Act<sup>120</sup> and apply to all applicants. Certain information is required by regulation to satisfy the Commissioner that the witness's circumstances warrant inclusion and the witness must enter into an agreement with the Commissioner that describes the obligations of both parties.<sup>121</sup> The agreement requires<sup>122</sup> the RCMP to take reasonable steps to provide the necessary protection and the participant to give all information or evidence required by the investigation or prosecution. The Act sets out<sup>123</sup> those things the Commissioner must be satisfied of before admitting the witness into the program. The threat to the witness and the risk to the community if the witness is included in the program, the value of the evidence the witness will provide and the cost of maintaining the witness in the program as well as the likelihood that the witness will be able to adjust to life in the confines of the program, must be considered.<sup>124</sup> The Commissioner must also be satisfied there are no alternative means by which the witness could be protected.<sup>125</sup>

The Act requires<sup>126</sup> the participant to meet all financial and legal obligations and to refrain<sup>127</sup> from committing federal offences or activities that may compromise their security or that of another participant or the program itself.<sup>128</sup> It provides for the termination of protection and sets out the requirements where protection and assistance is to be terminated.<sup>129</sup>

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<sup>119</sup> Ottawa, Presentation at RCMP Headquarters on the Witness Protection Program, Human Sources and Undercover Program, 21 January 2003; Lacko, above n 102, 13.

<sup>120</sup> *Witness Protection Program Act 1996 (CA)* s 6, 7.

<sup>121</sup> *Ibid* ss 8(a).

<sup>122</sup> *Ibid*.

<sup>123</sup> *Ibid* s 6-7.

<sup>124</sup> *Ibid* ss 7(e), 8(b)(v)-(vi).

<sup>125</sup> *Ibid* ss 7(g).

<sup>126</sup> *Ibid* ss 8(b)(i)-(ii).

<sup>127</sup> *Ibid* ss 8(b)(iv).

<sup>128</sup> *Ibid* ss 8(b)(iv).

<sup>129</sup> *Ibid* ss 9(1).

Termination can occur where there is evidence of a material misrepresentation by the witness or where there is a failure to disclose information relevant to their admission to the program.<sup>130</sup> It may also be justified where there has been a material breach of the protection agreement.<sup>131</sup>

Participation in the program is voluntary and therefore the participant can choose to leave at any time.<sup>132</sup> However, under Canadian law if the participant leaves the program or if protection and assistance is terminated the participant's family is still entitled to receive protection and can remain in the program.<sup>133</sup>

As is the case in the United States of America and in Australia, steps have been taken in the legislation to protect information relating to the identity and location of the participant. The Act creates offences<sup>134</sup> for knowingly disclosing, directly or indirectly, information about the location or identity of the participant or a former participant. Exceptions exist<sup>135</sup> where disclosure will not compromise the participant, another participant or the program itself or where participants are disclosing information about themselves. The Commissioner can also, in some circumstances, disclose information about the participant including where such disclosure is necessary to prevent the commission of a crime.<sup>136</sup> Inclusion in the program does not give the participant any immunity from prosecution for offences committed before being included in the program.<sup>137</sup>

To ensure the transparency of the program, the Commissioner is required to

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<sup>130</sup> Ibid ss 9(1)(a).

<sup>131</sup> Ibid ss 9(1)(b).

<sup>132</sup> Garry Breitkreuz MP, 'Review of the Canadian Witness Protection Program' (House of Commons Canada, 2008), 12.

<sup>133</sup> Ibid.

<sup>134</sup> *Witness Protection Program Act 1996* (CA) s 21 referring to ss 11(1).

<sup>135</sup> Ibid ss 11(2)(a)-(b).

<sup>136</sup> Ibid ss 11(3)(c)(i)-(iii).

<sup>137</sup> Breitkreuz MP, above n 132, 28.

provide an annual report, to be tabled in the Parliament by the Minister for Public Safety, on the general operation of the program.<sup>138</sup> Agreements for protection made before 20 June 1996 were deemed to be made under the relevant provisions of the Act and governed by it.<sup>139</sup>

In cases of emergency the Commissioner can provide protection and assistance for a person not included in the program, but for a period not exceeding 90 days.<sup>140</sup> Funds can also be made available to enable a person to manage their own relocation in certain circumstances including where the witness is not suitable to be included in the program or where the threat level is too low or where the participant does not want to maintain a relationship with the police.<sup>141</sup>

It is difficult to say how many people were in the program at any given time since the numbers fluctuated with the expiration of protection agreements and the elimination of threats to safety.<sup>142</sup> By 1996, on average, the program relocated approximately 50 people per year, but the number grew to closer to 60 or 70 in cases where family members of witnesses were also relocated.<sup>143</sup> For the purposes of this thesis and based on those assumptions, between 1996 and 2013, 850 witnesses and between 170 and 340 family members may have been included in the Canadian program, making an estimated total of 1,190 participants.

## **2.4 The evolution of witness protection in Britain**

In the United Kingdom witness protection was seen as a police function<sup>144</sup> and the development of witness protection arrangements was generally at

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<sup>138</sup> *Witness Protection Program Act 1996 (CA)* s 16.

<sup>139</sup> *Ibid* s 19.

<sup>140</sup> *Ibid* ss 6(2).

<sup>141</sup> Ottawa, Presentation at RCMP Headquarters on the Witness Protection Program, Human Sources and Undercover Program, 21 January 2003.

<sup>142</sup> Mary Clancy, 'House of Commons Debates' (1995) 133(266) *Hansard*, 16917.

<sup>143</sup> Corporal Jeff Warren RCMP, 'Evidence before the Standing Committee on Legal and Constitutional Affairs' (1996) Second Session, Thirty Fifth Parliament(10) *Senate of Canada*.

<sup>144</sup> Fyfe and Sheptycki, above n 77, 12.

the discretion of chief constables in the counties. The introduction of witness protection programs in Britain reflected a growing concern about the murder and attempted murder of witnesses involved in cases of serious and organised crime.<sup>145</sup>

The Metropolitan Police established the first formal witness protection scheme in 1978<sup>146</sup> and although initially dealing primarily with the relocation of 'supergrasses',<sup>147</sup> by the early 1990s half of its clients were 'ordinary witnesses at risk of serious attack.'<sup>148</sup> By the late 1990s, however, a further seven police forces<sup>149</sup> had established similar specialist units to protect witnesses and their families whose lives were in danger. The Association of Chief Police Officers (ACPO) published<sup>150</sup> a national template outlining how high level witness support should be provided.

It is useful to note that supergrasses had been used as witnesses in terrorism trials in Northern Ireland in the early 1980s and these accomplice witnesses, in some cases, may have been offered witness protection. While scholarly research in this early period stops short of specifying the use of witness protection programs, Hyland<sup>151</sup> and Bonner<sup>152</sup> both refer to instances where supergrasses may have been offered incentives to give evidence. These incentives may have included 'a new life and job in a safe environment with their families'<sup>153</sup> or 'a new job or a new life and identity elsewhere'.<sup>154</sup> It is likely that in at least some of the cases referred to by Hillyard and Bonner,

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<sup>145</sup> Fyfe and McKay, above n 4, 280.

<sup>146</sup> Ibid 283.

<sup>147</sup> Ibid.

<sup>148</sup> I. Greig, 'The growing menace of witness intimidation: terrorist intimidation and threats to witnesses' (1994) 4(5) *Intersec: The Journal of International Security* 153-158, 154.

<sup>149</sup> Greater Manchester Police, Hampshire Constabulary, Merseyside Police, Northumbria Police, the Royal Ulster Constabulary, West Yorkshire Constabulary and Strathclyde Police.

<sup>150</sup> Fyfe and McKay, above n 4, 283-284.

<sup>151</sup> Paddy Hillyard and Janie Percy-Smith, 'Converting Terrorists: The Use of Supergrasses in Northern Ireland' (1984) 11(3) *Journal of Law and Society* 335.

<sup>152</sup> David Bonner, 'Combating Terrorism: Supergrass Trials in Northern Ireland' (1988) 51(1) *The Modern Law Review* 23.

<sup>153</sup> Ibid 31.

<sup>154</sup> Hillyard and Percy-Smith, above n 151, 343.

witness protection was offered and used as a mechanism to protect witnesses who feared 'intimidation and reprisal'<sup>155</sup> because they chose to give evidence against terrorists in Northern Ireland.

The role of these supergrasses was not without its issues particularly in cases where the uncorroborated evidence of the informants led to the conviction of their former associates. Steven Greer<sup>156</sup> described in significant detail the failings of the so-called supergrass trials in Northern Ireland between 1969 and 1986 through case studies. Greer highlighted the methods adopted by police for recruiting supergrasses including what may have been considered to be through threats, promises and inducements. He noted the many instances of protection being offered and provided and cases where the witness later refused to give evidence in the trial or left protection and returned to their former associates. In those cases, the supergrass had usually secured 'immunity from prosecution, or lenient sentences and or new lives under new identities outside of Northern Ireland',<sup>157</sup> for their own role in the particular crimes. Where this occurred the defendants in the case were often released because the prosecution relied on the uncorroborated evidence of the associate witness, (the supergrass) as the only evidence to be offered at trial. Unsurprisingly the supergrass process fell into disuse by 1986 in Northern Ireland.

The role of the supergrass and the supergrass process was handed a lifeline in the fight against serious and organised crime in the United Kingdom with the passing of the *Serious Organised Crime Act 2005* and the establishment of the Serious Organised Crime Agency (SOCA). With the re-emergence of the supergrass, Richard Martin<sup>158</sup> reviewed the past failings of the process and its institutionalisation at the pre-trial and post trial stages in serious and organised crime cases. Institutionalisation addressed many of the issues that

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<sup>155</sup> Bonner, above n 152, 25.

<sup>156</sup> Greer, S, *Supergrasses: A Study in Anti-Terrorist Law Enforcement in Northern Ireland* (Clarendon, 1995).

<sup>157</sup> Ibid, Preface, vii.

<sup>158</sup> Martin, Richard, 'The recent supergrass controversy: have we learnt from the troubled past?' (2013) (4) *Crim LR* 273.

had haunted the earlier process. It took the form of a legislative framework covering deals with supergrasses<sup>159</sup> so that the new arrangements ‘ensured respect for the key public law values of transparency, accountability, and independence.’<sup>160</sup> While witness protection continues to evolve in the United Kingdom, the ‘supergrass is now convicted and sentenced before testifying, with the details of the agreement and the extent of the sentence reduction ... made available to the court’<sup>161</sup> prior to the trial at which he or she is to give evidence.

In Scotland, Strathclyde Police was the only police force to introduce a formal witness protection program.<sup>162</sup> It did so in 1996 with initial funding from the Scottish Executive. The establishment of the Strathclyde Program came about because of growing concerns among senior police officers about the problems of ‘real and perceived intimidation, including the murder and attempted murder of a small number of witnesses.’<sup>163</sup> The level of intimidation and fear experienced by witnesses and members of the public caused witnesses to decline to assist in the investigation of serious crime.<sup>164</sup>

In 2004 the British Government White Paper, *One Step Ahead: a 21<sup>st</sup> century strategy to defeat organised crime*<sup>165</sup> (the White Paper) confirmed that a national witness protection program would be established in the United Kingdom. It covered issues in Britain that demonstrate the same justification for the introduction of witness protection in Australia, Canada and the United States of America. Those same justifications are likely reflected in the establishment of programs in other countries not covered in this overview.

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<sup>159</sup> *Serious Organised Crime and Police Act 2005*, s 71-75.

<sup>160</sup> Martin, Richard, 'The recent supergrass controversy: have we learnt from the troubled past?' above n 158, 5.

<sup>161</sup> *Ibid* 12.

<sup>162</sup> Fyfe and McKay, above n 4, 284.

<sup>163</sup> *Ibid*.

<sup>164</sup> *Ibid*.

<sup>165</sup> Home Office, 'One Step Ahead: A 21st century strategy to defeat organised crime' (2004), 51 [6.4].

The White Paper suggested<sup>166</sup> that if defendants are to 'co-operate against their co-conspirators, they need strong assurances in respect of their safety.' It said<sup>167</sup> that law enforcement agencies often experience difficulty in getting witnesses to co-operate in organised crime trials partly because of a lack of confidence in the authorities' ability to protect them. The impact of these issues on the effectiveness of the criminal justice system is of an abiding concern. Witness protection arrangements vary from agency to agency; some provide a high quality service where others that are not called on as often to provide protection and assistance to witnesses giving evidence who are intimidated or in fear of retribution, need to improve.<sup>168</sup>

The White Paper recognised<sup>169</sup> there are obvious advantages in adopting a national witness protection program. Such arrangements would ensure higher and more consistent standards and potentially achieve substantial efficiency savings because witnesses could be handled by police in their point of relocation, rather than those from their original force areas. The White Paper led the way for the Home Office, ACPO and Witness Support Network to conduct a review of the costs, benefits and risks associated with moving to a national scheme.<sup>170</sup>

The *Serious Organised Crime and Police Act 2005* placed the existing arrangements for witness protection on a statutory footing and enabled the protection of British residents who are witnesses in investigations and prosecutions whose safety is at risk.<sup>171</sup> The Act enables the re-identification and relocation of witnesses in life threatening situations.<sup>172</sup> Law enforcement agencies in Britain are not obliged to use the Act, they can

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<sup>166</sup> Ibid.

<sup>167</sup> Ibid 154.

<sup>168</sup> Ibid 51.

<sup>169</sup> Ibid 41, 62.

<sup>170</sup> Ibid.

<sup>171</sup> Home Office, 'New provisions on witness protection in the Serious Organised Crime and Police Act 2005' (2005), 2-3; *Serious Organised Crime and Police Act 2005* (UK) Part 2, Chapter 4 - Protection of witnesses and other persons, s 82.

<sup>172</sup> Home Office, above n 165, 4.

continue to provide protection and assistance in other ways.<sup>173</sup> It is argued that this provision leaves discretion with the police force to provide some form of protection where the witnesses decline inclusion in the program, but are still prepared to assist police.

The protection provider can make appropriate arrangements<sup>174</sup> to protect witnesses, law enforcement officers, prosecutors and their staff, judges and magistrates, jurors, sources and close family members. It gives guidance on the persons who may require protection<sup>175</sup> and it defines a witness for the purposes of the Act.<sup>176</sup> This includes witnesses in proceedings that take place outside of Britain, for example proceedings before international tribunals.<sup>177</sup>

Criteria for the inclusion of witnesses in the program, which substantiate the threat faced by the witness as well as other matters such as the cost of protection and whether the witness is likely to be a witness in legal proceedings, are described.<sup>178</sup> The Act requires<sup>179</sup> that protection arrangements to be applied to the case and any variations to them must be recorded in writing in a document of protocol between the protection provider and the participant. This document of protocol is similar to the MOU required under Australian legislation or in the case of the Queensland witness protection act, the agreement between the participant and the protection provider. The protection provider can vary or cancel protection arrangements where necessary and this may be in the case of the participant committing a criminal offence whilst included in a program.

Cooperative arrangements, common in policing that see law enforcement agencies assisting one another in the provision of protection arrangements,

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<sup>173</sup> Ibid.

<sup>174</sup> *Serious Organised Crime and Police Act 2005* (UK) ss 82(5)(a)-(g).

<sup>175</sup> Ibid Schedule 5.

<sup>176</sup> Ibid ss 94(6).

<sup>177</sup> Ibid ss 82(4)(d).

<sup>178</sup> Ibid.

<sup>179</sup> Ibid ss 82(3).

are recognised.<sup>180</sup> The Act sets out arrangements for one protection provider to transfer the participant to another protection provider.<sup>181</sup> Transfer arrangements can include reimbursement for the costs incurred by the host police force in the transfer.<sup>182</sup> The Act also takes into account the need to provide the participant with additional support during relocation and re-identification.<sup>183</sup> It incorporates elements dealing with assistance from public authorities for example, in the case of housing, education and health and the Benefits Agency.<sup>184</sup>

Offences for disclosing information about the participant, the identity change, the protection arrangements and the program itself are created.<sup>185</sup> Exemptions are also included in the Act<sup>186</sup> where the disclosure is by the participant and the disclosure is not likely to result in harm to anyone. These exemptions also extend to exemptions from liability in civil or criminal proceedings if false statements are made about the protected person's identity in order to ensure the new identity is not disclosed.<sup>187</sup>

The transitional provisions enable witness protection cases existing prior to the commencement of these provisions (before 1 April 2006) to be covered by the new legislation.<sup>188</sup> In these situations, the participant must qualify for protection under the new criteria to be eligible for admission into the new program. Additionally, protection must have been provided to the participant immediately before the commencement of the Act and the provider believes ongoing protection is required.<sup>189</sup>

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<sup>180</sup> Ibid s 83.

<sup>181</sup> Ibid s 83.

<sup>182</sup> Ibid ss 84(2).

<sup>183</sup> Ibid s 85.

<sup>184</sup> Home Office, above n 165, referring to s 85, Duty to Assist Protection Providers.

<sup>185</sup> *Serious Organised Crime and Police Act 2005* (UK) s 86.

<sup>186</sup> Ibid s 87.

<sup>187</sup> Ibid s 90.

<sup>188</sup> Ibid s 92.

<sup>189</sup> Ibid ss 91(5).

## 2.5 The development of witness protection in Australia

In Australia the Australian Federal Police (AFP) was conducting witness protection operations from as early as 1981.<sup>190</sup> The impetus for establishing witness protection programs in Australia was the level and entrenchment of serious and organised crime and its effect on police investigations, prosecutions and on the community.<sup>191</sup> The parallels to the establishment of witness protection in Australia to those in the United States of America, Britain and Canada also extend to most countries that have adopted witness protection either through administrative arrangements or through legislation.

The first Australian jurisdiction to enact specific witness protection legislation was Victoria<sup>192</sup> in 1991 although in Queensland the *Criminal Justice Act 1989* contained provisions regarding witness protection. The *Witness Protection Act 1991* (Vic) was amended by the *Witness Protection (Amendment) Act 1996*. The 1996 legislation was complementary to the *Witness Protection Act 1994* (C'th) which required<sup>193</sup> state laws to meet certain criteria so that access to Commonwealth identification documents would be available to participants in witness protection programs other than the NWPP.

Prior to the introduction of witness protection programs in Australia, police in each jurisdiction provided a range of protection arrangements which, except in the case of Victoria,<sup>194</sup> had little or no legislative support. In this pre 1994 period, the AFP and state and territory police provided witness protection that encompassed twenty-four hour protection, relocation and more routine police attention as well as identity changes for witnesses

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<sup>190</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 51 [4.4].

<sup>191</sup> Woodward, above n 8; Stewart, above n 8.

<sup>192</sup> *Witness Protection Act 1991* (Vic).

<sup>193</sup> *Witness Protection Act 1994* (C'th) ss 24(1)(a)-(b)

<sup>194</sup> *Witness Protection Act 1991* (Vic).

included in the program.<sup>195</sup> At times the AFP provided witness protection services on behalf of other police services and the then National Crime Authority.<sup>196</sup>

In the absence of specific witness protection legislation, the AFP relied on section 8 of the *Australian Federal Police Act 1979* (the AFP Act) in performing functions relating to laws of the Commonwealth and in 'safeguarding Commonwealth interests', to provide witness protection services. The AFP Act was amended after witness protection legislation was passed in 1994 to specifically provide for the performance of functions related to witness protection.<sup>197</sup>

The need to encourage and protect informers and witnesses in organised crime matters in Australia was made clear in evidence to a number of Royal Commissions.<sup>198</sup> The reasons for an informant's reluctance to come forward is clearly stated in the reports of those Commissions of enquiry<sup>199</sup> and they go specifically to the tactics employed by organised crime figures to maintain their operational integrity. Fear and intimidation, murder and supply of drugs to workers in the syndicate to ensure their loyalty are features of those tactics. Law enforcement was struggling in the fight against organised crime<sup>200</sup> and the reluctance of witnesses and informers to give information to police was the result of pressure from influential organised crime figures or syndicate bosses or lesser figures, exerted in an effort to maintain control of their syndicates and continue with their criminal enterprises.<sup>201</sup>

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<sup>195</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 50-55 [4.3]-[4.11].

<sup>196</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8, 10.

<sup>197</sup> *Australian Federal Police Act 1979* (C'th) ss 8(1)(bb)-(bc).

<sup>198</sup> Woodward, above n 8; Williams, above n 8; Costigan, above n 8; Stewart, above n 8; Moffitt, above n 8.

<sup>199</sup> Costigan, above n 8, Volume 2, 3, 5-6; Stewart, above n 8, 558-563.

<sup>200</sup> Williams, above n 8; Costigan, above n 8; Stewart, above n 8.

<sup>201</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 9 [2.10].

The research for this thesis is grounded in the five Royal Commissions<sup>202</sup> set up between 1974 and 1984 to inquire into the emergence and entrenchment of organised crime in Australia. These five Royal Commissions reflected a growing concern about the establishment of organised crime in Australia and it became clear that the 'inquiries were not revealing isolated pockets of organised crime, but a culture of organised criminal activity that was steadily gaining hold in Australia.'<sup>203</sup> The Royal Commissions all arrived at a similar conclusion: that traditional policing methods were not effective<sup>204</sup> and that government action was required on a number of fronts to combat the proliferation of organised crime gangs. Other official enquiries<sup>205</sup> also reinforced the concerns about organised crime in Australia.

Common threads running through the Royal Commissions were issues such as the closed nature of the criminal syndicates, the methods their leaders adopted to maintain strong control over their empires, the culture of silence that existed and the level of official corruption in policing and government.<sup>206</sup> The two primary issues identified in the Royal Commissions were that witness intimidation and fear of reprisal was having an adverse effect on criminal investigations<sup>207</sup> and that organised crime was the causal factor in the intimidation of witnesses.<sup>208</sup> This created and perpetuated the problems associated with encouraging informants to come forward to give information to police.

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<sup>202</sup> Moffitt, above n 8; Woodward, above n 8; Williams, above n 8; Costigan, above n 8; Stewart, above n 8.

<sup>203</sup> William J. Horman, 'Countering Organised Crime Through Strategic Planning and Effective Coordination' (1993), 109.

<sup>204</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 8 [2.8].

<sup>205</sup> Parliament of South Australia, *Royal Commission on the Non-Medical Use of Drugs* (Commissioner: Professor R Sackville' 1979).

<sup>206</sup> Bob Bottom, *The Godfather in Australia* (A. H. & A. W. Reed Pty Ltd, 1979); Bob Bottom, *Without Fear or Favour* (Sun Books Pty. Ltd., 1984); David Hickie, *The Prince and the Premier* (Angus & Robertson, 1985); Athol Moffitt, *A quarter to midnight* (Angus & Robertson, 1985); Alfred W. McCoy, *Drug Traffic: Narcotics and Organized Crime in Australia* (Harper & Rowe, 1980); The Hon Justice J R T Wood, 'Royal Commission into the New South Wales Police Service Final Report Volume 1: Corruption' (May 1997).

<sup>207</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, vii, 15, 68, 70, [2.21], [5.13]-[5.14], [5.17].

<sup>208</sup> *Ibid* 10, 13, 15, [2.12], [2.17], [2.21].

In the period between 1960 and 1990 organised crime was emerging as a real and pressing issue for Australian governments, notably in respect of drug production, importation and drug trafficking and also in relation to the infiltration of organised crime groups into licensed clubs.<sup>209</sup> In the United States of America and Australia the Italian mafia was specifically identified to be of significant concern.<sup>210</sup> The trade in illicit drugs, its complexity and the range of problems it brought to policing and society in general raised the profile of organised crime in Australia and notice was taken of its influence on the political and judicial landscape.

The Moffitt Royal Commission was issued in 1974 to enquire into allegations of organised crime in clubs in New South Wales<sup>211</sup> and the alleged links of the mafia in the United States of America to poker machine companies servicing clubs in New South Wales. Justice Moffitt recognised the danger that organised crime from overseas would infiltrate Australia and become established.<sup>212</sup> To combat the lack of information flows and to ensure investigative effectiveness, Justice Moffitt suggested that there should be a drastic review of police investigation methodologies and that investigative procedures that recognise organised crime as a special class of crime were necessary.<sup>213</sup> He went on to make a number of suggestions about how *those* methods of investigation might be arranged within the New South Wales police service.<sup>214</sup>

Five years after the Moffitt Royal Commission, Justice Woodward<sup>215</sup> said ‘within New South Wales there are clear signs of careful organisation, planning, continuity of management and the structure of orderly

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<sup>209</sup> Moffitt, above n 8.

<sup>210</sup> Woodward, above n 8; Stewart, above n 8.

<sup>211</sup> Moffitt, above n 8.

<sup>212</sup> Ibid, Final report 135.

<sup>213</sup> Ibid 136.

<sup>214</sup> Ibid 136-137.

<sup>215</sup> Woodward, above n 8.

marketing'<sup>216</sup> in the drug trade. Pointing to the issues arising from the activities of the mafia in Australia, Justice Woodward noted the similarities to the Italian mafia in the United States of America. He identified the 'honoured society', 'L'Onorata Societa' and 'N'Dranghita',<sup>217</sup> the closed nature of mafia organisations and the culture of silence they demanded. Justice Woodward gave examples of the activities of organised crime groups in extortion and other criminal activity including murder. He described the lengths organised crime entities would go to in order to protect their operations and was satisfied, on the evidence provided to the commission that 'Donald Bruce MacKay was disposed of by members of, or on behalf of, that organisation on 15<sup>th</sup> of July, 1977.'<sup>218</sup> Former New South Wales Police Assistant Commissioner Clive Small wrote<sup>219</sup> that, for the first time, members of the Calabrian Mafia in Australia had been publicly identified and that the Woodward Royal Commission had exposed the extent of their drug dealing.

Law enforcement efforts were insufficient in respect of organised crime. Justice Woodward also identified the separation between crime organisations importing drugs in bulk and the addicts and street level dealers, which were, generally, the information sources for police. He noted, 'better methods are required for intercepting shipments of drugs at the point of entry into Australia.'<sup>220</sup> The friction that existed between the Commonwealth and the States in respect of policy approaches for tackling drug importation and the drug trade meant there was a need for revised methods that target the higher-level individuals involved in organised

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<sup>216</sup> Ibid 22.

<sup>217</sup> Ibid 198, 201.

<sup>218</sup> Ibid 197, 200.

<sup>219</sup> Clive Small and Tom Gilling, "'Fair Cop" The Australian, extract from Smack Express: How Organised Crime Got Hooked On Drugs', *News Limited* (Sydney), 2009.

<sup>220</sup> Woodward, above n 8, 370.

crime.<sup>221</sup> Arguably that friction still exists today in respect of witness protection arrangements.<sup>222</sup>

Gaining the cooperation of minor figures in organised crime groups to help the flow of information was, according to the Stewart and Williams Royal Commission, required to help the flow of information necessary in investigations targeting serious and organised crime. Police rely on the flow of information to progress investigations and there is no doubt that informants are responsible for the majority of drug detections<sup>223</sup> and that most police investigations rely on information coming to them.<sup>224</sup>

The murder of six drug couriers or minor figures in the syndicate operated by Terrence John Clark and his associates had been committed between 1977 and 1980.<sup>225</sup> Justice Stewart identified<sup>226</sup> that two things were necessary in order to get the cooperation of these minor figures. Firstly, the penalties they faced could be reduced if they cooperated. Secondly, that if they did cooperate they should be protected from retribution from those whom they gave information about either directly or through associates. Stewart concluded that informers would not be prepared to give testimony at the trial of organised criminal groups if they could not be confident that they would be protected.<sup>227</sup> He referred to perceived corruption and said that potential informants may have believed that syndicate bosses were paying police and as a result the police would be unlikely to protect the informant. Stewart identified a 'folklore of police corruption; verballing; fabricating evidence; planting incriminating material; stealing money and drugs; assaulting suspects and so on.'<sup>228</sup> These additional concerns might be

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<sup>221</sup> Ibid 1604, 1605, 1607, 1620, 1621, 1622.

<sup>222</sup> See Chapter 2.5 The development of witness protection in Australia, 39-50; and Chapter 4, Official Australian inquiries and reviews, 84-119.

<sup>223</sup> Williams, above n 8, B 197.

<sup>224</sup> Costigan, above n 8, Vol. 2, 3.

<sup>225</sup> Stewart, above n 8, 126.

<sup>226</sup> Ibid 562.

<sup>227</sup> Ibid.

<sup>228</sup> Ibid 561.

further reasons witnesses were reluctant to come forward to give evidence against organised crime figures and demonstrate concerns about their ability to trust the police.

When suggesting that witness protection arrangements might offer an incentive to informants to come forward and assist police in their investigations, Justice Williams<sup>229</sup> acknowledged that some informants were motivated by the money they were paid by police for the information they gave or the prospect of receiving more lenient treatment in relation to offences they may have committed.<sup>230</sup> The prospect of immunity from prosecution and a safe haven for giving evidence, likely provided sufficient incentive for some witnesses to come forward, thereby improving the information flow to police.

That organised crime was established in Australia is clear, as are the effects on police investigations emerging from some of the tactics adopted by organised crime figures. Tactics such as threats, intimidation and murder meant that police were not receiving information flows from their traditional sources<sup>231</sup> and therefore investigations were not achieving their full potential. M H Graham<sup>232</sup> pointed to the American experience, which showed that intimidation, threats, maiming and killing potential prosecution witnesses are methods used by organised crime figures to maintain the integrity of their organisations. He referred to Justice Department estimates suggesting that 10% of all murders connected to organised crime over a four-year period were of prosecution witnesses. In those cases, often a witness giving evidence to police would disappear or be killed regardless of whether the witness was a member of the gang or an ordinary citizen.

This thesis asserts that police forces in Australia recognised the need to protect certain witnesses in high profile cases and were conducting witness

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<sup>229</sup> Williams, above n 8, Book F Part A, 39-40.

<sup>230</sup> Ibid 419, 565.

<sup>231</sup> Stewart, above n 8; Costigan, above n 8.

<sup>232</sup> M. H. Graham, 'Witness Intimidation - The Law's Response' (1985) *Quorum, Westport, Connecticut* 5.

protection in some form or another from 1981. These early programs were conducted under administrative arrangements rather than with the support of specific legislation. The AFP<sup>233</sup> for example operated a program from about 1981 and other police forces had at various times set up their own programs. The Victoria Police created a witness protection unit in 1981 as part of its state Protective Security Group<sup>234</sup> and the New South Wales Police in 1984 through the Special Weapons and Operations Squad.<sup>235</sup> Queensland, South Australia, Western Australia and the Northern Territory conducted ad-hoc operations and developed plans to manage witness protection operations. Tasmania had not seen any demand for witness protection or any need to develop a plan.<sup>236</sup>

In this period in 1983, Justice Stewart<sup>237</sup> gave the clearest indication that a national approach to witness protection was required. Justice Williams<sup>238</sup> had, in 1980, commented that a proposed Drug Trafficking Act should enable the Attorney General to make provisions for the protection of witnesses. It was not clear from Justice William's comments whether this should be under a national witness protection program, a nationally arranged system or some other arrangement. However, as Roberts-Smith pointed out,<sup>239</sup> while there was strong support for a national witness protection program within the NPRU inquiry, Police Ministers and Commissioners preferred individual jurisdictional arrangements based on local needs. The Stewart Royal Commission highlighted<sup>240</sup> the need in Australia for better use to be made of informers in the fight against organised crime and, accordingly, for lower-level players to be given an incentive to inform on organisers. Stewart concluded that informers would not be prepared to give testimony at the

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<sup>233</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 52 [4.6]-[4.7].

<sup>234</sup> Ibid 51 [4.4]-[4.5].

<sup>235</sup> Ibid 53-54 [4.8]-[4.9].

<sup>236</sup> Ibid 50-55.

<sup>237</sup> Stewart, above n 8, 844.

<sup>238</sup> Williams, above n 8, F 39-40.

<sup>239</sup> Roberts-Smith RFD QC, above n 9, 20.

<sup>240</sup> Stewart, above n 8, 562.

trial of organised criminal groups if they could not be confident that they would be protected.<sup>241</sup> Justice Stewart referred<sup>242</sup> the issue of witness protection to the Australian Police Ministers Council (APMC) for consideration and the APMC tasked the National Police Research Unit (NPRU) to undertake a study of witness protection arrangements in Australia in November 1983.

Dissatisfied with existing arrangements for protecting witnesses in organised crime investigations in Australia, the National Crime Authority (NCA) in its 1986/87 Annual Report criticised<sup>243</sup> the existing programs, established by the AFP and other Australian police forces. In the inquiry into witness protection in Australia that followed in 1987-88, the PJC considered<sup>244</sup> the nature of witness protection in Australia, the extent to which it is essential in the fight against serious and organised crime and the adequacy and cost of current arrangements including options for improvement. The Committee's recommendations, for the most part, have been incorporated in witness protection legislation at the Commonwealth and state and territory jurisdictions. Detailed discussion of the witness protection legislation is contained in Chapter 5, but it is instructive to make a few points at this juncture.

The idea of an independent agency to provide witness protection in Australia was rejected by the PJC<sup>245</sup> because, it said, there was insufficient demand to justify the cost of creating such an agency. The PJC did recommend<sup>246</sup> that the AFP assume responsibility for an expanded national witness protection program. It also advocated<sup>247</sup> the need for a National Witness Protection Liaison Committee (NWPLC), under the auspices of the APMC, to facilitate

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<sup>241</sup> Ibid 563.

<sup>242</sup> Ibid 844.

<sup>243</sup> National Crime Authority, 'Annual Report' (1985-1986) 42-43.

<sup>244</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1.

<sup>245</sup> Ibid 77-79 [5.32]-[5.34].

<sup>246</sup> Ibid 79-80, 82 [5.35]-5.36], [5.39].

<sup>247</sup> Ibid 81-82 [5.37]-[5.39].

greater cooperation between the eight police forces in witness protection matters.

The National Witness Protection Program (NWPP) was established by the *Witness Protection Act 1994 (C'th)*<sup>248</sup> and the Commissioner of the AFP was given responsibility for the maintenance of the program.<sup>249</sup> The Act provides the statutory basis for protection arrangements for persons included in the NWPP and led the way for the introduction of complementary legislation in each Australian state and territory jurisdiction. The Act applies to participants in Commonwealth and state and territory programs.<sup>250</sup>

A witness, for the purposes of the Act, is defined<sup>251</sup> and the Act describes the matters the witness must disclose to the Commissioner in order to be considered for inclusion in the NWPP.<sup>252</sup> It also sets out the issues the Commissioner must take into consideration when deciding to include a witness into the program.<sup>253</sup> The terms of the MOU<sup>254</sup> are described and the Act also requires the Commissioner to maintain a register of participants in the NWPP.<sup>255</sup> It enables the Commissioner to authorise the creation of new identity documents and to liaise with state and territory registrars of births, deaths and marriages where the participant wishes to marry.<sup>256</sup> It is an offence for a participant to bigamously marry using their new identity.<sup>257</sup> Offences are created for the disclosure of information about a participant's

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<sup>248</sup> The Act received Royal Assent on 18 October 1994 and commenced operation on 18 April 1995.

<sup>249</sup> Australian Federal Police, 'Witness Protection Annual Report 2005-2006' (2006).

<sup>250</sup> Beverley Schurr, 'Witness Protection' (1994) 19 *Criminal Law Journal* 157.

<sup>251</sup> *Witness Protection Act 1994 (C'th)* s 3.

<sup>252</sup> *Ibid* s 7.

<sup>253</sup> *Ibid* s 8.

<sup>254</sup> *Ibid* s 9.

<sup>255</sup> *Ibid* s 11.

<sup>256</sup> *Ibid* s 13-14.

<sup>257</sup> *Ibid* s 20; Beverley Schurr, 'Witness Protection' (1996) 20 *Criminal Law Journal* 156.

inclusion in the program and for disclosing that a person has made application for, or been assessed for, inclusion in the program.<sup>258</sup>

An annual report to parliament on the operation of the NWPP is required<sup>259</sup> and legislation in South Australia<sup>260</sup> and Western Australia<sup>261</sup> require similar reporting. In Queensland, reporting on the operation of the witness protection program is required under section 260 and sub-section 292(f) of the *Crime and Misconduct Act 2001*. There is no requirement in New South Wales or Victoria for the police to report to the Parliament or to the Minister on the operation of the programs in those states. It is likely that the costs of operating the witness protection programs in those states is absorbed into the cost of major crime programs or other programs depending on the division administering the witness protection program. Regardless, the research for this thesis was unable to locate any reporting of note on the operation of the programs in New South Wales and Victoria. Northern Territory and Tasmania have dormant programs and the Australian Capital Territory directs any witness protection cases it identifies through criminal investigations conducted by the AFP – which conduct policing arrangements in the Australian Capital Territory – to the NWPP.

Expediting cases involving protected witnesses through the courts was considered an important issue and the PJC recommended<sup>262</sup> the matter be further considered. The PJC in 2000<sup>263</sup> repeated the same recommendation, however, no specific research has been conducted and no legislative provision has been made in regard to this recommendation.

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<sup>258</sup> *Witness Protection Act 1994 (C'th)* s 22.

<sup>259</sup> *Ibid* s 30.

<sup>260</sup> *Witness Protection Act 1996 (SA)* s 28.

<sup>261</sup> *Witness Protection (Western Australia) Act 1996* s 37.

<sup>262</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, (xv), 90-91 [5.57]-[5.59].

<sup>263</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8, (vii), 12 [1.32].

In considering whether a national scheme was the most appropriate and if so what shape it should take, the Committee considered four models:<sup>264</sup> (1) a national scheme run by a new, independent agency; (2) a national scheme based on an existing agency; (3) the retention of the existing scheme, coordinated by a national witness protection liaison committee; and (4) no change to existing arrangement.<sup>265</sup> As described above, the first option was rejected; the second was recommended with the AFP to take on responsibility for the NWPP. The third was not adopted and the establishment of the NWPP effectively negated the fourth.

## **2.6 The United Nations Office on Drugs and Crime and witness protection**

Witness protection programs are considered<sup>266</sup> a key tool in dismantling organised crime networks. The *United Nations Convention Against Transnational Organized Crime*<sup>267</sup> calls on state parties to take appropriate measures to protect witnesses in criminal proceedings from threats, intimidation, corruption or bodily injury, and to strengthen international cooperation in this regard.<sup>268</sup>

The United Nations Office on Drugs and Crime (UNODC) produced the *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*<sup>269</sup> manual to provide guidance to member states to support witnesses of crimes. Launched in February 2008 the manual sets<sup>270</sup> out guidance for protection measures, operational procedures and options for

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<sup>264</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 76-82 [5.30]-[5.39].

<sup>265</sup> See Chapter 5 Australian witness protection legislation for a more detailed account and comparative analysis of the legislation in the four jurisdictions with reference to the UN Model Bill; see also Annexure 14A and 14B Australian witness protection comparison chart.

<sup>266</sup> United Nations Office on Drugs and Crime, above n 12, 8.

<sup>267</sup> United Nations Office on Drugs and Crime, 'United Nations Convention Against Transnational Organized Crime' (2004).

<sup>268</sup> Ibid Article 24.

<sup>269</sup> United Nations Office on Drugs and Crime, above n 12, *iii*.

<sup>270</sup> Ibid 27-41.

adopting and integrating witness protection into the legal systems of United Nations member states.

These guidelines were developed in a series of regional meetings with the active participation of expert representatives from law enforcement, prosecutorial and judicial authorities of member states.<sup>271</sup> They reflect the experience from different geographical regions and legal systems, together with existing literature, previous and ongoing work by UNODC as well as other international and regional organisations. Karen Kramer<sup>272</sup> reviewed programs in various countries and made a number of observations<sup>273</sup> about the utility of consistency across jurisdiction particularly in respect of the relocation of foreign nationals into a receiving jurisdiction that is another country.

The standards, specifications and elements Kramer referred to are reflected in the Australian legislation and the themes of this study. She describes the minimum requirements<sup>274</sup> as including: (1) the protection measures that may be used; (2) the application and admission criteria; (3) the authority responsible for the program's implementation; (4) the criteria for the termination of protection; (5) the rights and obligations of the parties; (6) confidentiality; and (7) penalties for disclosing information about protection arrangements or the identity or location of the participant. Kramer went on to say that the elements<sup>275</sup> of an effective witness protection program should include that: (1) participation is voluntary; (2) participation is for life if necessary, but financial support is only provided for a limited duration; (3) participation should not be seen as a reward; (4) the participant should not be better off as a result of being included in a program; (5) existing legal obligations must be kept; and (6) due to the emotional hardship for participants, relocation and change of identity should be a tool of last resort.

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<sup>271</sup> *Ibid iii.*

<sup>272</sup> Kramer, above n 15.

<sup>273</sup> *Ibid* 11-13, 16.

<sup>274</sup> *Ibid* 12.

<sup>275</sup> *Ibid* 13.

The requirements and elements described by Kramer are generally consistent with the legislation in place in Australia and in other countries operating under the model first developed in the United States of America, almost without exception. Kramer's sixth element, which refers to relocation and re-identification of a witness as a tool of last resort due to the emotional hardship for participants, is not included in the Australian legislation.

## **2.7 A chronology of witness protection arrangements**

For the purposes of this comparison, the *Witness Protection Act 1994* (C'th) in Australia, the *Witness Control Act 1984* (USC), the *Witness Protection Program Act 1996* (Canada) and the *Serious Organised Crime and Police Act 2005* (United Kingdom) are the key instruments. The themes in the legislation that are the same or similar across the four jurisdictions and the significant differences between them are indicated. A more detailed examination of the Australian legislation is contained in Chapter 5.

While legislation in Australia, the United States of America, Britain and Canada share many similarities there are some distinct differences that show the adaptability of protection and assistance arrangements to unique jurisdictional requirements. The legislation in the four jurisdictions of interest shares many of the features with the UNODC *Model Witness Protection Bill*<sup>276</sup> and therefore with witness protection legislation the world over.

To illustrate the progression of witness protection arrangements within the jurisdictions offshore and on-shore, the table at Annexure 3 provides a summary of the key dates and activities. The table sets out the progress in the development of witness protection from the first witness protection program in the United States of America in 1964 to the introduction of legislation in 1970 to provide more formal arrangements. The Moffitt Royal Commission in Australia in 1974 reported the first real indication that organised crime was establishing a foothold in Australia and the following

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<sup>276</sup> United Nations Drug Control Program, above n 26.

four Royal Commissions through the late 1970s and early 1980s demonstrate the continuing growth of the problem that would ultimately lead to the requirement for witness protection arrangements in this country.

While Australia established programs in the early 1980s, Britain established its first program in 1978 and Canada in 1984. These, like the Australian programs of the day, were all conducted under administrative arrangements. By 1983 sufficient concerns had been raised with the operation of the American program that a significant review of arrangements in the United States of America was undertaken. That review led to reforms and the introduction of new legislation in 1984. Concerns were also being expressed about witness protection arrangements in Australia and in 1984 the NPRU conducted Australia's first review of measures to protect witnesses in organised crime cases. This was followed in 1988 by a Parliamentary Review, which ultimately led to the passages of witness protection legislation at the Commonwealth level in 1995 and complementary legislation in the states and territories introduced between 1996 and 2001.

While the Canadian program had been introduced in 1984, by 1995 a significant review was undertaken because of concerns raised in that country about the operation of the programs. Legislation was introduced to better manage the national witness protection program. By 1996 the Strathclyde Police in Scotland had developed its own witness protection program because of concerns about witness intimidation in serious criminal matters. Responding to calls for a national approach to witness protection in Britain in 2004, the British Government White Paper *One Step Ahead: a 21<sup>st</sup> century strategy to defeat organised crime* was tabled. The report led to the passage of the *Serious Organised Crime and Police Act 2005*, which contained specific provision for a national witness protection scheme to be managed by the Serious Organised Crime Agency (SOCA).

Today, witness protection is 'viewed as a crucial tool in combating organised crime,'<sup>277</sup> and a large number of countries around the world have established

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<sup>277</sup> United Nations Office on Drugs and Crime, above n 12, 8.

such specialised programs or have legislated their creation.

## 2.8 Conclusions

Globally, witness protection emerged as a result of the effects of serious and organised crime and the Italian Mafia on police investigations and on prosecuting criminals. Witness intimidation was a common experience in the four countries considered in this thesis and the impact of serious and organised crime meant governments had to act. Introducing programs to protect those vulnerable and intimidated witnesses was the response each of the four countries decided on.

The early programs were established under administrative arrangements in each jurisdiction referred to in this chapter and over time legislation was passed in each to put the programs on a statutory footing. These programs attracted criticisms concerning their introduction and operation. In the United States of America 'some scholars and the media'<sup>278</sup> questioned not only the need for the programs, but also the method of operation on the basis that innocent people in the community were adversely affected. The criticisms and the scholarly research undertaken about the program led to reforms and the passing of repealing legislation.

The issues and problems experienced in the United States of America were considered by the PJC<sup>279</sup> in Australia in its 1988 inquiry. It is argued that the analysis of the problems and issues helped to inform the development of witness protection legislation in Australia, albeit those programs had been operating at the state and the national level for ten or more years before the legislation was passed. Early problems that emerged from the operation<sup>280</sup>

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<sup>278</sup> Cetin, above n 3, p. ii.

<sup>279</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 23-24 [3.1]-[3.19].

<sup>280</sup> Dr. Yvon Dandurand and Kristin Farr, 'A Review of Selected Witness Protection Programs' (University of the Fraser Valley, 2010), 71-74.

of the early witness protection program in Canada<sup>281</sup> also led to reforms in that country including the introduction of legislation in 1996.

In the United Kingdom the protection of witnesses and informants had been the responsibility of the London Metropolitan Police since the 1970's.<sup>282</sup> More recently arrangements were made to place it on a statutory footing<sup>283</sup> because while it had been a generally held belief that the various boroughs were responsible for providing an adequate level of protection for witnesses and informants, the Chief Constables voiced an opinion<sup>284</sup> that there needed to be a national program in the UK. Recent changes to organised crime legislation in Britain led to an additional focus on the protection of witnesses and informants.<sup>285</sup>

What this demonstrates is that while each of the jurisdictions referred to started programs at the administrative level they all moved to legislatively based arrangements. The time frames taken in each case vary, reflecting the uniqueness of each jurisdiction, and it is also clear that each have programs operating at the national and state or provincial level. Programs in each country are operated by law enforcement or policing agencies. This reinforces the proposition that police have a responsibility for protecting members of the public, in certain circumstances, who require special assistance.

While the legislation and the mode of operation appear to be similar across the jurisdictions, the most notable differences appear in the Canadian and British Acts in relation to the relocation and re-identification of the participant. For example, in Canada, once a decision is made to re-identify a

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<sup>281</sup> Lacko, above n 102, 3-8.

<sup>282</sup> Roberts-Smith RFD QC, above n 9, 283-284.

<sup>283</sup> Fyfe and Sheptycki, above n 23, 323.

<sup>284</sup> Anonymous, 'Witness protection scheme', *Huddersfield Daily Examiner [Huddersfield (UK)]* 28 Dec 2012: 8. 2012.

<sup>285</sup> The publication in March 2004 of a UK Government White Paper entitled *One Step Ahead: A 21st century strategy to defeat organised crime* included a raft of new anti-organized crime measures including witness protection, witness immunity and plea-bargaining (Home Office 2004) that were subsequently incorporated into the Serious Organized Crime and Police Act 2005.

participant an application must be made to have the participant included in the federal program. The application and the participant must satisfy the eligibility requirements for inclusion in the national program. If they do not and are not included in the federal program, access to federal identity documents is denied and the provincial participant cannot be given a new identity. In the United Kingdom while a national program is now in place, police forces can transfer participants from one force to another under cost recovery arrangements. It is argued that these arrangements might provide greater protection for identity documents in the Canadian case and more flexible safety and security options for the participant in the British case. The restrictions on providing federal identity documents to participants in Canadian programs are incorporated into alternative arrangements proposed for Australian witness protection in this thesis.

## Chapter 3. Review of the literature

This chapter critically evaluates the scholarly research that has been undertaken into witness protection internationally. It identifies where and how this study will contribute to the knowledge on witness protection globally. A search was conducted for scholarly articles on witness protection. Little material was found in North America, the United Kingdom, or in Europe. Accordingly, much of the research for this thesis was sourced from official inquiries and reviews. The chapter explores the issues raised in the scholarly and other research into witness protection in those countries. Research into witness protection in Australia is limited to government reports and inquiries and is covered in Chapter 4 of the thesis.

This chapter also refers to eight<sup>286</sup> comparative studies of witness protection that explore witness protection legislation and practice across a variety of countries. These comparative reviews are structured around certain foci. These include matters such as: (1) where witness protection is situated within the government architecture; (2) administrative and resourcing arrangements; (3) admission eligibility and requirements; intimidated and vulnerable witnesses; (4) interagency and inter-jurisdictional coordination and cooperation in witness protection matters; (5) the re-identification and relocation of participants in witness protection; (6) legislative arrangements supporting witness protection programs; (7) immunity from prosecution and (8) the compellability of witnesses.

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<sup>286</sup> Institute for International Research on Criminal Policy, 'EU standards in witness protection and collaboration with justice' (Ghent University, 2005); United Nations Office on Drugs and Crime, above n 12; Toon van der Heijden, 'Witness Protection Programmes Compared' (Paper presented at the 2nd World Conference - Modern Criminal Investigation, Organised Crime & Human Rights, Durban, 2001); Dandurand and Farr, above n 280; Darwin Franks, Siyanda Munukwa and Shirley Moeng, 'The Witness Protection International Comparative Study' (2004); Fyfe and Sheptycki, above n 77; Anne-Marie Boisvert, 'La protection des collaborateurs de la justice ailleurs dans le monde: quelques constatations générales pour situer le cas du Québec' (Final Report Presented to the Minister of Public Security, 2005); Council of Europe, 'Report on Witness Protection (Best Practice Survey) Strasbourg; European Committee on Crime Problems, Committee of Experts on Criminal Law and Criminological Aspects of Organised Crime' (1999).

While there is some overlap between the themes explored in this thesis and the foci of the research discussed in this chapter, no scholarly research has been conducted specifically on point for the six themes.<sup>287</sup> Where the issues and outcomes identified in the scholarly work have a bearing on or mirror the themes of this thesis, those connections are identified and discussed.

Secrecy provisions contained in the Acts and the use of silence to protect the safety and security of participants in the program, results in limited empirical research into witness protection globally.<sup>288</sup> Research for this thesis is therefore bounded by the confidentiality protecting the identity and location of the witness and the integrity of the programs themselves.

Generating theories on witness protection may not be overly difficult, but it needs to be based on more than speculation or supposition. Some supporting data from which to draw conclusions or comparisons is required and for that evidence this study turns to the available literature.

### **3.1 The previous research in the United States of America**

Witness protection is an area of law enforcement which both domestically and internationally receives almost universal support as an effective method for fighting serious and organised crime. Witness protection had a rocky start in the United States of America; the concerns raised in the scholarly articles discussed earlier and in this chapter describe the problems and some of the solutions to those problems.

The scholarly research on witness protection in the United States of America used in this thesis is generally older than research conducted in the other countries referred to in this chapter and dates from 1984 to 1997. That research found significant problems with witness protection in the United States of America prior to 1984. The research identifies four primary foci for

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<sup>287</sup> See Chapter 1 Introduction 2 for the themes addressed in this thesis.

<sup>288</sup> See Chapter 7.5 Secrecy and its impact on the research, 193-196.

the research which were well stated by Montanino<sup>289</sup> as: (1) the victims of crimes committed by participant after relocation to the new community; (2) natural parents left behind as a result of the participant's relocation and the impact on their custody or visitation rights; (3) creditors left behind as a result of the participant's relocation and the impact on their ability to recover legal debts and obligations; and (4) the amendments to the witness protection laws by the *Comprehensive Crime Control Act 1984* in the United States of America which substantially remedied those problems. In this section of the thesis, issues identified in points one and three above are combined under a broader heading of enforcing rights and obligations because enforcing judgements against participants and protecting the community within which the participant is relocated, share a range of common issues.

Witness protection programs are entrenched in many countries and except for some differences, mostly associated with legal or executive arrangements in those countries, the programs are similar. Witness protection, however, is not without its detractors and witness protection programs have been criticised from time to time for 'purposeful misrepresentation, excessive expenditures and interference in the lives of innocent third parties.'<sup>290</sup> Levin argued<sup>291</sup> that witness protection programs represent an 'improper balance in weighing a witness's right to protection with the security interests of society.' This proposition suggests<sup>292</sup> a tension between the rights of a protected witness and those of the community within which they are located. One of the more strident opponents of witness protection, Fred Graham,<sup>293</sup> wrote a detailed review of the witness protection program from a journalist's perspective in 1977. Comments about witness protection that

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<sup>289</sup> Montanino, above n 17, 130.

<sup>290</sup> Lawson, above n 54, 1455.

<sup>291</sup> Levin, above n 53, 211.

<sup>292</sup> Ibid.

<sup>293</sup> Graham, above n 52.

Graham made in his book<sup>294</sup> are endorsed in some scholarly articles<sup>295</sup> and were discussed in more detail in Chapter 2.

Conversely though, witness protection has also been described as one of 'the most effective law enforcement tools for organised crime control we currently possess.'<sup>296</sup> This divergence in views demonstrates a tension between the role of witness protection in the fight against organised crime and the difficulties justifying it in the light of moral judgements of its worth.

Apart from the issues already identified, serious concerns were being raised about the approach adopted by the United States Marshals Service (USMS), the agency responsible for the operation of the program, and the enforcement of rights and obligations attached not only to the participant, but also to the community at large. Karen Cooperstein,<sup>297</sup> Joshua Levin,<sup>298</sup> Fred Montanino,<sup>299</sup> Raneta Lawson<sup>300</sup> and Risdon Slate<sup>301</sup> discussed these issues as well as those relating to children and witness protection and the role of the *Witness Protection Reform Act 1984* in resolving those issues. Lawson<sup>302</sup> and Slate<sup>303</sup> went on to describe alternative witness protection arrangements they considered were more appropriate. Fred Montanino<sup>304</sup> conducted scholarly research into the impact of being included in such a program on the witness, and those accompanying them, into witness

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<sup>294</sup> Ibid 73.

<sup>295</sup> Nicholas R. Fyfe and Heather McKay, 'Desperately Seeking Safety: Witnesses' Experiences of Intimidation, Protection and Relocation' (2000) 40(4) (Autumn 2000) *British Journal of Criminology* 675; Lawson, above n 54; Levin, above n 53.

<sup>296</sup> Montanino, above n 10, 405; Slate, above n 51, 20 citing Personal Communication, W. M. Dempsey, Public Information Office, U.S. Marshals Service (Aug. 6, 1997).

<sup>297</sup> Karen S. Cooperstein, 'Enforcing Judgements against Participants in the Witness Protection Program' (1984) 36(4) *Stanford Law Review* 1017.

<sup>298</sup> Levin, above n 53.

<sup>299</sup> Montanino, above n 10.

<sup>300</sup> Lawson, above n 54.

<sup>301</sup> Slate, above n 51.

<sup>302</sup> Lawson, above n 54.

<sup>303</sup> Slate, above n 51.

<sup>304</sup> Fred Montanino, 'Protecting the Federal Witness: Burying the past life and biography' (1984) 27(4) *The American Behavioural Scientist* 501; Montanino, above n 17.

protection and the adjustments they had to make<sup>305</sup> because of the transition from one name to another and one location to another.

These issues and those relating to the intimidation<sup>306</sup> and fear of reprisal<sup>307</sup> witnesses face as raised in the British research, give some indication of the complexity of the issues covered. They all have a bearing on the development of programs and legislation in countries that have followed the model of witness protection first developed in the United States of America. Australia is one of those countries.

### **Enforcing judgments against participants**

Enforcing judgments against participants in witness protection programs discussed by Cooperstein,<sup>308</sup> Levin,<sup>309</sup> Montanino,<sup>310</sup> Lawson<sup>311</sup> and Slate,<sup>312</sup> provided historical accounts of the issues. Their research relied on existing documents, case law and case studies. These five scholars adopted a similar thematic approach in their papers to identify, explain and reinforce the key issues. Central to their thesis was the unintended but foreseeable consequences of relocating participants who had criminal records, into an unsuspecting and unknowing community. Cooperstein adopted a thematic

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<sup>305</sup> Montanino, above n 304.

<sup>306</sup> van der Heijden, above n 286; Nicholas Fyfe, *Protecting intimidated witnesses* (Ashgate Publishing Limited, 2001); The Scottish Office, 'Towards a Just Conclusion: Vulnerable and intimidated witnesses in Scottish criminal and civil cases - An action plan' (Executive Justice Department, 2000); Nicholas R. Fyfe, 'Space, time and the vulnerable witness: exploring the tensions between policy and personal perspectives on witness intimidation' (2005) 11(6) *Population, Space and Place* 513; Fyfe and McKay, above n 295; Fyfe and McKay, above n 4; Allum and Fyfe, above n 33; Mark W LaLonde, 'Witness Protection in Canada: The Current State and Suggested State' (Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182: October 29, 2007; Warwick Maynard, 'Witness Intimidation Strategies for Prevention' (Home Office Police Department, 1994); Institute for International Research on Criminal Policy, above n 286; Kramer, above n 15; United Nations Office on Drugs and Crime, above n 12.

<sup>307</sup> Stewart, above n 8, 562; United Nations Office on Drugs and Crime, above n 12, 1, 29, 32; Lawson, above n 54, 1429.

<sup>308</sup> Cooperstein, above n 297.

<sup>309</sup> Levin, above n 53.

<sup>310</sup> Montanino, above n 10.

<sup>311</sup> Lawson, above n 54.

<sup>312</sup> Slate, above n 51.

approach in her research and included case studies to emphasise her main points. Cooperstein focussed on issues with enforcing judgments against participants in the witness protection program and problems associated with participant's who committed offences against state laws while included in the program, Cooperstein's article was in press when Congress passed the package bill<sup>313</sup> for crime reform in 1984 that dealt with the rights of third parties who had judgements against participants in the witness protection program.

Levin's research provided a historical overview of the development of witness protection in the United States of America. He dealt with the formation of the witness protection program and its growth and change, before moving on to thematically evaluate the adequacy of the existing program. Levin considered issues such as the government's liability for crimes committed by the participant while included in the program and discretions available to the Courts when dealing with matters involving participants who committed crimes. Levin discussed children in witness protection, the issues surrounding access and visitation by the non-custodial parent and the changes to witness protection driven by legislative amendments in 1984.

The central message emerging from each of the five articles was that something needed to be done to ensure that participants in witness protection programs were not able to avoid previous rights and obligations as a result of being included in a program. Additionally, all agreed that participants should not be able to hide behind their new identity if they committed criminal offences while included in the program. The fact that the United States Marshals Service (USMS) did not notify local authorities of a participant's relocation into their community or that a protected witness with a prior history of offending was now living in their community, enabled the participant to hide behind their new identity. The USMS would not disclose the fact that the person committing the offence was in the witness

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<sup>313</sup> *Witness Security Reform Act 1984* (USC), Pub. L. No. 98-473, Title VIII (Oct. 12, 1984).

protection program and had a prior criminal record, in some cases a significant prior criminal record.

### **Children and witness protection**

Children and witness protection create significant problems for contact orders and for access and visitation with the non-custodial parent. Cooperstein,<sup>314</sup> Levin,<sup>315</sup> Slate<sup>316</sup> and Lawson<sup>317</sup> all identified the difficulty the non-custodial parent had in maintaining contact with their child or children who were taken by the custodial parent into the witness protection program and were relocated. In these cases, the USMS refused to provide contact arrangements so that the non-custodial parent could exercise their rights to access and visitation with their children. The USMC also did not assist with family reunion visits so that the non-custodial parent and the children could maintain contact.

Between 1970 and 1984 witness protection legislation in the United States of America allowed the separation of children from non-custodial parents in the interests of suppressing organised crime.<sup>318</sup> While the Courts recognised the rights of the non-custodial parent in the cases relating to witness protection, they did not resolve the question of custody and visitation effectively. The American witness protection reforms<sup>319</sup> addressed this issue by strengthening the non-custodial parents' access rights to their children. Today, the USMS is constrained from asserting<sup>320</sup> 'the primacy of organised crime fighting at the expense of a family's constitutional right to companionship.' The participant is required to seek a variation to contact orders from the court if their relocation will affect the rights of the non-custodial parent to access and visitation.

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<sup>314</sup> Cooperstein, above n 297.

<sup>315</sup> Levin, above n 53.

<sup>316</sup> Slate, above n 51.

<sup>317</sup> Lawson, above n 54.

<sup>318</sup> Levin, above n 53, 234.

<sup>319</sup> *Witness Security Reform Act 1984* (USC).

<sup>320</sup> Levin, above n 53, 246.

In Australia the *Witness Protection Act 1994* (C'th) prevents the disclosure of the identity and the location of participants in the program and this prohibition can extend to matters involving access and visitation by a non-custodial parent with children included in a witness protection program. The Parliament did not rule out supervision by the Family Court of Australia (the Court) in relation to parenting orders when the Act was introduced. The Court examined this matter in *T&F* [1999] FamCA 738 (30 June 1999) and reinforced its power to make parenting orders in the best interests of the child, which may be inconsistent with the protection plan involving children in witness protection.<sup>321</sup>

### **Adjusting to a new life**

The implications of relocation for the new community aside, the ability of the participant to blend into the community into which they were relocated have been the subject of research. Montanino described<sup>322</sup> the phenomenon of 'social death and social rebirth' of the witness in the American program in his research in 1984 and 1990. He noted, using a number of case studies, the issues for the participant arising from inadequate identity documents, but also the effects on the participant. Montanino suggested<sup>323</sup> that 'all manner of social identification ... must be surrendered' so much so that the participants are stripped of their identities and whatever material possessions are associated with them.<sup>324</sup>

Montanino argued<sup>325</sup> that this social death was coupled with often-inadequate efforts at social rebirth. The participant was often only provided with limited, rudimentary identity documents in the new name and many of the documents surrendered could not be replicated in the new name.

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<sup>321</sup> See Chapter 4.3 Witness protection and the Family Court of Australia, 106-114, for detailed discussion about *T & F* [1999] FamCA 738 (30 June 1999) and the judgment of the Family Court of Australia.

<sup>322</sup> Montanino, above n 17; Montanino, above n 304, 528.

<sup>323</sup> Montanino, above n 304, 503-504.

<sup>324</sup> Ibid 504.

<sup>325</sup> Ibid 503-504.

Institutions that issued them only provided minimal assistance because the new identity document was not linked to the old. For the witness protection program this separation between the old and the new identity was necessary, but for the institution asked to provide the new documents, it raised concerns about civil and criminal liability. This meant the participant faced significant difficulties attempting to assimilate into the community resulting in 'social and personal distress'<sup>326</sup> and the sense of giving up not only their linguistic name, but also all that it symbolises.

Montanino's hypothesis<sup>327</sup> was that the degree of distress experienced over relocation and re-identification varies among clients of the program. He said<sup>328</sup> that variances in the level of distress could be accounted for by the concrete elements of the participant's social reality. To understand the participant's distress over their relocation and adjustment to the new community and their distress over adjustment to and management of the new identity, Montanino conducted a survey, which provided the opportunity for open-ended responses. The survey accommodated a range of variables including the age, gender and ethnicity of the participant, their life circumstances – married, single, partnered or other – the time spent in the program and the education level of the participant. The study, which was undertaken in partnership with the USMS, found that generally the actual witness fared better than other participants in adjusting to the new community. This may have been because 'the sheer pressure of being a witness in a serious criminal proceeding serves to mute other forms of discomfort,'<sup>329</sup> or the fact that they were more used to keeping secrets and lying as a result of their past lives than other participants were.

The psychological welfare of the participant is taken seriously in Australia. The Act requires<sup>330</sup> that a psychological assessment of the applicant's ability

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<sup>326</sup> Ibid 505.

<sup>327</sup> Ibid 510.

<sup>328</sup> Ibid.

<sup>329</sup> Ibid 514.

<sup>330</sup> *Witness Protection Act 1994* (C'th) ss 8(3)(b).

to adjust to inclusion in the program be conducted as part of the admission process. Ongoing psychological support is available to the participant once included.

### **Alternative witness protection arrangements**

Some scholars<sup>331</sup> have suggested alternative measures for dealing with informants currently included in witness protection programs. The well-founded criticisms described in the scholarly articles, identified above, led to legislative amendments<sup>332</sup> in the United States of America in 1984 and vastly improved checks and balances on the operation of the witness protection program.

Lawson<sup>333</sup> and Slate<sup>334</sup> proffered alternative measures for witness protection in their articles and while mostly consistent they did vary in one of the alternative measures. Firstly, Lawson<sup>335</sup> made a case for independent relocation and protection arrangements being handled by the witness rather than the government. She suggested that the witness be given a lump sum of money at the end of legal proceedings equivalent to that provided to an expert witness under existing arrangements. Lawson based the calculation of the lump sum payment on the fact that the witness was an expert in the field of organised crime and that their expertise was garnered through first hand experience. Once this lump sum was paid the witnesses would be responsible for managing their own relocation and re-identification.

The problem identified in this thesis with Lawson's approach and recommendation is that it fails to recognise the threat to the witness. That fact alone renders the plan deficient because it does not address the connection between the witnesses' original identity and the new persona through all official records. Connecting the old and new identity, in the way

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<sup>331</sup> Cooperstein, above n 297; Lawson, above n 54; Slate, above n 51, 32.

<sup>332</sup> *Witness Security Reform Act 1984* (USC).

<sup>333</sup> Lawson, above n 54, 1455-1458.

<sup>334</sup> Slate, above n 51, 31.

<sup>335</sup> Lawson, above n 54, 1455-1457.

Lawson's proposal would require, means that the new identity would be inherently and dangerously insecure. This outcome would likely be considered by potential witnesses to represent an unacceptable risk and one that would likely dissuade witnesses from coming forward in organised crime matters. This would clearly be at odds with the objective of witness protection in the criminal justice system.

Secondly, Lawson advocated<sup>336</sup> incarceration in special protective facilities suggesting that this would impress on the witness the gravity of their offences. She pointed out the incarceration would restore the perceptions of fairness and morality because the witness would be punished for the crimes committed. Slate asserted,<sup>337</sup> while agreeing with Lawson's proposition, that about 50% of witnesses within the witness protection program in 1997 were housed in special units in federal prison.

This thesis contends that Lawson's suggestion has parallels to the Italian witness protection arrangements.<sup>338</sup> In Italy, despite a participant's collaboration, where that participant has been involved in the commission of crimes, they will be prosecuted. If convicted, the participant will serve one quarter of the sentence in prison or 10 years if the sentence is for life. Secure facilities exist in many prisons, including in Australia,<sup>339</sup> and are used for housing prisoners who have given Crown evidence but who have not been granted immunity from prosecution or who are incarcerated for other crimes. Lawson's recommendation was not a new innovation. It could be considered an extension of one of the existing purposes of secure sections within corrections facilities. Lawson's proposal for incarceration in these

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<sup>336</sup> Ibid 1457.

<sup>337</sup> Slate, above n 51, 28.

<sup>338</sup> Allum and Fyfe, above n 33, 95 Citing V. Tedde, 'La lutte contre la criminalite organisee mafieuse en Italie: Les repentis' (Universite Paul Cezanne Aix-Marseille III, Faculte de Droit et de Science Politique D'Aix-Marseille, Master III professionnel 'Lutte contre l'Insecurite, unpublished memoire, 2006).

<sup>339</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 55-60 [4.12]-[4.21] where the committee described arrangements within prisons in Australia for prisoners who presented 'special problems' and had to be separated from the general population in the prison for their own safety.

circumstances, rather than giving indemnities or other special arrangements to witnesses, would likely act as a disincentive to witnesses to give information and evidence.

Finally, Lawson suggested<sup>340</sup> an independent review board oversee and make decisions relating to the inclusion of witnesses in the program. She considered this would provide more rigour in the selection of witnesses for inclusion and that guidelines developed by the board would provide stricter standards. Slate agreed<sup>341</sup> with the concept of an independent review board and advocated the same in his 1997 paper. The review board, according to Lawson,<sup>342</sup> would function in much the same way as a parole board and have responsibility for overseeing the acceptability of witnesses for inclusion in the federal witness protection program and developing firm guidelines for the operation of the program. Slate proposed<sup>343</sup> that a special committee be formed to scrutinise decisions relating to the admission and protection arrangements of participants included in the program. This measure did not find favour in the United States of America and it should be noted that the concept of a National Witness Protection Liaison Committee (NWPLC),<sup>344</sup> that might have a role in developing guidelines for witness protection in Australia, did not find favour either.<sup>345</sup>

## **3.2 Research conducted in the United Kingdom**

While limited scholarly research has been undertaken in the United Kingdom, Nicholas Fyfe has been the most prolific. Fyfe's research<sup>346</sup> and

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<sup>340</sup> Lawson, above n 54, 1458.

<sup>341</sup> Slate, above n 51, 31.

<sup>342</sup> Lawson, above n 54, 1458.

<sup>343</sup> Slate, above n 51, 31.

<sup>344</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, (xiii), 76-82 [5.30]-[539].

<sup>345</sup> Roberts-Smith RFD QC, above n 9, (iii).

<sup>346</sup> Fyfe, above n 306.

Fyfe's research with Heather McKay<sup>347</sup> explored intimidation of vulnerable witnesses in witness protection. As part of a broader Home Office study<sup>348</sup> on the impact of intimidation and vulnerability on witnesses to crime, Warwick Maynard<sup>349</sup> and Robin Elliot,<sup>350</sup> undertook other important research in Britain on intimidated and vulnerable witnesses. Elliot adopted Maynard's findings, particularly in respect of the three tiers of intimidation, the small inner core, the middle ring and outer ring, Maynard identified.<sup>351</sup>

Fyfe and James Sheptycki<sup>352</sup> undertook research on witness protection in organised crime cases on behalf of the British Home Office. In that research Fyfe and Sheptycki explored issues such as accomplice testimony, plea-bargaining and witness immunity, the use of crown witnesses in the United Kingdom, the cost and effectiveness of witness protection programs and their legitimacy and accountability. A study into witness protection and the Italian experience<sup>353</sup> conducted by Fyfe and Felia Allum compared witness protection in Italy to the federal witness protection program in the United States of America and provided insights into the differences between arrangements in those countries.

### **Witness Intimidation**

There is no doubt that organised crime is the primary driver for witness protection programs. The tactics used by organised crime to silence potential informants and witnesses include intimidation and fear of reprisal.<sup>354</sup> A

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<sup>347</sup> Nicholas R Fyfe and Heather McKay, 'Witness Intimidation, Forced Migration and Resettlement: A British Case' (2000) Vol 25(No 1) *Transactions of the Institute of British Geographers, New Series* 77; Fyfe and McKay, above n 295; Fyfe and McKay, above n 4.

<sup>348</sup> Home Office, 'Speaking up for Justice: Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System' (1998).

<sup>349</sup> Maynard, above n 306.

<sup>350</sup> R. Elliot, 'Vulnerable and Intimidated Witnesses: A Review of the Literature' (Home Office, 1998).

<sup>351</sup> Maynard, above n 306, 1.

<sup>352</sup> Fyfe and Sheptycki, above n 77; Fyfe and Sheptycki, above n 23.

<sup>353</sup> Allum and Fyfe, above n 33.

<sup>354</sup> Levin, above n 53, 208-209.

number of studies<sup>355</sup> have been undertaken to determine the extent of the problem of witness intimidation and vulnerable witnesses. Maynard noted<sup>356</sup> in 1994 that in Britain 'developing constructive partnerships between the police and the public were being hampered by the intimidation of witnesses.' The lack of comprehensive data on the issue was the catalyst for a large-scale survey to estimate the extent of the intimidation and in-depth interviews to estimate the circumstances of the intimidation.

Maynard's study involved five separate exercises to gather data; a review of the existing data sources, a random house-to-house survey of 1,100 respondents, a postal survey of 4,000 victims in five police sub-divisions, 50 face-to-face interviews with victims of intimidation in four of five sub-divisions and interviews with senior police in four of the five sub-divisions. His study identified that intimidated witnesses could be grouped into three tiers,<sup>357</sup> a small inner core of individuals who needed high-level protection, a middle ring of victims of crime and witnesses to crime who had suffered non-life threatening intimidation and an outer ring of the general public who perceived the possibility of being threatened or harassed. Maynard noted that witness protection programs had been established in three jurisdictions in Britain<sup>358</sup> to protect witnesses and that the Home Office was also conducting a review of 'its witness protection programme to consider ways in which it can be made even more effective.'<sup>359</sup>

Emerging from Maynard's study are two concepts of intimidation;<sup>360</sup> 'case specific' involving actual physical assaults and damage to property and 'community wide' intimidation that involves perceptions of intimidation.

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<sup>355</sup> Maynard, above n 306; Elliot, above n 350; Fyfe, above n 306; Fyfe and McKay, above n 347; Fyfe and McKay, above n 295; Fyfe and McKay, above n 4; Home Office, above n 348; The Scottish Office, 'Towards a Just Conclusion: Vulnerable and Intimidated Witnesses in Scottish Criminal and Civil Cases' (1999); The Scottish Office, above n 306.

<sup>356</sup> Maynard, above n 306, (v).

<sup>357</sup> Ibid 1.

<sup>358</sup> Greater Manchester, the Metropolitan Police and the Royal Ulster Constabulary.

<sup>359</sup> Maynard, above n 306.

<sup>360</sup> Ibid 1; Fyfe, above n 306, 519.

These categories emerged from the three rings Maynard described and Healey<sup>361</sup> devised the labels, case specific and community wide, to encapsulate Maynard's description in a more concise manner. These concepts have been adopted and refined by following studies and authors.<sup>362</sup> These same levels were referred to in an Australian inquiry<sup>363</sup> into the Victorian Witness Protection Program.<sup>364</sup>

In situations where the identity of the witness or victim of the original crime is known at the outset, and the case is one involving organised crime, high-level protection is necessary on occasion.<sup>365</sup> It is argued in this thesis that this qualification is important because it reinforces the fact that witness protection is not appropriate or necessary in all cases and other measures should be considered for the protection of witnesses before moving to inclusion in a formal witness protection program.

Elliot adopted Maynard's propositions on vulnerable and intimidated witnesses in the literature review<sup>366</sup> he prepared for a Home Office study<sup>367</sup> on intimidated witnesses in 1998. The Scottish Office<sup>368</sup> also undertook a study of vulnerable and intimidated witnesses in criminal and civil cases in 1997-1999. Inter-departmental Committees conducted both the Home Office and the Scottish Office reviews, and representatives from the Scottish Committee were included on the Home Office Committee. The research was undertaken using working groups to gather data on how intimidated and vulnerable witnesses were being treated and what could be done better. It could be argued that identifying witness protection as an option in the more

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<sup>361</sup> K. M. Healey, 'Victim and Witness Intimidation: New Developments and Emerging Responses' (1995).

<sup>362</sup> Elliot, above n 350; Fyfe, above n 306; Fyfe and McKay, above n 295, 677.

<sup>363</sup> Office of Police Integrity Victoria, above n 9.

<sup>364</sup> See Chapter 4.2 Official Australian Inquiries and Reviews, 96-102, for further discussion on the context within which Maynard's three tiers for intimidated witness is used in the Office of Police Integrity Victoria Review in 2005.

<sup>365</sup> Maynard, above n 306, 29-30.

<sup>366</sup> Elliot, above n 350, 99-128.

<sup>367</sup> Home Office, above n 348.

<sup>368</sup> The Scottish Office, above n 355.

serious cases was an inevitable outcome, but the reports were not focussing directly on witness protection, rather their efforts were directed to the witnesses themselves. Elliot noted<sup>369</sup> the effect witness intimidation was having on 'public confidence in the criminal justice system and its effectiveness' when referring to the dearth of information on the scale and nature of the problem. He suggested the lack of research and therefore literature in Britain and in other parts of the world<sup>370</sup> was 'partly because of the nature of the problem.'<sup>371</sup> This comment by Elliot was likely a reflection of the need for security and fear that details of the approaches used to counter the problem of witness intimidation could be used by perpetrators.<sup>372</sup>

In Britain, Fyfe and Sheptycki<sup>373</sup> compared witness protection arrangements in 11 European countries<sup>374</sup> and five countries outside of Europe<sup>375</sup> as part of the 2005 Crime Reduction and Community Safety Group (CRCSG), Organised Crime Research Program. This study compared the experiences in those countries to six specific areas including: (1) the date the legislation establishing the program was enacted; (2) the title of the legislation; (3) eligibility criteria applied in each program; (4) the type of protection and assistance provided were compared; (5) the decision maker or makers in relation to the protection and assistance arrangements; and (6) the agency that provides them. The study<sup>376</sup> sought to identify the legislative provision underpinning the protection of witnesses, the compellability of witnesses and plea-bargaining and immunity. The aim of the project was to examine the use of the different approaches for tackling organised crime. As noted<sup>377</sup>

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<sup>369</sup> Elliot, above n 350, 111; Fyfe and McKay, above n 4, 278; Allum and Fyfe, above n 33, 1.

<sup>370</sup> Elliot, above n 350, 116.

<sup>371</sup> Ibid 103.

<sup>372</sup> Ibid 119.

<sup>373</sup> Fyfe and Sheptycki, above n 77, 14-15.

<sup>374</sup> Austria, Belgium, Czech Republic, France, Germany, Italy, Lithuania, Poland, Portugal, Slovak Republic and Spain.

<sup>375</sup> Australia, Canada, Jamaica, Japan and South Africa.

<sup>376</sup> Fyfe and Sheptycki, above n 77, 1.

<sup>377</sup> Ibid 2.

in the report, the research was affected by the uneven nature of the existing empirical research.

Fyfe and Sheptycki reviewed published and unpublished academic research papers and policy documents and made specific requests for information from Australian, European and North American jurisdictions. Three broad problems emerged from the data collection<sup>378</sup> in the context of organised crime. Firstly, that social science and legal research on witness protection, plea-bargaining and immunity and witness compellability is immature or, in some cases, non-existent. Secondly, that no academic research on witness compellability could be found. Finally, the limited information available on measures used to enhance witness cooperation in organised crime cases prevented effective assessment of the issue. As a corollary there was no Australian scholarly research on the issue of plea-bargaining, witness immunity or witness compellability in the context of witnesses included in witness protection programs. The issue would clearly benefit from further scholarly research although the question did attract comment in the empirical research for this thesis.<sup>379</sup>

Fyfe and Sheptycki's report referred<sup>380</sup> to the similarities between witness protection programs globally and identified similarities and differences in managing accomplice testimony, plea-bargaining and witness immunity across the United States of America, Germany, Italy, Northern Ireland and Spain. Also noted<sup>381</sup> in the report were the efforts to harmonise witness protection arrangements in Europe and the leading role Europol is taking in that effort.<sup>382</sup>

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<sup>378</sup> Ibid.

<sup>379</sup> See Chapter 8.1 Analysis of online survey responses, 200-227, for discussion in the ability of the Defence to test the credibility of the protected witness at trial.

<sup>380</sup> Fyfe and Sheptycki, above n 77, 16-26.

<sup>381</sup> Ibid 12.

<sup>382</sup> See Chapter 3.4 Research in Europe, 76-77, for discussion on the harmonization of witness protection in Europe.

### 3.3 Canadian research into witness protection

Scholarly research in Canada<sup>383</sup> has, in a number of instances, been sponsored by official agencies and the reports stemming from that research is discussed in this thesis. More recently, Dr Yvon Dandurand and Kristin Farr conducted a scholarly review<sup>384</sup> of selected witness protection programs. Their 2010 review, on behalf of the Law Enforcement and Policy Branch, Public Safety Canada, compared witness protection arrangements across a number of jurisdictions internationally. Dandurand and Farr examined the characteristics of witness protection, governance and accountability arrangements and performance measures and accountability issues for the programs included in their study.

The comparative review conducted by Dandurand in 2010 built on his earlier research in support of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182.<sup>385</sup> His 2010 review relied on open source material<sup>386</sup> or information available in the public domain to compare and contrast six primary criteria, which included: (1) physical police protection; (2) identity change; (3) relocation; (4) financial support; (5) financial payment; and (6) other support services across 17 witness protection programs.<sup>387</sup> Separately Dandurand tabulated the eligibility for protection requirements in 17 programs.

In most cases, Dandurand's research indicated<sup>388</sup> that witness intimidation was linked to criminal organisations and most participants in witness

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<sup>383</sup> Lacko, above n 102; LaLonde, above n 306; Breitzkreuz MP, above n 132; Boisvert, above n 286.

<sup>384</sup> Dandurand and Farr, above n 280.

<sup>385</sup> Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 (Canada). (2010). *Air India Flight 182: A Canadian Tragedy*. Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182.

<sup>386</sup> Dandurand and Farr, above n 280, 3.

<sup>387</sup> Australia (the NWPP, Victorian, South Australian, Western Australian and Queensland programs), Canada, Germany, Ireland, Italy, Jamaica, Philippines, South Africa, United Kingdom, United States of America (the Federal and Massachusetts programs), Kenya and New Zealand.

<sup>388</sup> Dandurand and Farr, above n 280, 4.

protection programs were criminally involved. Protection is normally provided by police forces and most programs are legislatively based. The level of risk participants face dictates the level of protection and assistance the participant will receive and the public and media generally understand the reasons witness protection programs exist and support their existence.<sup>389</sup> Other findings that are relevant to this study involved those that dealt with evaluating the effectiveness of the programs. The final three points are directly relevant to the governance and accountability theme of this study. Dandurand refers to the placement of witness protection within various structures of government,<sup>390</sup> noting that in many jurisdictions the programs are established within police forces, but in others they are within other organisations. There is an argument in Europe and in parts of Canada<sup>391</sup> that witness protection programs should be separated from the agency conducting the investigation.

Efforts to accurately compare the effectiveness of programs in Dandurand's study were confounded by insufficient open-source data, which rendered a comparison of the effectiveness of programs across jurisdictions impossible. Dandurand said that few attempts had been made to systematically evaluate witness protection in any jurisdiction and that better oversight; evaluation and protection of witness's interests were needed in most jurisdictions.<sup>392</sup> The research for this thesis found the same problem when seeking to analyse the effectiveness and efficiency of the Australian witness protection programs. The experience is shared with most other research discussed in this thesis where facts and figures were sought to conduct academic research into witness protection.

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<sup>389</sup> Ibid 4.

<sup>390</sup> Ibid 40-41.

<sup>391</sup> United Nations Office on Drugs and Crime, above n 12; Council of Europe, above n 286; Boisvert, above n 286.

<sup>392</sup> See Chapter 9 Discussion, 229-263.

### 3.4 Research in Europe

Some scholarly research has been conducted into witness protection in Europe<sup>393</sup> where comparisons of some programs were considered. Karen Kramer's<sup>394</sup> research described a set of minimum standards for witness protection programs. Kramer and van der Heijden<sup>395</sup> both adopted the findings of studies sponsored by official organisations<sup>396</sup> in developing their papers which they presented at conferences on witness protection in 2010 and 2001 respectively.

#### **Harmonising witness protection**

The European literature has one thing in common, the articulation of a coordinated arrangement for witness protection where such programs are established in Europe. It is fair to say that the framework for protection programs set out in these papers is derived from an assessment of existing programs and an articulation of minimum requirements based on the experiences of a number of agencies over 40 years. Programs are, of course, tempered or ameliorated by local conditions because a witness protection model cannot be one size fits all, although most of the core elements are the same. Countries and jurisdictions will always have to contend with unique issues within their own legal and political systems, but there is undeniable logic in identifying and adopting common minimum standards on which to model witness protection.

A European review<sup>397</sup> of witness protection arrangements was presented at the *2<sup>nd</sup> World Conference: Modern Criminal Investigations, Organised Crime & Human Rights* in Durban in 2001 by van der Heijden.<sup>398</sup> The information to

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<sup>393</sup> Institute for International Research on Criminal Policy, above n 286.

<sup>394</sup> Kramer, above n 15.

<sup>395</sup> van der Heijden, above n 286.

<sup>396</sup> United Nations Office on Drugs and Crime, above n 12; Council of Europe, above n 286.

<sup>397</sup> Council of Europe, above n 286, Committee of Experts on Criminal Law and Criminological Aspects of Organised Crime of the Council of Europe.

<sup>398</sup> van der Heijden, above n 286.

support that study on witness protection arrangements in Italy, Germany and the Netherlands was collected by way of survey. The purpose of the research was to provide guidance for Member States of the Council of Europe on initiating or adapting their arrangements to suit a common model. The review by the Council of Europe<sup>399</sup> sits well alongside those conducted by the United Nations Office of Drugs and Crime<sup>400</sup> and the Institute for International Research.<sup>401</sup> The overview presented by van der Heijden is consistent with the findings of Kramer<sup>402</sup> and her framework for witness protection, which described<sup>403</sup> the elements of an effective witness protection program. Kramer's standards, specifications and elements of witness protection programs are discussed in greater detail in Chapter 5 where the legislation governing witness protection is described. Kramer's framework is very similar to legislative requirements encapsulated in the Australian witness protection legislation and those in the United States of America, Canada and the United Kingdom.

### **3.5 Research in South Africa**

A comparative review of witness protection conducted on behalf of the National Prosecuting Authority of South Africa,<sup>404</sup> examined witness protection arrangements in Australia, Europe and the United States of America in order to benchmark the South African witness protection program.

The National Prosecuting Authority of South Africa<sup>405</sup> study in 2004 compared witness protection arrangements of eight jurisdictions, the United States of America and California, Italy, Australia, the United Kingdom and

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<sup>399</sup> Council of Europe, above n 286.

<sup>400</sup> United Nations Office on Drugs and Crime, above n 12.

<sup>401</sup> Institute for International Research on Criminal Policy, above n 286.

<sup>402</sup> Kramer, above n 15.

<sup>403</sup> Ibid 12-13.

<sup>404</sup> Franks, Munukwa and Moeng, above n 286.

<sup>405</sup> Ibid.

Strathclyde, Germany and Canada to their own. It reviewed the available literature and analysed responses to a mailed questionnaire to develop an understanding of five specific elements of witness protection arrangements in the countries surveyed. Those elements included the optimal location of the program, staffing, specialisation of functions, training and funding and collaboration. The study was aimed at evaluating<sup>406</sup> the effectiveness of South Africa's witness protection program by drawing on the experience of the survey countries and establishing a benchmark for best practice. It also sought to develop an understanding of the effectiveness of the administration of criminal justice in South Africa, public confidence in the criminal justice system and the freedom and security of the South African population.

The review findings included suggestions<sup>407</sup> that the location of the witness protection program within government structures was less important than the design of the program and the policies, which enable it to operate without fear, favour or prejudice. Staffing the South African witness protection program was, it was said, not a matter of whether the witness protection unit should have dedicated staff, but that a secondment model enabling the rapid deployment of reserves to supplement the full time capacity could be used. Discussion about the tenure of staff took into account the need for specialist skills and the need to develop strong career incentives to attract skilled and competent staff to positions in witness protection. Noting the high degree of specialisation in the functions expected of staff, training was necessary and this had been highlighted in the review of established programs. Insofar as funding and collaboration are concerned, the report noted that it was often difficult to forecast the cost of a witness protection operation because of the variables that arise in each case. It found that some countries funded their programs out of funds forfeited under proceeds of crime.

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<sup>406</sup> Ibid 7.

<sup>407</sup> Ibid 32-33.

### 3.6 A significant gap in the research and knowledge

Comparison of witness protection programs operating in other countries in the Australian research<sup>408</sup> is limited and does not cover the wide variety of countries. Some studies<sup>409</sup> have included references to the national and state based witness protection programs in Australia.

It is argued that efforts by researchers to determine the effectiveness of witness protection programs have largely been unsuccessful. This is because the empirical data on witness protection is scarce and also because metrics, against which to consistently report data, have not been developed. A range of measures is clearly required to enable proper assessment of the effectiveness and efficiency of witness protection programs. Slate<sup>410</sup> suggested that more research into the costs and benefits of witness protection was required, but this would obviously need to be done in such a way as to preserve the secrecy and integrity of the program. Cetin<sup>411</sup> described the lack of data on aspects of the program and Fyfe and Sheptycki<sup>412</sup> described a weak evidence base from which to judge the effectiveness of elements of the programs and stressed the need for more empirical research. Whilst the problems associated with researching issues in witness protection are mentioned above, Fyfe and Sheptycki<sup>413</sup> devoted considerable effort in this report to problems in evaluating the cost and effectiveness of witness protection.

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<sup>408</sup> Roberts-Smith RFD QC, above n 9; Parliamentary Joint Committee on the National Crime Authority, above n 1; Joint Standing Committee on the Corruption and Crime Commission, Parliament of Western Australia, *Inquiry into the Future Operation of Witness Protection Programmes in Western Australia: Report No. 26 (2007)* 8.

<sup>409</sup> Franks, Munukwa and Moeng, above n 286; Bakowski, above n 15; Cetin, above n 3; Dandurand and Farr, above n 280; Fyfe and Sheptycki, above n 77; United Nations Office on Drugs and Crime, above n 12.

<sup>410</sup> Slate, above n 51, 31.

<sup>411</sup> Cetin, above n 3, 12-13.

<sup>412</sup> Fyfe and Sheptycki, above n 77, iv, 29, 34,

<sup>413</sup> *Ibid* 27-33.

The effectiveness of witness protection programs is sometimes referred to in the context of no participant or relative of a participant being harmed by the source of the threat whilst in a witness protection program.<sup>414</sup> Referring to the effectiveness of witness protection in Italy, Germany and the Netherlands, van der Heijden indicated<sup>415</sup> that they were highly effective because no participant had been the victim of an attack by the source of the threat. He wrote<sup>416</sup> that the exact number of organised crime figures convicted on the evidence of a participant was not available. This measure, arguably, is of little value in determining the overall effectiveness and efficiency of witness protection programs. While it is critical for the credibility of a witness protection program that the safety and security of participants is assured, the objective of witness protection includes the impact such programs have on serious and organised crime. To measure that impact it is necessary to appreciate a much broader range of issues including the successes of witness protection based on the disruption of organised crime syndicates, the prosecution of offenders, the cost of operating the programs and the social benefits realised.<sup>417</sup>

### **3.7 Conclusion**

The discussion above identifies some research that has been conducted into witness protection and a range of themes associated with it. The issues that arose in early efforts to conduct witness protection operations in the United States of America, those concerning the enforcement of judgements particularly, were resolved with legislative reform. The Australian legislation has largely also dealt with issues of participants hiding behind their new name to avoid prior obligations and rights, particularly in respect of debts

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<sup>414</sup> van der Heijden, above n 286, 6.

<sup>415</sup> Ibid 6.

<sup>416</sup> Ibid.

<sup>417</sup> See Chapter 9 Discussion, 229-263, for more detailed discussion on the issue of effectiveness and efficiency of witness protection programs and the performance measures that could be applied without jeopardizing the programs integrity or security of the safety and security of the participants; see also Annexure 13 for the full list of metrics recommended to enable a more holistic assessment of the effectiveness and efficiency of witness protection programs.

incurred prior to entering a witness protection program. Those issues arising in respect of contact orders where children are involved remain problematic. The legislation has not dealt with the tension between the witness protection and the *Family Law Act 1975* in Australia.

Research has been conducted on participants' adjustment to a new life and it could be argued that more recent efforts to ensure the participant's mental health are catered for by a greater use of psychologists during the participant's inclusion in a witness protection program. There is however, no empirical data to support the notion that participants are able to more readily adjust to this new life than they were when Montanino<sup>418</sup> first explored the issue in 1984. Further scholarly examination is required so as to develop a better understanding of the implications of inclusion in a witness protection program for the participant. Further research might lead to more effective operating methodologies for managing the ongoing welfare and well being of participants included in the program. This might also alleviate witness dependence on the police providing protection. The extent and the existence of such dependencies have not been studied.

While research on witness intimidation and vulnerable witnesses has been plentiful<sup>419</sup> it remains limited insofar as the implications for witness protection are concerned. Likewise there is little research on plea-bargaining, immunity and accomplice testimony in this context. No specific previous research was found on the themes or sub-themes this thesis was concerned with. Particularly, there has been no specific research done in Australia or overseas on cross-jurisdictional coordination of witness protection arrangements within a country where programs coexist in a number of jurisdictions. No contemporary studies have been undertaken to determine whether a national witness protection program, regardless of the originating jurisdiction, would be beneficial. The national coordination of witness protection has been mentioned in a cursory way in government-

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<sup>418</sup> Montanino, above n 304.

<sup>419</sup> Maynard, above n 306; Elliot, above n 350; Fyfe and McKay, above n 4.

sponsored inquiries since the PJC in 1988, but no scholarly studies have been undertaken until now.

No specific scholarly research has been undertaken in Australia or overseas on the implications of the inclusion of witnesses in a witness protection program. The issues include the participant's disclosures, the MOU or the witness's ability to adjust to life in a program. Data available on the effects of long term inclusion in a witness protection program on a participant or their immediate family could not be found.

No scholarly studies have been undertaken in Australia or overseas on issues associated with the change of a participant's identity other than those described by Montanino<sup>420</sup> in connection with his concept of social death and social rebirth. The requirement for an order from the Supreme Court for a new identity document – a birth certificate in the new name or a death certificate in the old name – has not been explored.

No specific studies have been undertaken in Australia or overseas in relation to confidentiality of information about witness protection programs. The witnesses' identity and location must remain confidential and the operating methodologies employed by police conducting witness protection operations must also be protected. There is however an argument that certain information could be disclosed without compromising the program or the participant's safety and security. These issues are not fully explored by the previous research.

No specific scholarly research has been undertaken in relation to expediting cases involving participants of witness protection programs giving evidence.

No specific scholarly research has been undertaken on governance and accountability issues. In this respect external oversight of the operation of witness protection programs and the effectiveness and efficiency of the programs are the central issues of particular interest. The lack of empirical

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<sup>420</sup> Montanino, above n 304.

data on a range of themes addressed above has been noted and issues presented in the collection of empirical data for this study.

## Chapter 4. Official Australian Inquiries and Reviews

This chapter examines the official inquiries and reviews conducted in Australia from 1974 to the present day. It develops an understanding of the reasons for the establishment of witness protection and those that shaped the programs that have been implemented. The reviews have led to some amended practices in such things as reporting on the operation of certain programs. Nonetheless, none have led to significant changes to the way witness protection programs are conducted in Australia. The reviews are examined to explore issues and tensions that exist in the Australian environment as well as to gain an understanding of whether the key themes of this thesis have been addressed at the domestic level. As seen in earlier chapters, they have not been examined in any of the international studies.

In Australia the inquiries and reviews of witness protection programs are all government initiated. As such, there is no scholarly research available to assist this thesis. Rob Settle<sup>421</sup> provided some references to the use of witness protection as part of the Victorian Police investigation into the Walsh Street murders of two uniformed police officers by Melbourne underworld figures in the 1980s. In that investigation, as Settle noted from the various interviews he conducted, key witnesses were included in the Victorian Witness Protection Program only to exercise their right to later remove themselves from the program. Those suspected to have been involved in the Walsh Street murders were subject to ongoing efforts by the investigating police to inform on their associates. Offers of protection including a change of identity and relocation, indemnities from prosecution, and favourable treatment were offered to encourage them to inform.

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<sup>421</sup> Settle, Rob, *Police Informers* (Federation Press, 1995).

The official inquiries include Royal Commissions,<sup>422</sup> parliamentary inquiries,<sup>423</sup> research bodies under common police services,<sup>424</sup> (one commissioned by government<sup>425</sup> in response to the death of a participant whilst still included in a witness protection program) and one by the corruption watchdog in Western Australia.<sup>426</sup>

The Annual Reports to parliaments in respect of the NWPP and the witness protection programs in South Australia, Western Australia and Queensland are also considered in this section. The three yearly reviews conducted by the Parliamentary Crime and Misconduct Committee in Queensland, which also review the operation of the witness protection program run by the CMC, are not examined in detail. Those reviews did, however, contribute to the development of the enhanced reporting metrics advocated in this thesis.

## **4.1 Inquiries into witness protection in Australia**

After the Royal Commissions there was considerable work still to be done to move to legislatively based programs. Despite the early administrative arrangements, Justice Stewart suggested<sup>427</sup> that Australian law enforcement agencies had no specific programs or guidelines for the protection of witnesses.

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<sup>422</sup> Moffitt, above n 8; Williams, above n 8; Woodward, above n 8; Costigan, above n 8; Stewart, above n 8.

<sup>423</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1; McGrath and Hailes, above n 8; Joint Standing Committee on the Corruption and Crime Commission, above n 408.

<sup>424</sup> The National Police Research Unit conducted Project Epsilon over a three-year period between 1984 and 1987, however, access to and use of the reports flowing from that work has been denied to this research by the Crime Managers Forum of the Australia New Zealand Police Advisory Agency (ANZPAA) for undisclosed reasons. That said, references exist in other publically available documents to a small amount of the work and findings of Project Epsilon and those references are included in this thesis.

<sup>425</sup> Roberts-Smith RFD QC, above n 9.

<sup>426</sup> Corruption and Crime Commission of Western Australia, 'The Anti-Corruption Commission's Investigation Report into any Involvement by Western Australia Police Officers in the Death of Andrew Petrelis' (2007).

<sup>427</sup> Stewart, above n 8, 537, 540.

The compelling need to do something about the growing problem of organised crime, its impact on the community and the implications of its tactics on police investigations fuelled more discussion about strategies to mitigate its effects. While the Royal Commissioners had all made suggestions about how authorities should attack organised crime, including suggestions about protecting witnesses, the Stewart Royal Commission was particularly influential. Justice Stewart's proposal (Recommendation 88) for a National Witness Protection Program was referred to the NPRU through the Australian Police Ministers Council (APMC) by resolution in November 1983 for early investigation and report.<sup>428</sup> Precise terms of reference for this early work are elusive and not clearly identified and the content of the reports produced by the NPRU are not available to this research. Despite the age of the material and the fact that it has been superseded by other inquiries and by legislation in Australia, all Australian police commissioners refused to allow the use of the NPRU research for this thesis.

It is known that the NPRU, one of a number of common police services 'making a significant contribution to the increased professionalism of the police services and law enforcement in Australia',<sup>429</sup> conducted Australia's first inquiry into witness protection between 1984 and 1985. The NPRU set out a methodology for national cooperation in witness protection<sup>430</sup> that Roberts-Smith interpreted to be 'the creation of a national witness protection scheme to be utilised by the states on a user pays basis.'<sup>431</sup>

The APMC considered<sup>432</sup> the NPRU report at its meeting on 31 May 1985 and noted that the state and territory police commissioners favoured the existing bilateral arrangements that they said were working satisfactorily. On that basis, the APMC decided against establishing a national witness protection

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<sup>428</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 49 [4.1].

<sup>429</sup> Horman, above n 203, 111.

<sup>430</sup> McGrath, above n 8, 5-9.

<sup>431</sup> Roberts-Smith RFD QC, above n 9, 20 [102].

<sup>432</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 49 [4.2].

program,<sup>433</sup> saying that each jurisdiction should make provisions for the protection of witnesses as the circumstances required.<sup>434</sup>

The recommendation for a National Witness Protection Liaison Committee (NWPLC) under the auspices of the APMC, put forward by the NPRU, was not adopted despite also being recommended by the PJC in 1988. This thesis argues that the NWPLC might have fulfilled some of the same roles recommended by Lawson and Slate for a review board<sup>435</sup> in the United States of America and it might also have ensured greater cross-jurisdictional coordination in Australia. However, that assumption is purely speculative.

Given that the APMC rejected the option of a NWPLC it is not surprising that the Australasian Crime Conference confirmed, at its meeting from 21-24 April 1987, that each state and territory police force should be responsible for providing protection for witnesses from within its own resources or with the assistance of other state and territory police forces or the Australian Federal Police (AFP).<sup>436</sup> The Police Commissioners Conference, held in Darwin in 1987, called for greater cooperation and coordination between the state and territory police forces in their witness protection schemes while at the same time rejecting a proposal for a national witness protection scheme modelled on the American witness protection program.<sup>437</sup>

### **The Parliamentary Joint Committee (PJC) on the National Crime Authority**

The establishment of witness protection in Australia was ultimately shaped by the PJC inquiry into witness protection in Australia in 1988. The PJC was a

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<sup>433</sup> Ibid 49-50 [4.2] citing Senator Evans, Answer to question on notice, Senate Hansard, 16 September 1986, 460; National Crime Authority, Witness Protection – Discussion Paper for the Operations Conference (unpublished, 1986) 14.

<sup>434</sup> Ibid.

<sup>435</sup> See Chapter 3 Review of the Literature, 66-68, for discussion of the alternative witness protection arrangements advocated by Lawson and Slate.

<sup>436</sup> Australasian Crime Conference Secretariat, 'Record of Proceedings (unpublished, 1987)' (Paper presented at the Australasian Crime Conference, Darwin, 1987).

<sup>437</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, citing In Camera Evidence, Victorian Government, 593-4; Superintendent J B Barclay, 529-30.

parliamentary committee made up of Members and or Senators from all sides of politics, established to undertake enquiries, hear witnesses, correlate information and discuss issues before making reasoned conclusions about the matter being investigated. Such a committee, concentrating on a specific task, offers the benefits of specialisation.<sup>438</sup> This standing committee has undergone a number of name changes since 1988. On 1 January 2003, the Committee's name changed to the Parliamentary Joint Committee on the Australian Crime Commission. The change coincided with the establishment of the Australian Crime Commission on the passage of the *Australian Crime Commission Act 2002* (C'th). On 25 November 2010 the Committee's name was changed to the Parliamentary Joint Committee on Law Enforcement (formerly the Australian Crime Commission) with the passage of the *Parliamentary Joint Committee on Law Enforcement Act 2010* (C'th).

Established under section 53 of the *National Crime Authority Act 1984* (the NCA Act), the PJC was responsible for overseeing the operation of the National Crime Authority (NCA). It was required under section 55 to report to both Houses of Parliament on matters relating to the NCA or the performance of its functions. In this case, the PJC enquiry into witness protection arose from concerns expressed by the NCA in its 1985/86 Annual Report. There the NCA noted its dissatisfaction with the existing witness protection arrangements in Australia and complained that it did not have the resources to set up its own witness protection program despite the legislative power to do so.<sup>439</sup> The NCA Act empowered the Chairman of the NCA or his delegate to make arrangements with the Minister or the AFP or state or territory police to provide for the safety of a person or to protect the person from intimidation or harassment because that person was appearing or was to appear at a hearing before the NCA.

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<sup>438</sup> Parliament of Australia, *Parliamentary Committees* (18 May 2012) <http://www.aph.gov.au/house/committee>.

<sup>439</sup> *National Crime Authority Act 1984* (C'th) s 34.

The NCA considered that a national witness protection scheme had merit and advocated the establishment of a national scheme to coordinate witness protection arrangements.<sup>440</sup> The NCA sought specific legislation in Australia to regulate such a program. In August 1987, Mr Bingham, then a delegate of the Chairman of the NCA, made public calls for the establishment of a statutory national witness protection scheme.<sup>441</sup>

The PJC commenced its inquiry on 1 April 1987 and was particularly interested in four specific aspects of witness protection. It examined the nature of witness protection and its role in the fight against organised crime and the extent to which witness protection is an essential requirement of successful organised criminal investigation and prosecution. The PJC also considered the extent to which organised crime witnesses were presently protected and the nature, adequacy and cost of current arrangements. As part of the inquiry, the PJC suggested options available to government, to improve witness protection in Australia.<sup>442</sup>

The first PJC meeting was held on 21 October 1987 and it called for submissions from interested parties and set a closing date of 4 December 1987 for submissions. The inquiry received a total of 42 submissions from 71 persons or bodies. The PJC held public and private hearings over the course of a year and took evidence from government and academic sources and from participants and former participants in witness protection programs through in-camera hearings in Brisbane, Sydney, Melbourne and Canberra.<sup>443</sup> It examined witness protection arrangements in place in Australia, West Germany, Canada, the United States of America, and the United Kingdom and compared the programs in those five countries. The inquiry considered what drove the establishment of the programs, which agencies were responsible for conducting witness protection operations and how they operated. The PJC also took evidence from prisoners and former

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<sup>440</sup> National Crime Authority, above n 243, 42-43.

<sup>441</sup> Age, August 1987, 5; 27 August 1987, 6.

<sup>442</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, (vii).

<sup>443</sup> Ibid 3.

prisoners in Queensland and New South Wales including inmates who were, or had been in the Witness Protection Unit in Long Bay Jail.<sup>444</sup> Issues to do with custodial witnesses are, however, not considered in this thesis.

There can be no doubt that the information provided by informers accounts for the detection of the greater part of crime particularly in victimless or consensual crimes such as drug trafficking, illegal gambling, the sale of pornography, organised prostitution and usury.<sup>445</sup> The PJC identified the characteristics of witness protection and in doing so examined the problems experienced in the early programs.<sup>446</sup> The PJC noted the use of re-identification and relocation as the preferred methods of protecting witnesses included in formal witness protection programs, eventually recommending that relocation be included in the legislation.

The coordination of witness protection arrangements was an important issue considered by the PJC, which recommended<sup>447</sup> that the AFP assume responsibility for an expanded national witness protection role. The PJC considered the AFP to be well placed to conduct such a program. It recommended that a NWPLC be formed<sup>448</sup> to coordinate the development of arrangements for the relocation of witnesses across state boundaries and facilitate information exchange between agencies in the relocation process.<sup>449</sup> This thesis argues that these recommendations reflected work already underway by those police forces undertaking witness protection operations. For example, each police force would have allocated an officer in charge for witness protection and each would have been working to improve their operational arrangements including the use of relocation as a strategy.

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<sup>444</sup> Ibid.

<sup>445</sup> Ibid 7.

<sup>446</sup> See Chapter 3.1 The previous research in the United States of America, 58-68, for discussion about the problems experienced with the federal program in the United States of America and the need for legislative amendments to correct the problems with the 1970 legislation and program in that country.

<sup>447</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 81 [5.37].

<sup>448</sup> Ibid (xiii).

<sup>449</sup> Ibid 82.

The cross-jurisdictional coordination of witness protection may not have been to a sufficiently high level noting the comments of the APMC and the Crime Commissioners forum referred to earlier.

Recommendations for the structure of witness protection arrangements emerged from the enquiry and those recommendations also had a significant bearing on the legislation subsequently drafted. The PJC recommended<sup>450</sup> that: (1) legislation relating to the registration of births be amended to provide suitable mechanisms for new identity documents to be issued and that the original birth certificate be retained by the protection provider on a closed register with limited access; (2) complementary state and territory legislation should indemnify people acting in an official capacity who alter records from civil or criminal liability; (3) complementary legislation create criminal offences where a person compromises the security of the participant by revealing details of the witness's change of identity; (4) where unavailable, an appropriate complaints handling mechanism be established to enable persons aggrieved by decisions made by agencies in the administration of the programs; and (5) complementary state and territory legislation allow for the protection of participants by relocation, prevent participants evading civil debts and obligations imposed by the Family Court, enable the release of the participant's criminal record in their old name if the participant commits an offence, enable cases involving participants giving evidence to be expedited and clarify the law relating to the suppression of details identifying the participant.

The framework for the NWPP and the *Witness Protection Act 1994* (C'th) was, to a large extent, informed by the recommendations. The same recommendations informed the development of the state and territory legislation 'with the intention that it provide a model for complementary legislation by the States and Territories in Australia.'<sup>451</sup> The 1991 Victorian

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<sup>450</sup> Ibid xiii-xv.

<sup>451</sup> John Feneley, 'Witness Protection Schemes - Pitfalls & Best Practice & Covert Investigations' (Paper presented at the 8th International Anti-Corruption Conference (IACC), Lima, Peru, 1997) 6.

legislation, which essentially adopted the witness protection model first developed in the United States of America, and the 1996 amendments to the Victorian Act, demonstrate the close correlation between the Australian and American legislation and programs. There is little doubt but that witness protection arrangements in the United States of America influenced the development of programs and legislation in Australia.<sup>452</sup> The approach to witness protection adopted in Australia is also consistent with elements of a joint taskforce approach advocated by Justice Woodward.<sup>453</sup> However, as will be seen later in this thesis, national coordination still eludes the Australian programs.

## **4.2 Reviewing witness protection programs in Australia**

In Australia to date five official reviews<sup>454</sup> have been conducted into witness protection programs. Reviews of legislation have, in some cases meant amendments to the *Witness Protection Act 1994 (C'th)*<sup>455</sup> and to the state and territory statutes. These amendments are discussed in Chapter 5. Of these five reviews, two relate to the operation of the Western Australian witness protection program<sup>456</sup> and two others relate to the New South Wales<sup>457</sup> and the Victorian<sup>458</sup> witness protection programs. The fifth review, a PJC review entitled *Witnesses for the Prosecution: Protected Witnesses in the National Crime Authority*<sup>459</sup> relates to the NWPP.

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<sup>452</sup> Caslon Analytics, above n 22.

<sup>453</sup> Woodward, above n 8, 1611-1612.

<sup>454</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8; Office of Police Integrity Victoria, above n 9; New South Wales Parliament, above n 9; Roberts-Smith RFD QC, above n 9; Joint Standing Committee on the Corruption and Crime Commission, above n 408.

<sup>455</sup> See Chapter 5 Australian Witness Protection Legislation.

<sup>456</sup> Joint Standing Committee on the Corruption and Crime Commission, above n 408; Roberts-Smith RFD QC, above n 9.

<sup>457</sup> New South Wales Parliament, above n 9.

<sup>458</sup> Office of Police Integrity Victoria, above n 9.

<sup>459</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8.

The matters arising from those five reviews include: the safety of the participant highlighted by the death of a protected witness, Andrew Petrelis, while included in a witness protection program; the legislative arrangements supporting witness protection in Australia; and the operation of extant programs. The administrative arrangements for witness protection on certain police forces including external oversight and accountability were examined in these reviews. Cooperation between police forces, issues to do with the provision of identity documents to participants, fast tracking cases involving protected witnesses and the tension between family law and witness protection were also touched on, but only superficially.

### **The Western Australian Reviews**

Western Australia has experienced more reviews<sup>460</sup> of its witness protection arrangements and of its police force in the witness protection context than any other state or territory or the Commonwealth. This is not surprising since it has the distinction of the death of a participant whilst included in that state's witness protection program in troubling circumstances. The death of a participant whilst included in a witness protection program is a particularly dire issue because it points directly to potential deficiencies in the protection arrangements put into place and/or to the integrity of the program itself.

The death of Andrew Petrelis from a drug overdose while included in the program was the catalyst for two examinations of the witness protection program in Western Australia.<sup>461</sup> The Roberts-Smith inquiry in 1999-2000 looked into the management of Petrelis by the Witness Protection Unit (WPU) of the Western Australian police. In examining those arrangements, it considered the scope and suitability of the WPU, the adequacy of the existing

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<sup>460</sup> Roberts-Smith RFD QC, above n 9; Joint Standing Committee on the Corruption and Crime Commission, above n 408; Corruption and Crime Commission of Western Australia, above n 408; The Hon G. A. Kennedy AO QC, 'Royal Commission into Whether there has been Corrupt or Criminal Conduct by any Western Australian Police Officer Final Report Volume 2' (2004).

<sup>461</sup> Roberts-Smith RFD QC, above n 9; Joint Standing Committee on the Corruption and Crime Commission, above n 408.

legislative authority supporting the state witness protection program; and the coordination agreements in place with other agencies at the time. In addition, Roberts-Smith reviewed the human and financial resources and staff and risk management practices and standard operating procedures adopted since 1994 and other matters related to his terms of reference that arose during his review.

As part of the analysis of coordination arrangements with other agencies, Roberts-Smith reviewed the national coordination of witness protection across Australasian jurisdictions. That part of the review, however, was brief and did not delve into any of the possible problems associated with the cross-jurisdictional coordination arrangements for witness protection in Australia. This is not surprising since the terms of reference did not require an examination of those issues, allowing the reviewer flexibility on what was considered to be an issue associated with the terms of reference.

The material Roberts-Smith examined<sup>462</sup> as part of the review included official records, media articles, police reports, academic and specialist papers and other material from Australia and abroad on witness protection, the WPU and the death of Petrelis. He received briefings and held meetings with senior police in Western Australia and in other jurisdictions as well as with senior police in the London Metropolitan Police and officials in the British Home Office. He conducted interviews with past and present members of the state program and protected witnesses who volunteered to take part in the enquiry.

The review resulted in the presentation of a confidential two-volume report to the Police Commissioner on 3 July 2000. A redacted version of Volume One of the report was subsequently prepared and was released on 1 August 2000. Volume Two of the Roberts-Smith report dealt with the issues surrounding the death of Petrelis and the actions, omissions or flaws in the Western Australian program. It is not available to the public and therefore it did not contribute to the discussion in this thesis.

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<sup>462</sup> Roberts-Smith RFD QC, above n 9, 4-6.

A comprehensive comparison of the existing witness protection arrangements in the NWPP, Queensland, Victoria, New South Wales, Northern Territory, Tasmania and New Zealand was conducted. Roberts-Smith described<sup>463</sup> these existing witness protection arrangements as well as the development of programs in the United States of America and the United Kingdom. A large part of the report focussed on the evolution of witness protection in Western Australia<sup>464</sup> particularly in respect of administration and governance. Roberts-Smith also referred to the practices and procedures, adopted as normal practice by the WPU, in managing the Petrelis operation. From that exercise he identified deficiencies in witness protection arrangements in Western Australia.

The report contained 41 recommendations<sup>465</sup> to address problems in the operation of the program. They ranged from changes to the management of the WPU, its location within the police forces, record keeping including electronic record keeping and the maintenance of a register on a stand-alone computer so that witness protection records were not kept on the broader police computer system. Changes to recruitment; training and tenure for officers deployed to the WPU and enhanced arrangements for recording breaches to the MOU by participants were also described. None of the recommendations involved legislative amendments; however, one recommended the establishment of a Coordination Team within the WPU to, amongst other things, negotiate new MOUs with external agencies. At Recommendation 41, Roberts-Smith suggested the Minister for Police and the Police Commissioner make formal representations for an inquest into the death of Petrelis to be held in Queensland, where he had been relocated.

The second significant Western Australian inquiry was that conducted by the Joint Standing Committee on the Corruption and Crime Commission (JSCCC) in 2006-2007. In that inquiry, the Western Australian Attorney General was required to 'review the *Corruption and Crime Commission Act*

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<sup>463</sup> Ibid 19-59.

<sup>464</sup> Ibid 59-164.

<sup>465</sup> Ibid xxii-xxvii.

2003 as soon as practicable after three years from the commencement of the legislation.’<sup>466</sup> This inquiry produced three separate reports, the first on whether the Corruption and Crime Commission (CCC) ‘should have a witness protection function.’<sup>467</sup> The second related to the review of the future operation of the state witness protection program following the Queensland Coroner’s verdict in the Petrelis case.<sup>468</sup> This 2006<sup>469</sup> report provided an account of the circumstances surrounding the death of Petrelis while included in the Western Australian witness protection program, as well as the Queensland Coroner’s findings.

The third report examined, under the sole term of reference<sup>470</sup> for that part of the inquiry, whether the *Corruption and Crime Commission Act 2003* should be amended to enable the Corruption and Crime Commission (CCC) to perform witness protection functions. In this third part of the inquiry, the JSCCCC received eight submissions, among them, submissions from the Western Australian Police, the CCC and the Parliamentary Inspector of the Corruption and Crime Commission. In its submission the CCC sought designation as an approved authority under the Western Australian Act so that it could access the witness protection program for witnesses to be protected by interstate and federal agencies.

In its submission, the CCC argued<sup>471</sup> that it did not have access to information about the administration of the state witness protection program and therefore could not comment on whether its current administration was satisfactory. The CCC inferred that the Western Australian Police Force was not effectively managing the witness protection

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<sup>466</sup> Joint Standing Committee on the Corruption and Crime Commission, above n 408, ix.

<sup>467</sup> Ibid.

<sup>468</sup> Joint Standing Committee on the Corruption and Crime Commission, Parliament of Western Australia, *Inquiry into the Future Operation of Witness Protection Programmes in Western Australia: Report No. 9* (2006), vii.

<sup>469</sup> Joint Standing Committee on the Corruption and Crime Commission, above n 9.

<sup>470</sup> Joint Standing Committee on the Corruption and Crime Commission, above n 408, vii.

<sup>471</sup> Ibid 16.

program. It argued that<sup>472</sup> the Queensland Crime and Misconduct Commission had established the witness protection program in that state after its removal from the Queensland Police Service because of inadequate management. While the CCC sought a witness protection function, the Parliamentary Inspector of the CCC, in its submission, suggested<sup>473</sup> that improving the effectiveness of the existing program was more appropriate. It said that to give the CCC a witness protection function would be an unnecessary duplication of resources. The JSCCCC concurred<sup>474</sup> finding that there was no justification for the establishment of a separate witness protection program within the CCC or any reason to transfer the existing program to the CCC from the WA police. It did however note that the CCC should be recognised as an ‘approved authority’ under the Act so that the Commissioner of Police could facilitate arrangements with relevant witness protection agencies on behalf of the CCC.

The JSCCCC also reviewed the implementation of Roberts-Smith’s recommendations and found<sup>475</sup> that the Western Australian police had made significant progress against all of the recommendations with the exception of Recommendation 7.<sup>476</sup> Recommendation 7 called for the state witness security plan to include, as an objective, a proportion of not less than one-third female to male sworn officers deployed to the WPU. Western Australian Police policy on gender specific advertising<sup>477</sup> prevented the recommendation being implemented, however, the WPU maintained a minimum of two female officers in the unit at any one time and could draw on the reserve list to supplement its female officer contingent as required. The Police Commissioner granted an exemption<sup>478</sup> to compliance with the policy immediately prior to the JSCCCC inquiry, which meant that specific

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<sup>472</sup> Ibid 17.

<sup>473</sup> Ibid 16.

<sup>474</sup> Ibid 60.

<sup>475</sup> Ibid.

<sup>476</sup> Roberts-Smith RFD QC, above n 9, (xxiii).

<sup>477</sup> Joint Standing Committee on the Corruption and Crime Commission, above n 408, 31.

<sup>478</sup> Ibid 43.

advertising to recruit female police officers to work in the WPU could take place. While the JSCCCC made some recommendations of its own, the committee noted they did not reflect any systemic problems with the witness protection unit.

Insofar as the integrity of the state program was concerned, the JSCCCC reviewed<sup>479</sup> the annual reporting regime<sup>480</sup> and the role of the Ombudsman in handling complaints<sup>481</sup> from participants aggrieved by decisions made by the Commissioner. The activities captured in the annual report were limited at the time and the JSCCCC considered more enhanced data would help in understanding the effectiveness of the witness protection program. It suggested the issues covered in the Victoria Police annual reports relating to witness protection were appropriate measures and unlikely to compromise the operation of the state witness protection program. A search of the Victorian Police annual reports, the Parliamentary website and specific requests to the Clerk of Legislative Assembly, failed to uncover any annual reporting on witness protection in Victoria or the measures referred to by the JSCCCC.

The two other reviews of the Western Australian Police Force mentioned earlier,<sup>482</sup> either contained references to witness protection or the Petrelis matters, but neither had a bearing on this research.

### **Review of the New South Wales witness protection program**

The New South Wales *Witness Protection Act 1995* was reviewed in 2001, and resulted in the Minister for Police reporting to the Legislative Assembly<sup>483</sup> that the program was operating effectively. The 2001 review

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<sup>479</sup> Ibid 47-62.

<sup>480</sup> Ibid 47-50.

<sup>481</sup> Ibid 52-62.

<sup>482</sup> The Hon G. A. Kennedy AO QC, 'Royal Commission into Whether there has been Corrupt or Criminal Conduct by any Western Australian Police Officer Final Report' (1 July 2003 to 30 June 2004 2004); Tomlinson MLC, above n 9; See Chapter 1 Introduction, 3, particularly footnote 8.

<sup>483</sup> New South Wales Parliament, above n 9.

was required, under section 47 of the New South Wales Act, as soon as possible five years after the commencement of the Act. Terms of reference<sup>484</sup> for the review focussed on two issues: whether the policy objectives of the Act remain valid; and whether the terms of the Act remain appropriate for securing the objectives. The terms of reference noted that the review was primarily intended to examine the utility of the Act. The review report confirms that some details of the operation of the program were also examined.

The New South Wales review engaged in extensive stakeholder consultation<sup>485</sup> to determine<sup>486</sup> the validity of the policy objectives of the New South Wales Act.<sup>487</sup> The review team, however, sought neither public comment nor any comment from current or former participants of the program. It considered that the Ombudsman's role, hearing appeals from participants and former participants and the access the Ombudsman had to the program, meant that any major problems with the program would have been identified, and none were.

The review noted that the objective of the Act is to support the operation of the criminal justice system<sup>488</sup> and that in light of ongoing concerns about organised crime in New South Wales the objective remained relevant at the time of the review. A number of matters raised in the review are directly relevant to the themes of this study; however, they do not relate to changes in the operation of witness protection or to the objective of witness protection. Rather, they relate to legislative amendments and are therefore discussed in greater detail in Chapter 5.

The report covered the general operation of the program. It identified policy objectives, which, it said, were not defined in the legislation. With few

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<sup>484</sup> Ibid 5.

<sup>485</sup> Ibid 2.

<sup>486</sup> Ibid 5.

<sup>487</sup> *Witness Protection Act 1995* (NSW).

<sup>488</sup> New South Wales Parliament, above n 9, 7.

exceptions, the review determined that the New South Wales Witness Protection Program was operating efficiently and professionally, but sixteen recommendations<sup>489</sup> for changes were made. Some related to police awareness of the program and the processes for receiving applications for protection. Identification documents, in particular, access to birth certificates and death certificates, were raised in the New South Wales review, which recommended amendments to the New South Wales Act to enable officers of recognised Australian witness protection programs to go directly to the New South Wales Supreme Court for new identity orders under section 15.<sup>490</sup> This would allow other witness protection programs to effect entries in the Register of Births Deaths and Marriages to have witnesses issued with birth certificates.

Recommendations to enhance the protection, safety and security of the witness and the operational integrity of the program were also included. Amendments to the legislation,<sup>491</sup> which would enable other Australian witness protection providers to apply directly to the New South Wales Supreme Court for an order in relation to identity documents, have been progressed. The New South Wales police, as part of the review also asked that section 15 be expanded to enable entries to be made in the Register of Deaths under the original name of a participant where that participant has died whilst in the program to allow the spouse to remarry.<sup>492</sup>

### **The Review of the Victorian witness protection program**

The Victorian Office of Police Integrity (OPI),<sup>493</sup> formerly the Police Ombudsman in Victoria conducted an own motion investigation of the Victorian Witness Protection Program in 2005. The Director of Police

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<sup>489</sup> Ibid 3-4.

<sup>490</sup> Ibid 4.

<sup>491</sup> See Chapter 5 Australian Witness Protection Legislation.

<sup>492</sup> New South Wales Parliament, above n 9, 12.

<sup>493</sup> Office of Police Integrity Victoria, above n 9.

Integrity, G E Brouwer's investigation, permitted under the Act,<sup>494</sup> was undertaken because of perceived public attention about the danger faced by witnesses giving evidence in criminal trials.<sup>495</sup> This public attention arose from the murder of two key witnesses, Terrence and Christine Hodson, in an important criminal trial in Victoria in May 2004. Media reporting overlooked the fact that the Hodson's were not participants in the witness protection program.<sup>496</sup> The review resulted in a report on the Victorian Witness Protection Program to the President of the Legislative Council and the President of the Legislative Assembly in 2005.

The OPI reviewed the available literature on witness protection in Australia and overseas. Brouwer compared the legislation in Victoria with that in other Australian states, particularly Queensland and Western Australia and gathered material from jurisdictions overseas including Britain, Canada, New Zealand and the United States of America.<sup>497</sup>

Issues aligned to the themes of this thesis were considered in Brouwer's review, including the legislative basis for witness protection, entry into the program and arrangements once a participant is included in the Victorian program. Referring primarily to the literature, Brouwer explored witness intimidation<sup>498</sup> adopting Maynard's case specific and community wide concepts.<sup>499</sup> He also included an additional category, life threatening, as the first level of intimidation although said it was the least numerous category. It is argued in this thesis that life threatening comes into the first of Maynard's rings as described earlier because at that level, witness protection is considered an appropriate response to the intimidation and vulnerability of the witness.

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<sup>494</sup> *Ombudsman Legislation (Police Ombudsman) Act 2004* (Vic) ss 87NA(1)(b).

<sup>495</sup> Office of Police Integrity Victoria, above n 9, Forward.

<sup>496</sup> *Ibid* 4-5.

<sup>497</sup> *Ibid* 4-6, 16.

<sup>498</sup> *Ibid* 8-9.

<sup>499</sup> See Chapter 3.2 Research conducted in the United Kingdom, Witness Intimidation, 68-74, for discussion on Maynard, Elliot and Healey.

Secondary protection arrangements were described, particularly that there is little known about those who would come within level two and three of intimidation, but those in level one would generally be afforded witness protection. Brouwer suggested<sup>500</sup> evaluating secondary level protection arrangements and documenting the reasons for including the person in the program. He also suggested legislative amendments to enable protection arrangements for witnesses who do not meet the thresholds for inclusion in the program. This thesis contends that this would provide an avenue of enquiry for the Ombudsman or Director of the OPI when reviewing a decision by the Commissioner, which is ultimately questioned by the applicant. Brouwer went on to highlight the requirements involved in entry to the program including pre-entry assessments, the MOU and what it should contain, termination from the program and the refusal of protection by the Chief Commissioner of the Victorian Police Force.

National witness protection arrangements and the relocation of witnesses interstate and overseas were canvassed in the report and Brouwer recommended 'the creation of a National Witness Protection Program.'<sup>501</sup> He called on Police Ministers to consider the efficacy of existing arrangements that see each state and territory and the Commonwealth carrying out witness protection functions independently. Brouwer recommended amendments to provide for cooperation with other Australian jurisdictions.

It is argued that these recommendations, in the absence of any reference in the report to the existing NWPP, are difficult to reconcile. Cooperation between witness protection providers in Australia is already facilitated by the complementary witness protection legislation. Brouwer's review and findings failed to consider existing witness protection arrangements both in Australia and internationally. He did not consider, at any point in his report, the existence of the NWPP and the arrangements currently available in the Commonwealth legislation and the program run by the AFP. These omissions

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<sup>500</sup> Office of Police Integrity Victoria, above n 9, 10-12 [4.1].

<sup>501</sup> Ibid 30.

render Brouwer's report of limited value, casting doubt on the comparative analysis and particularly the findings.

Under the external oversight arrangements of the Victorian program the OPI has a role in reviewing complaints from participants about decisions made by the Chief Commissioner. Brouwer recommended<sup>502</sup> the Victorian Police annual report include some reference to witness protection, but, as noted earlier, this does not seem to have happened or if it has those sections of the annual reports are classified and not available to the public or for scholarly research. He suggested<sup>503</sup> that the location of witness protection in the police force was appropriate and a revision of court operations in respect of vulnerable or intimidated witnesses was required. Brouwer also recommended<sup>504</sup> enhancements to witness protection practices including requiring the applicants to undergo medical and psychological assessment prior to inclusion and the engagement of a suitably qualified psychologist to provide ongoing psychological support to participants. It is suggested that this would be a useful addition to the Victorian Act which does not currently specify that an applicant should undergo a psychological assessment prior to inclusion, although that requirement is included in other Australian Acts. Discretion to include a witness in the state witness protection program rests solely with the Chief Commissioner in Victoria<sup>505</sup> and the Commissioner in the Northern Territory.<sup>506</sup> Other Australian Acts<sup>507</sup> specify the types of issues the commissioner should be satisfied of when including a witness in the relevant program and a psychological assessment of the ability of the witness to adapt to the new arrangements is generally one of those issues.

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<sup>502</sup> Ibid 44-45.

<sup>503</sup> Ibid 15.

<sup>504</sup> Ibid 16.

<sup>505</sup> *Witness Protection Act 1991* (Vic) s 3B.

<sup>506</sup> *Witness Protection Act 2000* (NT) s 8-9.

<sup>507</sup> *Witness Protection Act 1994* (C'th) s 7-8; *Witness Protection Act 2000* (Qld) s 6; *Witness Protection Act 1995* (NSW) s 6-7; *Witness Protection Act 1996* (SA) s 8-9; *Witness Protection (Western Australia) Act 1996* s 8, s 10; *Witness Protection Act 1996* (ACT) s 5; *Witness Protection Act 2000* (Tas) s 5, 8.

With respect to relocation of participants, Brouwer recommended<sup>508</sup> that the case officer and the participant both consider the risks to the community into which the participant is to be relocated. This is consistent with discussion earlier in this thesis about concerns for the unintended victims of witness protection and is an effective way to include the participant in the relocation arrangements. It reflects considerations and amendments to witness protection laws in the United States of America discussed in Chapters 2 and 3 of this thesis.

It should be noted at this point that the Victorian Parliament is considering a Bill to amend the Witness Protection Act in that state which will align the Victorian witness protection arrangements with those at the Commonwealth and other state and territory levels. The major areas of focus in the amendments include: (1) the disclosures required of the witness when making an application for inclusion in the Victorian witness protection program; (2) the requirement for a witness to undergo medical, psychological and psychiatric examinations as part of the assessment for inclusion process; (3) various amendments to oblige the participant to disclose their previous criminal history and to inform the Chief Commissioner if they become involved in civil proceedings in which their new identity is an issue; (4) interim witness protection and temporary assumed identity arrangements and the termination of interim protection and associated matters; and (5) removing merits review provisions vested in the Independent Broad-based Anti-corruption Commission for decision of the Chief Commissioner in respect of the termination of protection and assistance to a participant. See Annexure 5 for the details of the amendments, intended to take effect in December 2014.

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<sup>508</sup> Office of Police Integrity Victoria, above n 9, 19, 26.

## **The Parliamentary Joint Committee on the National Crime Authority 2000**

The operation of the NWPP was considered by the PJC<sup>509</sup> in 2000, however, while this review revisited witness protection in Australia under the same remit as its earlier cousin, the PJC set terms of reference for its inquiry that did not cover the original 1988 PJC recommendations. In this second review the PJC paid particular attention to<sup>510</sup> (1) the efficiency of the witness protection program administered by the AFP on the NCA's behalf; (2) whether the criteria used to offer witness protection and to discontinue it are adequate; and (3) whether payments to participants are administered effectively. The committee advertised in the national press on 18 March 2000 and received 15 submissions, four of which were confidential. It held public hearings on 23 June 2000 with representatives from key government agencies.

It must be noted that the first point considered above was based on a misconception. The AFP did not administer the NWPP 'on behalf of' the NCA. While the AFP in all likelihood included witnesses in the NWPP that were involved with NCA investigations, the AFP Commissioner was charged with the responsibility of establishing and maintaining the NWPP, not the Chairman of the NCA. The NWPP was therefore responsible for the protection and assistance – and all that that involves – of certain NCA witnesses most likely under an MOU with the NCA, but that is a far cry from administering the NWPP on behalf of the NCA.

Overall, the Committee found<sup>511</sup> that the NWPP was well run and that there were only a small number of administrative areas that required attention. The Committee noted<sup>512</sup> that the establishment of the NWPP had led to certainty and that the MOU used by the program ensured there were no

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<sup>509</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8.

<sup>510</sup> Ibid xii.

<sup>511</sup> Ibid xiii.

<sup>512</sup> Ibid vii.

grounds for confusion by the participant or police. The PJC affirmed that the Commonwealth Ombudsman's role, as part of the accountability regime for the NWPP, was critical and that the effectiveness of the programs depended on close cooperation across the three tiers of government in Australia. The committee highlighted<sup>513</sup> the need for the tension between the NWPP and family law to be settled, but this matter is still outstanding.

### **4.3 Witness Protection and the Family Court of Australia**

A clear tension between the principles of contact orders determined by the Family Court of Australia (the Court) and the protection arrangements managed by the police for participants emerged in 1999. That tension has not been resolved.<sup>514</sup> A ruling of the Chief Justice of the Court<sup>515</sup> determined that the provisions of the Act do not prevent the Court making a parenting order in respect of children included in a witness protection program and that where such an order is made, the Commissioner must accommodate the access and visitation arrangements set out in the order. The Court determined that it is not bound by the Commissioner's assessment of the risk to the participant.<sup>516</sup> The Court pointed out that it has long been held<sup>517</sup> that if the Parliament wants to remove the power of the Court in supervising guardians and protecting the welfare of children 'it must do so in language which is either express or such as inescapably implies that expression of intention on the part of the Parliament.'

The Act provides sufficient safeguards to protect the identity and location of the participant and the security of the program in most cases and this was tested in *T & F* [1999] FamCA 738 [herein after referred to as *T&F*]. The

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<sup>513</sup> Ibid vii, 33-34.

<sup>514</sup> Ibid 33.

<sup>515</sup> *T & F* [1999] FamCA 738 (30 June 1999).

<sup>516</sup> Ibid.

<sup>517</sup> *Johnson v Director-General of Social Welfare* (Vic) (1976) 135 CLR 92 per Barwick CJ (with whom Stephen and Mason JJ agreed).

outcomes of *T&F* have implications for protection arrangements for participants in the NWPP and also those in state or territory witness protection programs. From the outset it should be made clear that the argument in this thesis is not regarding the authority of the Court to make parenting orders. It is more about the competence of the Court to appreciate the threat to participants in the program and the risk posed by those orders to the safety and security of the participant.

Two essential interests are at the centre of the Court discussion and the judgment in *T&F*.<sup>518</sup> Firstly, the responsibility of the Court to make parenting orders it considers to be in the best interests of the child and secondly, the responsibility of the Commissioner to provide for the safety and security of participants in the NWPP. These two interests are not incompatible.

The Court was faced with making a decision in the case of *T & F* in relation to a situation in which the custodial parent and two children were participants in the NWPP and the non-custodial parent, who was seeking access to the children, was not. Both parents reached an agreement about contact and visitation, but the Commissioner, responsible for the NWPP, disagreed with the terms of the agreement. He suggested contact should be by mail, based on the risk to the children and the custodial parent. As discussed in other parts of the thesis, a threat assessment is required and the Commission must take that threat assessment into account when considering whether to include the witness in the NWPP.

The Court was required to consider a number of issues including the powers of the Court in respect of the Act. Those issues, while set out in full in the judgment, along with the findings, were, for the purposes of this study, whether the Court has the power to order that the children reside with one parent or the other and the nature and details of any parenting order. The court also considered whether it could direct a participant to withdraw from the program; or whether its orders could have the effect of substantially changing the circumstances of the children despite the risks associated with

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<sup>518</sup> *T & F* [1999] FamCA 738.

those changes; or cause the termination of protection and assistance. Two final questions the court was asked to consider were whether the court could hear evidence of the risk to the child and assess the extent of the risk independently of the Commissioner's advice, and finally, whether the word 'circumstances' in sub-section 26(3) of the Act includes the nature and extent of the risk faced by the participant.

The setting within which the Court made its judgment is described in the powers of the court under the *Family Law Act 1975* and the *Family Law Reform Act 1995*, hereinafter referred to as the FLA and FLRA respectively. The court described Part VII of the FLA, in particular sub-section 60B, and the requirement that the children of the relationship receive 'adequate and proper parenting to help them achieve their full potential and to ensure the parents fulfil their duty'.<sup>519</sup> The principles integral to that outcome include that the children have a right to know both parents regardless of whether the parents remain together or are separated and to maintain contact with both parents on a regular basis,<sup>520</sup> and that the parents should share duties and responsibilities for care, welfare and development of the child<sup>521</sup> and should agree on future parenting arrangements.<sup>522</sup> The court described its responsibility to make parenting orders 'as it thinks proper'<sup>523</sup> and in making those orders to 'regard the best interests of the child as the paramount consideration.'<sup>524</sup> There is no doubt the court has the power and the responsibility to make decisions regarding children.

In its judgment, the Court acknowledged the nine primary reasons for the *Witness Protection Act 1994* (C'th) insofar as they were relevant to the issues before the court in this case. It identified that the Act caused consequential

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<sup>519</sup> *Family Law Act 1975* (C'th) ss 60B(1).

<sup>520</sup> *Ibid* ss 60B(2)(a), 60B(2)(b).

<sup>521</sup> *Ibid* ss 60B(2)(c).

<sup>522</sup> *Ibid* ss 60B(2)(d).

<sup>523</sup> *Ibid* ss 65D(1).

<sup>524</sup> *Ibid* s 65E.

amendments to other Acts,<sup>525</sup> but that the parliament had not caused consequential amendments to the FLA. This was despite the explanatory memorandum describing the information that must be disclosed by the witness at the time of applying for inclusion in the NWPP. Specifically, the court referred to disclosures about rights and obligations including those relating to matters of access and custody of children. This is important in the context of the judgment for two reasons. Firstly, the Court went to some lengths to describe the situation in the United States of America following the reform of witness protection arrangements in 1984<sup>526</sup> with respect to the relocation of a protected witness where someone other than the participant has access and parenting rights. There the participant is required to apply to the court for an order to vary the conditions of a parenting order. Secondly, the Australian witness protection legislation does not mirror the American legislation and there is no comparable requirement for the participant to apply to the court for a variation in parenting orders in the Australian Act.

The Commissioner submitted that the Court should infer from the lack of such a requirement that the parliament did not intend for custody and access orders to interfere with the Commissioner's absolute discretion in respect of protected witnesses. Further, that had the parliament intended that the Court retain power to make parenting orders in relation to participants in the program, it would have specifically spelled out the retention of those powers in the Act. The Court took the opposite view.

The Court cited authority<sup>527</sup> for the proposition that had the parliament intended to take the powers away from the FCA it would have had to have done so in unambiguous language.<sup>528</sup> Amendments to the FLA in 1983 resulted in the

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<sup>525</sup> *Marriage Act 1961* (C'th); *Administrative Decisions Judicial Review Act 1977* (C'th); *Australian Federal Police Act 1979* (C'th).

<sup>526</sup> *Witness Security Reform Act 1984* (USC).

<sup>527</sup> *T & F* [1999] FamCA 738, 14 [27]; *Johnson v Director-General of Social Welfare* (Vic) (1976) 135 CLR 92, 97.

<sup>528</sup> *Johnson v Director-General of Social Welfare* (Vic) (1976) 135 CLR 92, 97.

substance of *parens patriae* over infants<sup>529</sup> resting in the Court with the referral of powers from the states and territories to the Commonwealth. Western Australia was the exception, not following the other states and territories in referring powers in Family Law to the Commonwealth. In the absence of specific language, the Court decided that parliament did not intend to remove the powers associated with it making parenting orders.

The Court then went on to consider the effects of FLA parenting orders on the NWPP in cases such as *T&F*. It found that while parenting orders might make the Commissioner's task more difficult, the Commissioner is nonetheless obliged to arrange protection and assistance around them. It acknowledged the court's responsibility to pay attention to the existence of the Act and the role the child plays in the witness protection program. It noted that the court could only assess, within the confines of the Act, whether providing contact with the non-custodial parent best advances the welfare of the child. The Court considered that where the contact orders are too difficult for the Commissioner to apply, the Commissioner must either seek to have the orders varied or consider removing the protected person from the NWPP.

The tension between the Court and witness protection arising from the courts decision is twofold. Firstly, the Commissioner has a responsibility to provide protection and assistance where a decision has been made to include a person in the NWPP, that decision having been based on a number of considerations including the threat to the witness. Secondly, while the Court is seized of the potential conflict between the parenting orders it makes and the safety and security of the participant, in *T&F* it was unable to fully appreciate the safety and security issues asserted by the Commissioner. This raises a question about the competence of the Court to interpret the threat and appreciate the risks posed by its decision. It highlights the differences between the responsibilities of the Commissioner and those of the Court. In

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<sup>529</sup> *Secretary, Department of Health and Community Services v JMB and SMB* (1992) 175 CLR 218; FLC 92-293; 15 Fam LR 392 ("*Re Marion*") per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ at CLR 256 and 257.

*T&F*, the Court seems to have reached its decision applying the rationale that the NWPP benefits the criminal justice system, which it undoubtedly does, however, it is argued in this thesis that the Court should have considered the threat faced by the participant as a result of the evidence being given in a serious and organised crime matter. The threat and the importance of the evidence the participant is giving form the basis for their inclusion in the NWPP. A decision by the Court that failed to give appropriate weight to those issues could not only jeopardise the safety of the participant and the children, but also have an adverse impact on the prosecution of significant criminals.

In this case, the Court gave priority to what it considered the best interests of the child. In the context of the safety and security of the participant though, a serious question arises. That is, who is responsible, if in complying with the parenting order, the threat to the participant is realised and people are killed or seriously injured because those who would do the participant harm became aware of information that compromised the security of the participant? This is a critical point. In the judgment in *T&F*, the Court discusses threat and risk, but it is clear it does not understand the significant differences between the issues. The words, threat and risk are used interchangeably when in fact they are very different concepts. The distinction needs to be well understood and the concepts applied correctly in the assessment, otherwise the decision of the Court concerning the best interests of the child in witness protection cases is likely to be fatally flawed.

The assessment of a threat involves consideration of the capability and intent of the individual or individuals making the threat to deliver that outcome. In a witness protection environment, it is the capability and intent of members of serious and organised crime groups to kill or seriously injure the witness who is giving evidence against them and who they have threatened. Where those making the threat are judged lacking either capability or intent, it is likely the witness would not be included in the NWPP. Risk, on the other hand is an assessment of the likelihood and consequence of a chance risk event occurring. In a security environment

such as witness protection it is also important to consider the likelihood of a vulnerability being exploited in the assessment of risk. In witness protection cases, that vulnerability is the location and identity of the participant and the number of people who are aware of it. There are significant risks associated with the parenting orders that need to be considered alongside the threat to the participant. To conduct that assessment, the court requires more than the Commissioner's assertions that the threat exists, and that ensuring the requirements of the parenting orders are satisfied would place the participant at greater risk.

In *T&F*, while asserting the threat and risk to the participant, the Commissioner gave no further information on the nature and extent of the threat. This gives rise to two considerations. Firstly, that the court cannot compel the Commissioner to disclose information and secondly, if information about the threat is disclosed to the court, the Court considered it would feel compelled to share that information with others involved in the case, including presumably, the non-custodial parent. The Court said that sharing the information with others would enable the veracity of the information to be considered and if necessary refuted.

In making this observation the court drew comparisons with the doctrine of public interest immunity and cited section 130 of the *Evidence Act 1995* (C'th) and *Alistair v The Queen* (1984) 154 CLR 404 as authority for the proposition that it could and should share the information. However, in *Alistair v The Queen* the issue was about the court compelling the Director General of the Australian Security Intelligence Organisation to produce files at a criminal trial involving conspiracy to commit murder. There the High Court considered whether the trial judge should have compelled the production of the files so that the court could inspect them and decide whether they should be disclosed to the accused. While the Court suggested this was somehow of the same nature as *T&F*, the only similarity is deciding whether the information should remain secret, and that assessment in this case rests with the Commissioner. It is argued in this thesis that the cases are not comparable. In the case of *T&F*, the non-custodial parent is not the

accused in a criminal trial and therefore there are no questions to answer about the right of the accused to a fair trial and the information relates to a threat to the participant, not to investigative information concerning an accused.

The Court described issues to do with section 26(3) of the *Witness Protection Act 1994* (C'th) and noted that the FLA paramountcy principle does not override legislation protecting disclosure.<sup>530</sup> This creates a dilemma for the Court because while it must consider the Commissioner's assertions of threat and risk in making the parenting order, it has no access to the information to satisfy itself of the information upon which those assertions are made. Perhaps there is scope for the Commissioner to release some information from a comprehensive risk assessment and a limited amount of information relating to the evidence of threat to the court hearing the matter, so that it can make a well-informed decision. The passage of that information to the Judge would have to be in accordance with the requirements for disclosure set out in the Act, and confidentiality would have to be preserved.

Where the implications of the Court judgment are such that protection arrangements may be compromised to the extent that the participant's inclusion in the program is not viable, the question of cessation of protection and assistance arises. The removal of the child from the NWPP was not an issue the Court had to consider in *T&F* so, but for some observations about the Commissioner's powers under section 18 of the Act in relation to the cessation of protection and assistance, the court delivered its judgment.<sup>531</sup>

The findings included that: (1) the Court has the power to make orders that the children live with the parent included in the NWPP and that the children have contact with the other parent at certain times which were specified; (2) the orders may have a significant impact on the circumstances of the children despite the Commissioner's belief that such orders caused an unacceptable risk; and (3) the Court can hear evidence of the risk to the

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<sup>530</sup> *Northern Territory of Australia v GPAO* (1999) 24 Fam LR 253.

<sup>531</sup> *T & F* [1999] FamCA 738 32-33 [76].

children under witness protection. The Court did not have to answer three of the initial questions: (1) that the Court can direct a participant in the NWPP to request in writing the cessation of protection; (2) that the parenting order might have the effect of causing the cessation of protection and assistance; and (3) whether ‘circumstances’ in s 26(3) of the Act include the nature and extent of the risk faced by the participant.

It must be noted that the matter is still one that causes some concern in Australia. The Act<sup>532</sup> does not deal with the issue of visitation rights specifically. The problem therefore exists insofar as the effects of a Court ruling on the security arrangements for the participant are concerned. The possibility of the termination of protection and assistance because of a ruling from the Family Court is evident. This may occur because the ruling makes it impossible to implement or maintain protection and assistance arrangements while the threat to the participant persists. An involuntary termination may arise because the threat to the participant has not been properly understood or considered by the Judge.

Roberts-Smith<sup>533</sup> and the PJC<sup>534</sup> both commented on the possible impact of the Court decision on witness protection arising from *T & F*. The decision, it was said, ‘exemplifies the tensions which can result in extremely serious practical problems’<sup>535</sup> while acknowledging the role of the Family Court insofar as the best interests of children are concerned. Unlike Australia, the issue was resolved in the United States of America with the passage of the revised witness protection legislation in 1984,<sup>536</sup> but the question remains in Australia, whether the interests of children should prevail over the public

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<sup>532</sup> *Witness Protection Act 1994* (C'th).

<sup>533</sup> Roberts-Smith RFD QC, above n 9.

<sup>534</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8, vii, 33-34 [3.35]-[3.37].

<sup>535</sup> Roberts-Smith RFD QC, above n 9, 29.

<sup>536</sup> *Witness Security Reform Act 1984* (USC).

interest in protecting witnesses and the overall best interest of the community.<sup>537</sup>

#### 4.4 Court case management

Significant research has been undertaken on court case management in Australia<sup>538</sup> in situations where vulnerable witnesses are to give evidence.<sup>539</sup> The effects on the participant in a witness protection program, of extended periods of time in the care of police and the state, mentally, socially and morally have not been subjected to scholarly research. Whether more effectively managing cases in the court system where protected witnesses are giving evidence would adversely affect the right of the accused to a fair trial has also not been the subject of specific scholarly research.

In Western Australia the Law Reform Commission (WALRC) was, in 1997, tasked to conduct a *Review of the Criminal and Civil Justice System of Western Australia*. Terms of reference for the review included the examination of the criminal and civil justice systems including the role of the legal professions and the identification of reasons for and processes by which the increase in demand on resources comes about. The WALRC was required to make recommendations for necessary and desirable changes to provide a more efficient, cost effective and accessible legal system.

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<sup>537</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8, 33.

<sup>538</sup> The Hon. Wayne Martin, 'Review of the Civil and Criminal Justice System - 10 years on' (Paper presented at the The Law Reform Commission of Western Australia, 13 October 2009); New South Wales Department of Juvenile Justice, 'Case Management Policy' (April 2003); Supreme Court of Western Australia, 'Case Management in the Supreme Court' (Supreme Court, 2009); Law Reform Commission of Western Australia, 'Review of the Criminal and Civil Justice Systems of Western Australia' (1999).

<sup>539</sup> Australian Government, 'A new family law system: Government Response to Every picture tells a story' (2005); Law Reform Commission of Western Australia, 'Court Intervention Programs Final Report Project No. 96' (2009); Northern Territory Law Reform Commission, 'Report on the Laws Relating to the Investigation and Prosecution of Sexual Assault in the Northern Territory' (1999); Paul Murphy and Lisbeth Pike, 'The Columbus Project in the Family Court of Western Australia: some early findings from the evaluation' (2003) 5(9) *ADR Bulletin*; Family Court of Australia, 'Discussion Paper, Family Court of Australia Case Management System' (2006); Dr Daryl J. Higgins, 'Cooperation and Coordination: An evaluation of the Family Court of Australia's Magellan case-management model' (Australian Institute of Family Studies, 2007).

The WALRC examined the means of instituting criminal proceedings, preliminary hearings, pre-trial procedures and conferences and criminal discovery amongst other matters. It produced 447 recommendations, 'a number of recommendations made by the Commission in respect of criminal law that have been implemented with great success.'<sup>540</sup> In a total of 15 recommendations relating to alternative criminal charge resolution, the WALRC recommended that a comprehensive code of criminal practice be developed and that preliminary hearings be abolished.

In 2009, Chief Justice of Western Australia The Hon. Wayne Martin (a Barrister in private practice while assisting the 1997 Law Reform Commission review), addressed the Law Reform Commission on the review and its outcomes.<sup>541</sup> In relation to the recommendation to abolish committal hearings, he said that despite vigorous criticism from the defence lawyers, the recommendation was implemented albeit without a number of other recommendations dealing with pre-trial case management in criminal cases. He suggested that there had been no notable adverse ramifications and the changes had enabled a much more flexible criminal procedure. The changes have enabled the seamless management of cases from the point immediately after the laying of charges until trial, which has 'expedited the final resolution of criminal cases, to the advantage of the community generally.'<sup>542</sup>

In the context of case management, the Western Australian Supreme Court Rules<sup>543</sup> describe procedures aimed at expediting criminal cases through a system of individual case management of each matter from start to finish. In Western Australia, therefore, the parties are encouraged to engage in voluntary case conferencing early regardless of the requirement for prosecution disclosure.<sup>544</sup> The process sets time frames for unresolved matters, including that unless there is good reason for delay, dates for

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<sup>540</sup> Martin, above n 538, 10.

<sup>541</sup> Ibid.

<sup>542</sup> Ibid 11.

<sup>543</sup> Supreme Court of Western Australia, above n 538, 169.

<sup>544</sup> Ibid, Practice Direction 5.3.

appearances and trial should generally be within six months of the arrest of the accused. In Victoria, a 2011 Police Summary Procedures Bulletin<sup>545</sup> described reforms in Victoria for criminal trials that would reduce court lists and provide the accused with an outcome in a fair and timely manner through summary case conferencing.

Other courts have recognised the need to make arrangements to facilitate the more rapid progression of cases<sup>546</sup> and have developed mechanisms to ensure that progression.<sup>547</sup> While cases in the FCA, the Federal Court and civil cases generally differ significantly from criminal cases, the principle of case management, not to unreasonably delay the trial and final resolution, applies to all.

Noting the changes in Western Australia and the use of more active case management in other courts, it is argued that further review of the criminal trial particularly where protected witnesses are involved, could be beneficial. The alternative arrangements put forward in this thesis ensure cases involving protected witnesses are expedited, while still ensuring the accused receives a fair trial.

## **4.5 Conclusions**

A significant proportion of the examination of arrangements described in the five Australian inquiries and reviews related to the administration of the relevant programs. The Robert-Smith inquiry considered the management of protection and assistance in relation to Andrew Petrelis. It also reviewed the allocation of human and financial resources, staff assessment and associated risk management and the application of standing operating procedures since 1994.<sup>548</sup> The New South Wales review considered whether the Act was meeting its objectives in that state and issues to do with the induction

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<sup>545</sup> Victoria Police, 'Summary Procedure Bulletin No 3 - May' (2011).

<sup>546</sup> Federal Court of Australia, 'Practice Note No. 30 Fast Track Directions' (2009).

<sup>547</sup> Higgins, above n 539.

<sup>548</sup> Roberts-Smith RFD QC, above n 9, (i).

arrangements for operational police members entering the witness protection unit, standing operating procedures and improved police education.<sup>549</sup> The OPI review amongst other things examined the management of the program including staffing, training and education of police members performing roles in the Witness Security Unit.<sup>550</sup> The JSCCC considered witness protection in Western Australia and whether the CCC should be permitted to establish a witness protection function separate to that entrusted to the Western Australian police force. Finally, the PJC considered issues in the NWPP particularly in respect of what it indicated was a review of the effectiveness of the program.

The review conducted by Roberts-Smith dealt mostly with information security, selection and training staff to work in the witness protection role and other more mechanical procedures not bound in the legislation such as standing operating procedures and other operational guidelines. The recommendations covered record keeping in respect of individual operations, the conduct of meetings within the witness protection unit and mechanisms for recording breaches to the MOU by the participant. None of the recommendations related to greater external oversight of the program, noting that in Western Australia the police are required to provide an annual report to parliament on the operation of the State Witness Protection Program. The recommendations relating to personnel issues are consistent with the recommendations in New South Wales and Victoria.

The review of the NWPP by the PJC in 2000<sup>551</sup> noted that the NWPP was well run and that only a small number of areas of administration required attention. The relationship between the Court and cases involving witness protection, however, received attention in the review and still requires resolution. The conflict between the role of the family court in deciding parenting orders and that of the Commissioner in provided for the safety and security of the participant is not easily reconciled. The Court requires

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<sup>549</sup> New South Wales Parliament, above n 9, 7, 10, 11.

<sup>550</sup> Office of Police Integrity Victoria, above n 9, 41-42.

<sup>551</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8.

information upon which to base its decisions about access and visitation and the Commissioner is restricted on the extent of the information about the threat faced by the participant and the risks associated with complying with the Court parenting order that can be provided to the Court. The Commissioner cannot be compelled to provide the information, but the Court is required to take the Commissioner's advice into account in making its decision.

The inquiries and reviews discussed in this chapter did not examine the six key themes of this thesis outside of the 1988 PJC inquiry from which the themes were derived. The reviews did not specifically consider issues of cross-jurisdictional coordination and the establishment of the NWPP. The OPI review was in fact at pains to exclude the NWPP from its review. No examination has been undertaken into the inclusion of witnesses in witness protection programs or the re-identification of participants. None have considered in any depth the confidentiality of participants or the stress on the participant arising from extended periods of time in witness protection. The option of expediting cases involving protected witnesses has therefore never been the focus of any dedicated research either at the official or the scholarly level.

The effectiveness and efficiency of witness protection programs in Australia cannot be assessed because reporting mechanisms; performance measures and metrics for analysis are not established and mandated. The external oversight arrangements for the programs are inconsistent and reporting on the number of complaints to the Ombudsman or OPI in relation to decisions of the Commissioners is not reliable. These reasons further support the need for the scholarly investigation in this thesis and the need for more transparent reporting on the operation of witness protection in Australia.

# Chapter 5. Australian Witness Protection Legislation

This chapter examines and explains the witness protection legislation in Australia with reference to the standards articulated by the United Nations<sup>552</sup> and the specifications and elements for witness protection legislation identified by Karen Kramer.<sup>553</sup> The similarities between the Australian and other witness protection legislation, not already discussed in Chapter 2 of this thesis, will also be identified.

The chapter will show the alignment between the Commonwealth and state and territory legislation, describing the complementarity between the Acts. It also highlights the differences between the various Acts, and presents observations on the utility of those differences. The strength of the statutory arrangements is demonstrated in Australia through the essentially seamless approach to witness protection legislation in each jurisdiction.

The chapter describes the mechanical parts of the legislation before moving on to analyse the existing Australian legislation according to the themes outlined in Chapter 1. It considers the legislation in the context of the research topic, but also in respect of the arrangements that currently exist, how effective they are and whether alternative legislation could improve the way witness protection is currently delivered in Australia.

The thematic analysis of the legislation is aided by reference to the table showing the correlation between the Act and the legislation made complementary to it, which is included in the thesis at Annexure 4. The major differences between the various Acts are drawn out and discussed separately and are shown in the table at Annexure 14A and 14B. Throughout this chapter, references are made to the Northern Territory and Tasmanian Acts because while witness protection programs are not active in those

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<sup>552</sup> United Nations Office on Drugs and Crime, above n 12.

<sup>553</sup> Kramer, above n 15, 12-13.

locations, the legislation has been passed and made complementary to the *Witness Protection Act 1994* (C'th). Significant amendments made to the Acts since 1994 are discussed and a table of amendments to the Australian witness protection Acts appears at Annexure 5.

## 5.1 Establishing a witness protection program

The Act gives authority<sup>554</sup> to the AFP Commissioner to establish and maintain the NWPP. It also empowers the Commissioner<sup>555</sup> to 'arrange or provide protection and other assistance for witnesses' including in respect of<sup>556</sup> 'things done as a result of powers and functions conferred on the Commissioner under a complementary witness protection law.' The Act reinforces the central tenets of effective witness protection programs: relocation and change of identity. It sets out the criteria necessary to maintain the integrity of the program itself, and to protect the location and identity of the participant.

Each of the complementary Acts requires the relevant Commissioner to establish and maintain a witness protection program. Queensland is the exception, where the Act<sup>557</sup> assumes the existence of a program operated by the Crime and Misconduct Commission (CMC) without specifically directing that a program be established. Nonetheless, the Queensland Act does define a witness protection program<sup>558</sup> and states that the CMC is to provide witness protection for persons included in the program<sup>559</sup> and those being protected under complementary witness protection laws.<sup>560</sup> The United Nations Model Witness Protection Bill<sup>561</sup> (The Model Bill) notes that the

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<sup>554</sup> *Witness Protection Act 1994* (C'th) s 4.

<sup>555</sup> *Ibid* ss 4(1).

<sup>556</sup> *Ibid* ss 4(2).

<sup>557</sup> *Witness Protection Act 2000* (Qld)

<sup>558</sup> *Ibid* s 5.

<sup>559</sup> *Ibid* ss 5(a).

<sup>560</sup> *Ibid* ss 5(b).

<sup>561</sup> See Chapter 2.6 The United Nations Office on Drugs and Crime and witness protection, 50-52, for discussion about the Model Witness Protection Bill.

Commissioner of Police (or other person to be designated) is required to take action which he thinks necessary and reasonable to protect the safety and welfare of a witness in any proceedings relating to the Act.<sup>562</sup>

The Commissioner can delegate certain powers,<sup>563</sup> but in some cases<sup>564</sup> can only delegate powers to a Deputy Commissioner. These situations include arrangements with approved authorities;<sup>565</sup> selections for inclusion in the NWPP;<sup>566</sup> special provision in relation to marriage of a participant;<sup>567</sup> non-disclosure of the former identity of the participant;<sup>568</sup> cessation of protection and assistance;<sup>569</sup> the provision of information to approved authorities;<sup>570</sup> and requirements where a participant becomes a witness in criminal<sup>571</sup> and in civil proceedings.<sup>572</sup> The Commissioner can only delegate power to the Deputy Commissioner in relation to providing access to the Register of participants<sup>573</sup> to the Commonwealth Ombudsman and to other persons where that access is required for the administration of justice.

## 5.2 Complementary witness protection legislation

The integrity of Commonwealth identity documents is critical and safeguards<sup>574</sup> are required in respect of access to these documents by state and territory witness protection programs. Complementary legislation had to be passed in each state and territory within 12 months of the

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<sup>562</sup>United Nations Drug Control Program, above n 267, Clause 3.

<sup>563</sup> *Witness Protection Act 1994* (C'th) s 25.

<sup>564</sup>Ibid s 6, 8, 14, 16, 18, 20, 27, 27A.

<sup>565</sup>Ibid s 6.

<sup>566</sup>Ibid s 8.

<sup>567</sup>Ibid s 14.

<sup>568</sup>Ibid s 16.

<sup>569</sup>Ibid s 18.

<sup>570</sup> Ibid s 20.

<sup>571</sup> Ibid s 27.

<sup>572</sup> Ibid s 27A.

<sup>573</sup> Ibid ss 12(2), 12(3).

<sup>574</sup> Ibid s 24.

commencement of the Act, to enable access to Commonwealth identity documents for participants in those state and territory witness protection programs. Queensland, the Northern Territory and Tasmania did not enact legislation until a significant period of time after the passing of the 12 months. In Queensland prior to 2000, the *Criminal Justice Act 1989* contained provisions regarding witness protection and operations that had been conducted in that state from the time of the Fitzgerald Enquiry.<sup>575</sup> The provisions in the *Criminal Justice Act 1989*, however, did not qualify as complementary legislation<sup>576</sup> and a comprehensive witness protection bill was tabled in the Queensland Parliament on the 22 June 2000. The Queensland Act received Royal Assent on 17 November 2000 and commenced on 9 March 2001.

In recognition of the Northern Territory's obligation to pass complementary legislation the Northern Territory developed its own legislation.<sup>577</sup> The Northern Territory Act received the assent of the Administrator on 7 June 2002 and commenced on 21 August 2002. Until then requirements for the relocation and re-identification of witnesses in the Northern Territory had 'been carried out through interstate agencies.'<sup>578</sup>

The Tasmanian government saw the need<sup>579</sup> to 'provide cross-jurisdictional consistency together with consistency towards the protection of participants within the program.' The government recognised the need to protect witnesses in high-risk cases where new identities and relocation are required, and also recognised that as other jurisdictions had enacted legislation, the absence of a scheme in Tasmania would place other similar

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<sup>575</sup> G E Fitzgerald, 'Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct' (1987).

<sup>576</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8, 5.

<sup>577</sup> Mr Stirling, 'Witness Protection (Northern Territory) Bill (Serial 37) Police Administration Amendment Bill (Serial 38) Presentation and Second Reading Speech' (2002).

<sup>578</sup> *Ibid* 1.

<sup>579</sup> Parliament of Tasmania, 'Witness Protection Bill 2000 (No. 12) Second Reading' (2000), 1 per Mr Parkinson, Deputy Leader of the Government in the Council.

programs in jeopardy.<sup>580</sup> The Tasmanian Act received Royal Assent on 16 June 2000 and commenced on 1 July 2001.

All Australian jurisdictions now have witness protection legislation in force and all are declared complementary to the Act.<sup>581</sup> The Act is also declared complementary to the state or territory legislation. In South Australia<sup>582</sup> and Western Australia<sup>583</sup> the Act is complementary by virtue of the definition of the term in the state Acts, and thus a separate declaration by the Minister is not required. Access to Commonwealth identity documents for participants in a state or territory witness protection program is assured now that the Minister has signed section 24 arrangements<sup>584</sup> with respect to most complementary legislation. No section 24 arrangements have been signed for Tasmanian and the Northern Territory legislation,<sup>585</sup> likely as a result of witness protection programs not being active in those states.

### **5.3 The legislation by study theme**

The comparative analysis conducted on the Australian witness protection legislation in this chapter provides an assessment of the similarities and differences between the Acts. References are made to discussion in other chapters of this thesis to demonstrate how issues of concern about witness protection have been addressed in the Australian legislation.

#### **Cross-jurisdictional coordination**

The establishment of the NWPP in 1994 in Australia was a significant step forward in terms of cooperation and coordination. Roberts-Smith said<sup>586</sup> that the 'scheme of complementary legislation has enhanced and facilitated

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<sup>580</sup> Ibid.

<sup>581</sup> Witness Protection (Complementary witness protection laws) Declaration 2011 (Cth).

<sup>582</sup> *Witness Protection Act 1996* (SA) s 3.

<sup>583</sup> *Witness Protection (Western Australia) Act 1996* s 3.

<sup>584</sup> *Witness Protection Act 1994* (C'th) s 24.

<sup>585</sup> Australian Federal Police, 'Witness Protection Annual Report 2011-2012' (2012) 6.

<sup>586</sup> Roberts-Smith RFD QC, above n 9, 164-165.

cooperation and coordination enormously.’ Each Australian program however operates independently, reflecting the sovereignty of the states, territories and the Commonwealth.<sup>587</sup> This independence, and the secrecy provisions of the various witness protection Acts, creates problems for the coordination of witness protection arrangements between programs.

Ongoing issues between the Commonwealth and the states and territories in law enforcement matters, and the lack of legislated requirement for states and territories to use the NWPP, further reduces the chances of fully coordinated witness protection arrangements in Australia. The decision not to adopt the PJC recommendation for a NWPLC<sup>588</sup> may further limit effective coordination and cooperation. The adoption of a committee may be less effective than adopting a fully functional NWPP as described in Chapter 9 and as demonstrated in Annexures 11 and 12.

Some coordination of the existing programs is enabled under the Commonwealth and complementary Acts, at least they have ensured that witness protection is more consistently practiced in Australia. The Commissioner can make arrangements with an approved authority about any matter in connection with the administration of a complementary witness protection law.<sup>589</sup> These arrangements include procedures under which the authority shares with the Commonwealth the costs incurred<sup>590</sup> in providing those services.<sup>591</sup> The Commissioner is not entitled to make arrangements in relation to a law of a state or territory, unless authorised to the extent necessary by the State or Territory concerned.<sup>592</sup> South Australia<sup>593</sup> and Western Australia<sup>594</sup> require the Minister to make a

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<sup>587</sup> *Commonwealth of Australia Constitution Act* Chapter 5 Overview and specifically s 106, Saving of Constitutions, s 107 Saving of Power of State Parliaments and s 108 Saving of State laws.

<sup>588</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, (xiii), 81-82 [5.37]-[5.39].

<sup>589</sup> *Witness Protection Act 1994 (C'th)* ss 6(1).

<sup>590</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8, 4.

<sup>591</sup> *Witness Protection Act 1994 (C'th)* ss 6(2)(b).

<sup>592</sup> *Ibid* ss 6(3).

<sup>593</sup> *Witness Protection Act 1996 (SA)* ss 7(a).

separate authorisation for the Commissioner to enter into arrangements with approved authorities. All other complementary legislation lists the Commissioner as an approved authority and do not require a separate Ministerial authorisation.

The Commissioner can enter special commercial arrangements<sup>595</sup> that enable the participant to obtain benefits under a contract or arrangement, without revealing his or her former identity. The types of commercial arrangements may include rental accommodation or the purchase of a home or motorcar.

The transitional arrangements<sup>596</sup> in the Act mean that proscribed authorities immediately prior to the commencement of the Act were for the purposes of subsection 8(2A) of the *Australian Federal Police Act 1979*, taken to be declared by the Minister to be an approved authority for the purposes of the definition of approved authority in section 3 of the Act.

### **Inclusion in a witness protection program**

Once the program is established, the Commissioner has responsibility for deciding who can be included.<sup>597</sup> Witness protection may be provided to a range of persons<sup>598</sup> involved in the criminal justice system. Informants, witnesses, undercover police officers, innocent bystanders, prosecutors and others whose lives may be in danger as a result of the assistance they have provided to the police investigation or to the prosecution. The information they can give or the evidence they can provide about the criminal enterprise or syndicate members is likely to be critical to the success of the prosecution.

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<sup>594</sup> *Witness Protection (Western Australia) Act 1996* s 7.

<sup>595</sup> *Witness Protection Act 1994* (C'th) s 17.

<sup>596</sup> *Ibid* s 29.

<sup>597</sup> *Ibid* s 8.

<sup>598</sup> United Nations Office on Drugs and Crime, above n 12, 19.

If not, the witness would not meet the threshold requirements<sup>599</sup> for inclusion in the program.

Inclusion in the program should not be seen as a reward<sup>600</sup> by the witness or the public, or as a means of persuading or encouraging the witness to give evidence.<sup>601</sup> The New South Wales Act makes no reference to inclusion in the program not being provided as a reward for giving evidence whereas the remaining complementary legislation all recognise this requirement. It is possible that such a condition is contained in the MOU or in some other instrument in New South Wales, however, that is not clear from the legislation. The New South Wales Police provided no assistance to the thesis and it is unlikely the Police Commissioner would confirm that such arrangements are in place. The legislation<sup>602</sup> prevents the release of information about the contents of the MOU except where authorised<sup>603</sup> by the Commissioner of the New South Wales Police Force.

The timing of any payment of a reward to the participant must be carefully managed. If paid prior to the finalisation of the participant's commitments to give evidence or if the participant knows of the prospect of a reward before entering the program, the evidence the participant is to provide may be tainted. The witness's credibility might be attacked during Defence questioning in court about the nature and circumstances of the witness's inclusion in the witness protection program. The PJC said<sup>604</sup> that a reward might be considered after all court commitments are concluded so as to refute the claim that the evidence is tainted by the offer of a reward.

Procedures governing the inclusion of witnesses in the NWPP,<sup>605</sup> including

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<sup>599</sup> *Witness Protection Act 1994* (C'th) ss 8(3)(f)-(g).

<sup>600</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 67-68 [5.12]-[5.13]; Kramer, above n 15, 14; United Nations Office on Drugs and Crime, above n 12, 55.

<sup>601</sup> *Witness Protection Act 1995* (NSW) s 5.

<sup>602</sup> *Ibid* ss 33(1)(b).

<sup>603</sup> *Ibid* ss 33(2).

<sup>604</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8, 36.

<sup>605</sup> *Witness Protection Act 1994* (C'th) s 7.

the signing of a MOU,<sup>606</sup> are set out in the Act. Procedures governing the inclusion of foreign nationals or residents<sup>607</sup> in the NWPP, at the request of foreign law enforcement agencies or the International Criminal Court, are explained. Arrangements in respect of the termination of protection and assistance and of inclusion in the NWPP<sup>608</sup> are also set out in the Act.

The witness is required to disclose any issues that may have a negative impact on the protection arrangements.<sup>609</sup> There are 21 matters the witness must disclose listed in Section 7 of the Act; nine matters relate to the witness' criminal record, legal obligations including those involving children, legal proceedings and restrictions on holding positions on companies. Ten relate to financial matters concerning debts, bankruptcy or insolvency and the witness's general financial situation and the remaining two require the witness to disclose their immigration status and their general medical condition.

Insofar as inclusion in the Northern Territory is concerned, the Act<sup>610</sup> simply says the witness must disclose all information necessary for the Commissioner to make a decision about their inclusion. The Victorian Act leaves the decision<sup>611</sup> as to the matters the Chief Commissioner must be satisfied of before admitting a witness into the program to the Chief Commissioner of the Victoria Police Force without providing any additional guidance.

In deciding whether to include<sup>612</sup> a witness in the NWPP, the Commissioner faces limitations<sup>613</sup> imposed by the Act. These limitations include that the

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<sup>606</sup> Ibid s 8.

<sup>607</sup> Ibid s 10, 10A.

<sup>608</sup> Ibid s 18, 19.

<sup>609</sup> Ibid s 7.

<sup>610</sup> *Witness Protection Act 2000* (NT) ss 9(1).

<sup>611</sup> *Witness Protection Act 1991* (Vic) s 3B.

<sup>612</sup> *Witness Protection Act 1994* (C'th) s 8.

<sup>613</sup> Ibid.

witness agrees to be included<sup>614</sup> and signs a memorandum of understanding.<sup>615</sup> The witness's agreement to be included in the NWPP reinforces the voluntary nature of admission to the program.<sup>616</sup> The Commissioner must consider a number of issues<sup>617</sup> when making the decision to include a person in the NWPP. These considerations include whether the witness has a criminal record;<sup>618</sup> whether the witness is suitable to be included following psychological or psychiatric examination;<sup>619</sup> the seriousness of the offence the witness is giving evidence about and the importance of the witness's evidence to the prosecution;<sup>620</sup> whether there are viable alternative methods of protecting the witness;<sup>621</sup> the nature of the threat or perceived danger to the witness;<sup>622</sup> and the nature of the witness's relationship with others being considered for inclusion into the program.<sup>623</sup>

### **The provisions of the MOU**

Once the Commissioner has made a decision to include a witness in the NWPP the terms of the agreement are included in a MOU.<sup>624</sup> Inclusion is not confirmed until the Commissioner<sup>625</sup> and the witness<sup>626</sup> both sign the MOU, and upon that signing, the witness becomes a participant.<sup>627</sup> The MOU also

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<sup>614</sup> Ibid ss 8(2)(b).

<sup>615</sup> Ibid ss 8(2)(c).

<sup>616</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 69-70 [5.16]; United Nations Office on Drugs and Crime, above n 12, 64; Parliamentary Joint Committee, above n 8, 13, 26, 31.

<sup>617</sup> *Witness Protection Act 1994* (C'th) ss 8(2)-8(5).

<sup>618</sup> Ibid ss 8(3)(a).

<sup>619</sup> Ibid ss 8(3)(b).

<sup>620</sup> Ibid ss 8(3)(c).

<sup>621</sup> Ibid ss 8(3)(e).

<sup>622</sup> Ibid ss 8(3)(f).

<sup>623</sup> Ibid ss 8(3)(g).

<sup>624</sup> Ibid s 9.

<sup>625</sup> Ibid ss 9(4).

<sup>626</sup> Ibid ss 9(3).

<sup>627</sup> Ibid ss 9(4).

records the basis upon which the participant was included<sup>628</sup> and a provision concerning termination of protection and assistance<sup>629</sup> if the participant breaches a term of the MOU or commits an offence<sup>630</sup> against a law of the Commonwealth or of a state or territory.

The MOU may contain the terms and conditions<sup>631</sup> of the protection and assistance. It may also include the requirements and obligations<sup>632</sup> on the participant not to compromise, either directly or indirectly, any security aspect of the protection and assistance being provided to them, or the integrity<sup>633</sup> of the NWPP. It requires the participant to comply with reasonable directions<sup>634</sup> and sets out the nature of the financial assistance to be provided to the participant<sup>635</sup> and an agreement that the participant will disclose details of any criminal charges or civil or bankruptcy proceeding underway in relation to them.<sup>636</sup> It should be noted that the Queensland Act refers to the MOU as a Protection Agreement,<sup>637</sup> but describes essentially the same requirements in it. In Victoria,<sup>638</sup> the conditions of the witness's protection and evidence were set out in a court-supervised MOU<sup>639</sup> under the 1991 legislation, but the requirement for the MOU to be supervised by the Supreme Court is no longer contained in that Act.

At this point it is useful to distinguish the MOU from a contract because while there is an intention that the MOU sets out the agreement between the Commissioner and the witness, there is no intention to establish a

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<sup>628</sup> Ibid ss 9(1)(a).

<sup>629</sup> Ibid ss 9(1).

<sup>630</sup> Ibid ss 9(2)(a)(i).

<sup>631</sup> Ibid ss 9(2)(a).

<sup>632</sup> Ibid ss 9(2)(b).

<sup>633</sup> Ibid ss 9(2).

<sup>634</sup> Ibid ss 9(2)(c).

<sup>635</sup> Ibid ss 9(2)(f).

<sup>636</sup> Ibid ss 9(2)(g).

<sup>637</sup> *Witness Protection Act 2000* (Qld) s 7.

<sup>638</sup> *Witness Protection Act 1991* (Vic).

<sup>639</sup> Beverley Schurr, 'Witness Protection' (1992) 16 *Criminal Law Journal* 111.

contractual arrangement. An MOU describes a common intent of two or more parties where the parties do not wish to assume legally binding obligations.<sup>640</sup> MOUs provide a framework for shared understandings, and are usually less complex and less detailed than a contract. An MOU is a form of an agreement or contract sometimes identifying a range of provisions the parties wish to be binding and others, which they do not. It is therefore '... essential that these different provisions are dealt with in a way that protects the parties to the MOU'.<sup>641</sup>

A contract on the other hand is described as a promise that creates contractual obligations such that the promise could be described as an assurance, commitment, guarantee, a pledge or a vow.<sup>642</sup> For a contract to exist there must, in addition to agreement and consideration, be an intention to create legal relations.<sup>643</sup> While that intention could be express or implied<sup>644</sup> the party's intentions need to be considered on a case-by-case basis.<sup>645</sup>

Consideration and intention to create legal relations are related matters but a question arises whether consideration brings with it an intention that the promise be legally binding, thereby creating a situation where an independent requirement of intention is not necessary.<sup>646</sup> There is a further question whether consideration is evidence of an intention to create legal relations, but if that were the case there would be no need for the independent element of intention. That is not the case. Despite Lord

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<sup>640</sup> Victorian Government Solicitor's Office, 'Memorandum of Understanding' <http://www.vgso.gov.au/node/259>.

<sup>641</sup> Holman Webb, 'Deed or Agreement - a legal minefield' [http://www.HolmanWebb.com.au/\\_webbapp\\_1445892/"MOU,"LOI",deedoragreement-alegalminefield](http://www.HolmanWebb.com.au/_webbapp_1445892/).

<sup>642</sup> Brian Coote, 'The Essence of Contract - Part II' (1989) 1(91) *Journal of Contract Law* 183, 191.

<sup>643</sup> H. K. Lucke, 'The Intention to Create Legal Relations' (1970) 3 *Adel. L. R.* 419 1967-1970.

<sup>644</sup> *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v R'AS al-Khaimah National Oil Co (No 2)* [1990] AC 295, 315 (reversed in another point at 329).

<sup>645</sup> *Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 at 336.

<sup>646</sup> Samuel Williston, *Williston on Contracts: Forms* (Lawyers Co-operative Publishing Company, 1979) 21.

Mansfield's attempts to change the rule, such consideration would be evidence of an intention that a promise was legally binding.<sup>647</sup> His proposition was that consideration would only be essential where it was the only evidence of an intention to create legal relations. There were, it was considered,<sup>648</sup> two classes of contract, agreements by specialty and agreements by parol and contracts are 'merely written and not specialties, they are parol, and the consideration must be approved.' The Statute of Frauds 1677 (Imp) did not remove the necessity for consideration in contracts either,<sup>649</sup> but Lord Mansfield went on to suggest that a pre-existing moral obligation was a good consideration for a later promise to discharge that obligation.<sup>650</sup> His views on these issues were authoritatively rejected in 1840<sup>651</sup> when the courts began to define the concept in a more doctrinal way.<sup>652</sup>

In this thesis, the issue is whether negotiating and signing the MOU between the Commissioner and the witness evidences an intention to enter into a legally binding agreement. While there is offer, acceptance and consideration, all of the elements of a contract are not made out. There is no intention in a MOU to create legal relations. The MOU sets out a range of matters including rights and obligations as they apply to the participant and matters to do with the provision of witness protection services by the protection provider. MOUs are not documents representing an agreement (contract) enforceable by measures such as specific performance. Nevertheless, where a participant breaches the MOU or conditions of the MOU, those actions can lead to the termination of protection and assistance for the participant. The MOU therefore is not legally binding and an agreement by the participant to give evidence to the best of his or her ability

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<sup>647</sup> *Pillans v Van Mierop* (1765) 3 Burr 1663; 97 ER 1035

<sup>648</sup> *Rann v Hughes* (1778) 7 TR 350n; 101 ER 1014

<sup>649</sup> J. W. Carter and D. J. Harland, *Contract Law in Australia* (Butterworth's, 2nd ed, 1991) 85.

<sup>650</sup> *Hawkes v Saunders* (1782) 1 Cowp 289 at 290, 98 ER 1091; *Atkinson v Hill* (1775) 1 Cowp 184, 98 ER 10 88; *Truman v Fenton* (1777) 2 Cowp, 544; 98 ER 1232

<sup>651</sup> *Eastwood v Kenyan* (1840) 11 AD & EL 438; 113 ER 482

<sup>652</sup> Carter and Harland, above n 649, 85.

should not be seen as a duty but rather as an agreement to be well prepared and to answer questions fully and honestly. The inclusion of such a clause and the potential consequence puts all parties on notice that failure to be well prepared and answer questions fully and honestly may lead to an outcome not desired by any party.

### **Relocating a participant**

At times it may be preferred to relocate a witness overseas and by that same reasoning it may also be that a foreign country seeks to relocate a witness in their program to Australia. The Act provides authority for the Minister to consent to the relocation of a foreign witness into Australia.<sup>653</sup> The Minister must receive a request<sup>654</sup> from an appropriate authority and be satisfied<sup>655</sup> that the approved authority has provided all the material necessary to support the request. In advising the Minister, the Commissioner must consider all the same matters<sup>656</sup> involved with any other application for inclusion in the NWPP, including seeking further advice<sup>657</sup> if required. An arrangement<sup>658</sup> between the Commissioner and the relevant agency, which include financial arrangements<sup>659</sup> for costs associated with providing protection, must be in place so that NWPP services can be made available. The nominated person must also have been granted a visa for entry to Australia.<sup>660</sup> The same rules and restrictions apply in the case of a request for assistance from the International Criminal Court.<sup>661</sup> There are no equivalents in the state and territory legislation for the relocation of foreign participants into Australia. State and territory Acts do not contain provisions for the relocation of foreign nationals into the state or territory witness

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<sup>653</sup> *Witness Protection Act 1994* (C'th) s 10.

<sup>654</sup> *Ibid* ss 10(1)(a).

<sup>655</sup> *Ibid* ss 10(1)(b).

<sup>656</sup> *Ibid* ss 10(2), 10(3).

<sup>657</sup> *Ibid* ss 10(3).

<sup>658</sup> *Ibid* ss 10(4)(c).

<sup>659</sup> *Ibid* ss 10(5).

<sup>660</sup> *Ibid* ss 10(4)(d).

<sup>661</sup> *Ibid* s 10A.

protection program. Only the NWPP is empowered to receive foreign nationals but the legislation is silent on the relocation of Australian participants overseas regardless of the program they are included in.

The Commissioner is required to maintain a Register of participants<sup>662</sup> and to include certain details relating to the participant in the register.<sup>663</sup> Original copies of MOU, permissions granted by the Commissioner<sup>664</sup> relating to the disclosure of information by the participant under the Act, copies of new birth certificates, and any documents returned to the Commissioner as a result of the termination of protection connected to the register, must be kept.<sup>665</sup>

Access to the Register is restricted<sup>666</sup> to the Commissioner and designated officers authorised by the Commissioner. The Commissioner may give permission<sup>667</sup> to the Commonwealth Ombudsman, or a person authorised by the Commonwealth Ombudsman who has an appropriate national security clearance for the purposes of an investigation under Part V of the *Australian Federal Police Act 1979*, to access the register. The Commissioner has discretion<sup>668</sup> to allow others access to the Register if he or she thinks it is in the due administration of justice, but must notify<sup>669</sup> the approved authority, if that is relevant, where such a decision is made.

The Act stipulates the actions the Commissioner can take when relocating and re-identifying a participant.<sup>670</sup> These actions must be considered necessary to protect the witness's safety and welfare and that of persons

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<sup>662</sup> Ibid ss 11(1).

<sup>663</sup> Ibid ss 11(3).

<sup>664</sup> Ibid s 16.

<sup>665</sup> Ibid ss 11(5).

<sup>666</sup> Ibid s 12.

<sup>667</sup> Ibid ss 12(2).

<sup>668</sup> Ibid ss 12(3).

<sup>669</sup> Ibid ss 12(4).

<sup>670</sup> Ibid s 13.

holding designated positions.<sup>671</sup> The Commissioner can: apply for documents to facilitate a new identity for the participant;<sup>672</sup> permit persons holding designated positions<sup>673</sup> to use assumed names in carrying out their duties in relation to the NWPP; relocate the participant<sup>674</sup> and provide accommodation, transport and financial assistance, assisting the participant to obtain employment and achieve self-sustainment.

Restrictions<sup>675</sup> apply to what actions the Commissioner can take in relation to identity documents. For example, the Commissioner cannot provide documents for qualifications the participant does not have, and likewise, the Commissioner cannot<sup>676</sup> seek to provide benefits the participant would not be, or is not, entitled to. Section 13 also prevents a Commonwealth officer preparing identity documents if the officer does not have an appropriate security clearance.<sup>677</sup>

Comparing directly with the position under changes to the American legislation in 1984, the Commissioner must ensure the participant's rights and obligations.<sup>678</sup> These rights and obligations may include providing protection for the participant while the participant is attending court or notifying a party or possible party to legal proceedings that the Commissioner will accept process<sup>679</sup> issued by a court or tribunal on behalf of the participant, and nominating a member for the purpose. That action may also include informing a person who is seeking to enforce rights against

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<sup>671</sup> Ibid ss 13(1).

<sup>672</sup> Ibid ss 13(2)(a).

<sup>673</sup> Ibid ss 13(2)(b).

<sup>674</sup> Ibid ss 13(2)(c)-(j).

<sup>675</sup> Ibid ss 13(3)(a).

<sup>676</sup> Ibid ss 13(3)(b).

<sup>677</sup> Ibid ss 13(2)(a)-(j).

<sup>678</sup> Ibid s 15.

<sup>679</sup> Ibid ss 15(2)-(4).

the participant of the details of any property (whether real or personal) owned by the participant under his or her former identity.<sup>680</sup>

Cessation of protection and assistance<sup>681</sup> in the NWPP can occur in two ways. The participant may request the termination in writing.<sup>682</sup> This is an important recognition of the voluntary nature of the program. Alternatively, the Deputy Commissioner can make a decision to cease protection and assistance based on certain criteria.<sup>683</sup> Criteria includes that the participant knowingly provided false or misleading information to the Commissioner during the application process;<sup>684</sup> or that the conduct or threatened conduct of the participant is likely to compromise the integrity of the NWPP;<sup>685</sup> or the participant deliberately breaches an undertaking. Where the Deputy Commissioner decides to terminate protection and assistance,<sup>686</sup> they must take reasonable steps to advise the participant in writing<sup>687</sup> of that decision. The participant can challenge<sup>688</sup> the cessation in writing within 28 days by asking the Commissioner to review the decision. If the decision stands after the review and the former participant is still aggrieved by it, they can make a complaint to the Ombudsman and have the matter investigated. The Ombudsman cannot make a different decision, but can make recommendations as to process.

Where protection and assistance is terminated, the former participant is required to return any identity documents provided to them as a consequence of their inclusion in the program within seven days of receiving

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<sup>680</sup> Ibid ss 15(5).

<sup>681</sup> Ibid s 18.

<sup>682</sup> Ibid ss 18(1)(a).

<sup>683</sup> Ibid ss 18(1)(b)(i)-(vii).

<sup>684</sup> Ibid ss 18(1)(b)(ii).

<sup>685</sup> Ibid ss 18(1)(b)(v).

<sup>686</sup> Ibid ss 18(1)(b)(vii).

<sup>687</sup> Ibid ss 18(2).

<sup>688</sup> Ibid ss 18(4).

the notice<sup>689</sup> and the Commissioner must restore the participant's former identity.

Payments to the participant under the NWPP cannot be confiscated<sup>690</sup> or restrained<sup>691</sup> as payment of pecuniary penalties under Division 3 of Part XIII of the *Customs Act 1901*, the *Proceeds of Crime Act 1987*, the *Proceeds of Crime Act 2002*, the *Crimes (Superannuation Benefits) Act 1989* or the *Australian Federal Police Act 1979* where the Commissioner has made a certification. The Commissioner can provide a written certification<sup>692</sup> that an amount held by the participant relates to payments made under the NWPP.

### **Identity documents**

Providing participants in the NWPP and state and territory based programs with a new identity is essential in re-establishing them in a new location and a new life. A number of concerns are associated with this aspect of witness protection, ranging from the manner in which new identity documents are sourced, to the use participants can make of them. Measures to protect the participant's identity and their documents, as well as offences for misuse of the documents, are included in the Act.

Prior to the introduction of statutory witness protection programs in Australia in 1994, new identities arranged by police operating witness protection programs under administrative arrangements were not supported by specific legislation. It is likely that state and territory Registrars assisting police relied on discretionary provisions in their own Acts.

A birth certificate is the principal identity document and no other identity documents, including Commonwealth identity documents, can be obtained without it. Today, and in Victoria from 1991, an entry into the Register of

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<sup>689</sup> Ibid s 19.

<sup>690</sup> Ibid s 23.

<sup>691</sup> Ibid ss 23(2).

<sup>692</sup> Ibid ss 23(1).

Births requires the supervision of the Supreme Court in each state or territory.<sup>693</sup> Queensland is the exception and there the chairperson<sup>694</sup> of the CMC or an approved authority<sup>695</sup> can apply to the authorising officer<sup>696</sup> for a new identity authority for a participant. Once the authorising officer is satisfied that a new identity authority is appropriate, a new birth certificate can be created<sup>697</sup> to provide the participant a new identity.

Until 2006 the New South Wales Act did not allow a designated authority under complementary witness protection law to apply directly to the Supreme Court for a court order authorising an entry to be made in the Register. This issue was raised by the AFP during the 2001 review of the New South Wales Act,<sup>698</sup> and was subsequently corrected through legislative amendment on 27 October 2006. The amendment included the AFP Commissioner as a designated authority under section 3 of the New South Wales Act, which allowed the NWPP to directly seek a court order for the necessary authorisation.

The Commonwealth Act contains specific safeguards<sup>699</sup> for the integrity of Commonwealth identity documents. It restricts the use a participant can make of new identity documents, and mandates that the participant cannot use their new identity to avoid civil or criminal liability.<sup>700</sup>

Special provisions are required if the participant wishes to marry,<sup>701</sup> as there needs to be certainty about their legal status in regards to marriage. The

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<sup>693</sup> *Witness Protection Act 1991* (Vic) s 6; *Witness Protection Act 1995* (NSW) s 15; *Witness Protection Act 1996* (SA) s 17; *Witness Protection Act 1996* (ACT) s 7; *Witness Protection (Western Australia) Act 1996*, s 21; *Witness Protection Act 2000* (NT), s 14; *Witness Protection Act 2000* (Tas) s 9.

<sup>694</sup> *Witness Protection Act 2000* (Qld) Clause 16.

<sup>695</sup> *Ibid* Clause 33.

<sup>696</sup> *Ibid* Schedule 2.

<sup>697</sup> *Ibid* Clause 17(2).

<sup>698</sup> New South Wales Parliament, above n 9, 21-22.

<sup>699</sup> *Witness Protection Act 1994* (C'th) s 24.

<sup>700</sup> *Ibid* s 20, 27.

<sup>701</sup> *Ibid* s 14.

Commissioner must be satisfied that the participant is of marriageable age,<sup>702</sup> and if previously married, that the participant is divorced<sup>703</sup> or the former spouse is deceased,<sup>704</sup> before consenting to the marriage.

To recognise that those assisting in the re-identification process were acting in good faith, the PJC recommended<sup>705</sup> that future legislation should indemnify government officials providing assistance to protected witnesses. The Act refers specifically to this protection,<sup>706</sup> indemnifying persons acting in an official capacity, who alter records or issue documents, from civil or criminal liability.

The transitional provisions<sup>707</sup> in the Act ensured that participants in the AFP witness protection program immediately before the commencement of the Act became participants in the NWPP on its commencement.

### **Confidentiality**

A critical element in providing effective protection arrangements is ensuring the ongoing confidentiality of the participant and family members included in the program. Suppression orders, court orders protecting a participant's identity, non-disclosure of the former name and location of the participant and other provisions are necessary inclusions in the Act to achieve that confidentiality.

The Act was amended<sup>708</sup> so that the offence provisions include offences relating to the disclosure of information about a Commonwealth, territory<sup>709</sup>

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<sup>702</sup> Ibid ss 14(b)(i).

<sup>703</sup> Ibid ss 14(d).

<sup>704</sup> Ibid ss 14(c).

<sup>705</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, (xiii), 86-87.

<sup>706</sup> *Witness Protection Act 1994* (C'th) s 21.

<sup>707</sup> Ibid s 29(2).

<sup>708</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010* (No. 4, 2010) (C'th).

<sup>709</sup> *Witness Protection Act 1994* (C'th) s 22.

or state participant.<sup>710</sup> Offences relating to the disclosure of information about the NWPP by persons undergoing assessment for inclusion in the program,<sup>711</sup> and disclosures to the courts,<sup>712</sup> were created. The sections within the Act relating to these offences are aligned so that where reference is made to offences for particular disclosures in the analysis the citations show the relevant sections for Commonwealth or territory and state participants.

Offences are created in the Act for the disclosure of information about the identity of the participant,<sup>713</sup> or information revealing them to be a participant in the NWPP<sup>714</sup> or that the potential participant was being assessed for inclusion in the program.<sup>715</sup> Similar offences were created relating to the disclosure of information that would compromise the security of a participant<sup>716</sup> or the security of a person being assessed for inclusion in a program.<sup>717</sup>

The offence provisions do not preclude the disclosure of all information about every aspect of the NWPP. They do, however, restrict the disclosure of information about the way in which the NWPP operates,<sup>718</sup> about AFP employees involved in witness protection,<sup>719</sup> the fact that a participant has signed a MOU<sup>720</sup> and what the MOU contains.<sup>721</sup> The Commissioner can authorise disclosure of the information by the participant for the purposes of

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<sup>710</sup> Ibid s 22A.

<sup>711</sup> Ibid s 22B.

<sup>712</sup> Ibid s 22C.

<sup>713</sup> Ibid ss 22(1)(a).

<sup>714</sup> Ibid ss 22(1), 22A(1).

<sup>715</sup> Ibid ss 22(2), 22A(2).

<sup>716</sup> Ibid ss 22(3), 22A(3).

<sup>717</sup> Ibid ss 22(4), 22A(4).

<sup>718</sup> Ibid ss 22B(2)(b)(i).

<sup>719</sup> Ibid ss 22B(2)(b)(ii).

<sup>720</sup> Ibid ss 22B(1)(b)(iv).

<sup>721</sup> Ibid ss 22B(1)(b)(v).

making a complaint<sup>722</sup> to the Ombudsman<sup>723</sup> or the Integrity Commissioner.<sup>724</sup> Where the Commissioner authorises disclosure subsections (1), (2), (3) and (4) do not apply, but absolute liability continues to apply<sup>725</sup> in respect of the fact that the person is a participant in the NWPP or in a state program.

The unauthorised disclosure of information is treated extremely seriously. A person can be convicted of an offence against subsections (1), (2), (3) and (4) regardless of whether the risk posed by the disclosure had a particular effect or not.<sup>726</sup>

A participant is not required to disclose<sup>727</sup> their former identity where, apart from this section, the person would be required to under a law of the Commonwealth. In those cases, the participant is entitled to claim that their new identity is their only identity. In the same way, Commonwealth<sup>728</sup> and state<sup>729</sup> officers, who are aware of information relating to the NWPP, are not required to disclose that information except as authorised by the Commissioner.

Protecting the identity of participants appearing in court under an assumed identity is managed by specific legislation in Tasmania.<sup>730</sup> The legislation, passed in 2006, requires<sup>731</sup> the participant to notify the Commissioner of the Tasmanian Police that they are required to give evidence in a court proceeding and the Commissioner must provide a certificate<sup>732</sup> to the

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<sup>722</sup> Ibid ss 22(5), 22A(5).

<sup>723</sup> Ibid ss 22(2).

<sup>724</sup> Ibid ss 22B(3).

<sup>725</sup> Ibid ss 22(5), (1)(c), (2)(c), 3(c), 4(c), 22A(5), (1)(d), (2)(d), (3)(d), 4(d).

<sup>726</sup> Ibid ss 22(7), 22A(7).

<sup>727</sup> Ibid s 16.

<sup>728</sup> Ibid ss 16(3).

<sup>729</sup> Ibid ss 16(4).

<sup>730</sup> *Witness (Identity Protection) Act 2006* (Tas).

<sup>731</sup> Ibid ss 18(1).

<sup>732</sup> Ibid ss 18(2).

participant for those proceedings. The certificate must state that the person is a participant in the witness protection program<sup>733</sup> and that they have been given a new identity.<sup>734</sup> It must also confirm that the participant has not been convicted of any crimes other than those disclosed in the certificate.<sup>735</sup> The certificate must not disclose<sup>736</sup> the participant's protected identity or location.

Secrecy, in the context of the Act, requires that the Commissioner and members of the AFP not divulge information they become aware of as part of the duties under the Act. The Act states<sup>737</sup> that they are not to be required to divulge, to a court, tribunal or commission of enquiry, any matter or thing that has come to their notice as a result of the performance of duties or functions in connection with the Act. The exception<sup>738</sup> being, where it is necessary for the purposes of the Act. In this context, such things as applications to the Supreme Court in the states of territories, for the purposes of obtaining an identity order for a birth certificate, and disclosures required for obtaining other identity documents, are permitted.

To ensure the participant is not able to hide behind their inclusion in the program or their new identity to avoid prosecution for crimes allegedly committed while the participant is included in a witness protection program, the Act makes provision for the release of some information to the court. Where a participant is under investigation or has been arrested for particular offences<sup>739</sup> and the penalty includes imprisonment for one year or more, the Commissioner can release information to an approved authority. In these situations, the Commissioner may release the participant's criminal

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<sup>733</sup> Ibid ss 19(1)(a).

<sup>734</sup> Ibid ss 19(1)(b).

<sup>735</sup> Ibid ss 19(1)(c).

<sup>736</sup> Ibid ss 19(2).

<sup>737</sup> *Witness Protection Act 1994* (C'th) s 26.

<sup>738</sup> Ibid ss 26(1)-(3).

<sup>739</sup> Ibid s 20.

record<sup>740</sup> or other information considered appropriate in the circumstances.<sup>741</sup> In cases where disclosures about the participant's location and circumstances are required for the determination of legal proceedings,<sup>742</sup> those disclosures must be made to a judge or magistrate in chambers. No other person can be present at the time of disclosure<sup>743</sup> and the judge or magistrate may subsequently only disclose the information in accordance with the Act.<sup>744</sup>

Where a participant becomes involved as a witness in criminal proceedings<sup>745</sup> in their new identity<sup>746</sup> and they have a previous criminal record<sup>747</sup> under the original identity, the participant must advise the Commissioner that they are to be a witness.<sup>748</sup> At these times, the Commissioner may take whatever action considered necessary<sup>749</sup> including informing the court, the prosecution or the accused person or their legal representative, of the participant's previous criminal record. Likewise, if the participant becomes involved in civil proceedings in the new identity,<sup>750</sup> the Commissioner may take whatever action he or she considered appropriate.<sup>751</sup>

The suppression of the former identity or name of a participant, or suppression of the fact that the person is a participant or was assessed for inclusion in the NWPP<sup>752</sup> in a court, tribunal or commission,<sup>753</sup> is necessary

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<sup>740</sup> Ibid ss 20(d).

<sup>741</sup> Ibid ss 20(e).

<sup>742</sup> Ibid ss 26(3).

<sup>743</sup> Ibid ss 26(3).

<sup>744</sup> Ibid ss 26(4).

<sup>745</sup> Ibid s 27.

<sup>746</sup> Ibid ss 27(1)(a).

<sup>747</sup> Ibid ss 27(1)(b).

<sup>748</sup> Ibid ss 27(1).

<sup>749</sup> Ibid ss 27(2).

<sup>750</sup> Ibid ss 27B(1).

<sup>751</sup> Ibid ss 27B(2).

<sup>752</sup> Ibid ss 28(1).

to ensure the safety and security of the participant. The Act requires the court tribunal or commission to consider holding that part of the proceedings that relates to those issues in private.<sup>754</sup> A suppression order relating to publication of the evidence<sup>755</sup> including where the evidence might compromise the security of the participant<sup>756</sup> must also be made. The section<sup>757</sup> does not prevent the taking of a transcript of proceedings, but it does affect how the transcript can be dealt with including whether that part of the transcript should be withheld from publication.

The Act notes that Chapter 2 of the *Criminal Code Act 1995* applies to all offences against this Act and sets out the general principles of criminal responsibility. The Queensland Act binds<sup>758</sup> the State, Commonwealth and other States to the extent permitted by the legislative authority of the Parliament in that state.

### **Fast Tracking**

The PJC recommended<sup>759</sup> that cases involving protected witnesses should be given some priority in the court system and this thesis considers matters arising from that proposition. Conscious of issues pertaining to the right of the accused to a fair trial and the credibility of the witness in the trial process, this thesis explores options, used in branches of the judicature, to manage sensitive cases through the court process. Court case management is a vexed issue because on the one hand the community is entitled to expect that the courts operate in an efficient way, incurring reasonable cost in the administration of justice, but also acting responsibly in respect of the time taken to put matters before the courts. On the other hand there is a compelling need to ensure the accused receives a fair trial.

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<sup>753</sup> Ibid ss 28(1).

<sup>754</sup> Ibid ss 28(2)(a).

<sup>755</sup> Ibid ss 28(2)(b).

<sup>756</sup> Ibid ss 28(2)(c)(ii).

<sup>757</sup> Ibid ss 28(3).

<sup>758</sup> *Witness Protection Act 2000* (Qld) s 4.

<sup>759</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, xiv-xv.

There are no provisions in the Act to facilitate expediting cases where participants in the NWPP are giving evidence. This represents a gap in the approach to witness protection in Australia and is a matter that should be taken up in future scholarly research. Expediting cases is a matter addressed in the model and the uniform legislation recommended in this thesis.

### **Governance and Accountability**

In this thesis, governance and accountability refers to external oversight of the administration of the program and is a critical part of an evaluation of the effectiveness of the witness protection in Australia generally. The Act requires the Minister to report annually<sup>760</sup> to 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.<sup>761</sup> There is no guidance in the Act or the annual report to suggest what disclosures would prejudice the effectiveness of the NWPP or other witness protection programs. The annual reports that are prepared vary considerably in what information is provided by the Minister and in what form. The one consistency is that the reports all contain information about the number of participants included in the program and the overall running costs for that year.

Legislation requiring annual reporting on the operation of witness protection programs is in force in South Australia,<sup>762</sup> Western Australia<sup>763</sup> and Queensland.<sup>764</sup> The Parliamentary Crime and Misconduct Committee also reviews the CMC in three-year cycles<sup>765</sup> in Queensland and those reviews cover the operation of the witness protection program. The reports are tabled in parliament, but are also available to the public. There are no

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<sup>760</sup> *Witness Protection Act 1994 (C'th)* s 30.

<sup>761</sup> *Ibid* ss 30(2).

<sup>762</sup> *Witness Protection Act 1996 (SA)* s 28.

<sup>763</sup> *Witness Protection (Western Australia) Act 1996* s 37.

<sup>764</sup> *Crime and Misconduct Act 2001* s 260.

<sup>765</sup> *Ibid* ss 292(f).

legislative requirements for the New South Wales Police or the Victoria Police to provide annual reports to parliament.

## 5.4 Conclusions

The legislation across Australia represents a consolidated approach to witness protection at the statutory level and demonstrates the commitment of the Commonwealth and the states and territories to ensure a comprehensive response in this country. There are differences, albeit minor, in the various statutes, the alignment of sections and the matters covered under certain sections of the legislation as has been identified above and in the comparative review in Annexure 14B.

All of the state and territory legislation has provisions for orders of the court in respect of new identity documents with the exception of Queensland, which adopts an approach exclusive of the Supreme Court. All have protections for the community in regards to participants with previous criminal records being relocated into an unsuspecting community.

Queensland specifically describes arrangements for the temporary protection of witnesses while the witness is undergoing assessment for inclusion in the program.<sup>766</sup> Those arrangements are attractive to other states, particularly New South Wales, which described the Queensland provisions favourably in its 2001 review of the Act in New South Wales.<sup>767</sup> Queensland also legislates specifically for designated training in witness protection roles for officers undertaking duties in the CMC Witness Protection Program.<sup>768</sup> This thesis proposes the adoption of this clause in a uniform witness protection act presented as part of the alternative arrangements for witness protection in Chapter 9.

The Australian legislation has dealt with the issues and problems raised in the early programs in the United States of America, which are described in

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<sup>766</sup> *Witness Protection Act 2000* (Qld) s 9.

<sup>767</sup> New South Wales Parliament, above n 9.

<sup>768</sup> *Witness Protection Act 2000* (Qld) s 35.

Chapters 2 and 3. The current Australian legislation is very similar to the American legislation and is also consistent with the UNODC Model Witness Protection Bill<sup>769</sup> and the arrangements described in the Institute of International Research report.<sup>770</sup> To a significant degree, witness protection legislation is consistent in that it contains the same key issues, although the application of the legislation is at times different.

An opportunity exists in Australia to better align witness protection legislation and programs through the development of a Uniform Witness Protection Act. This option is described in more detail in Chapter 9 and is one of the key recommendations arising from this study.

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<sup>769</sup> United Nations Drug Control Program, above n 26.

<sup>770</sup> Institute for International Research on Criminal Policy, above n 286.

# Chapter 6. Policy Issues in Witness Protection

A strategic policy issue for government in combating serious and organised crime in all Australian jurisdictions is delivering effective and efficient witness protection services. Through this facility, government can fulfil its obligation to protect the community and promote law and order.

This chapter examines in some detail the primary policy issues and implications arising from witness protection including: (1) the role of witness protection programs in the criminal justice system; (2) the protection of witnesses; (3) cooperation between police forces; (4) the elimination of duplication; and (5) confidentiality versus secrecy. The chapter proposes an alternative model for witness protection to be included in a package of measures to enhance witness protection in Australia so as to protect vulnerable and intimidated witnesses.

This chapter does not comment on each aspect of the legislation, but it does raise issues where differences between the Australian legislation create inconsistency or duplication.

## 6.1 The issues – evidence and analysis

The objective of an efficient witness protection program is to protect witnesses from harm,<sup>771</sup> and implicit in that objective is support for the operation of the criminal justice system.<sup>772</sup> Witness protection contributes to the operation of the criminal justice system in relation to serious and organised crime matters. It is a critical contribution because it secures and protects witnesses and informants who come forward to give information to police or evidence in court in certain circumstances. Witness protection

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<sup>771</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 14 citing the Moffitt submission at 2.

<sup>772</sup> New South Wales Parliament, above n 9, 7.

programs have been successful<sup>773</sup> in the United States of America, Canada and the United Kingdom in enabling law enforcement agencies to investigate and prosecute individuals involved in major crime.

Cooperation between police forces and the implementation of protection arrangements is dealt with through legislation and operational cooperation. Issues such as duplication of effort, fiscal waste, resource commitment and appropriate confidentiality measures can be dealt with through structural measures for witness protection arrangements nationally. These issues should be supported by legislative and other amendments as described in Chapter 9 and Annexures 11 and 12. Changes to the witness protection model in Australia and to the legislation that enables it will require significant commitment and cooperation between governments and police forces.

## **6.2 The role of witness protection programs in the criminal justice system**

Witnesses and informants perform a critical role in the criminal justice system; witnesses because of the evidence they give in the prosecution of offences, and informants because of the intelligence they provide to police during criminal investigations, which ultimately lead to the prosecution of criminals. The evidence a participant gives in court is important to the case and the integrity of the witness's evidence is paramount.<sup>774</sup> Justice Stewart noted<sup>775</sup> that a witness protection program that threatened the integrity of the witness's evidence in court would be contrary to the goals of the program.

A goal of witness protection, integral to the objective of the programs, is to ensure the safety and security of the witness. Witness protection programs create an environment where that is possible. This thesis argues that the

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<sup>773</sup> van der Heijden, above n 286, 6; Kramer, above n 15, 10-11, 14.

<sup>774</sup> Stewart, above n 8, 540.

<sup>775</sup> Ibid.

participant can be more assured they will not face retribution from crime figures as a result of giving evidence and the Crown will secure evidence to be used to prosecute serious and organised crime cases. These outcomes contribute significantly to the effectiveness of law enforcement efforts. The goals underscore two critical issues raised by the Royal Commissioners that: improved information flow in police investigations is required;<sup>776</sup> and the security of witnesses who come forward to give information must be assured.<sup>777</sup>

The effective flow of information to police to assist criminal investigations has a direct correlation to the number of cases put before the courts because without witnesses to crimes, prosecutions would not be possible. Arguably, without witness protection as a facility to protect vulnerable and intimidated witnesses, investigations by police and then prosecutions in courts might not be successful. The implication where criminal investigations are not fruitful and prosecutions of serious criminals are not successful is damage to the reputation of government and its institutions.<sup>778</sup> If investigations and prosecutions are affected by the lack of information, the public will likely develop a lack of trust in government and the criminal justice system.<sup>779</sup> High value witnesses whose lives may be in danger as a result of giving information to police or evidence in courts, therefore, must be protected.

## 6.3 Protection of witnesses

### Establishing witness protection programs

Witness Protection programs in each Australian jurisdiction are established and maintained by Police Commissioners under specific legislation.<sup>780</sup> It is

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<sup>776</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, (vii); Costigan, above n 8, Vol.2, 3; Stewart, above n 8, 561.

<sup>777</sup> Stewart, above n 8, 562.

<sup>778</sup> Elliot, above n 350, 111.

<sup>779</sup> Ibid 195.

<sup>780</sup> *Witness Protection Act 1994* (C'th) s 4; *Witness Protection Act 1995* (NSW) s 5; *Witness Protection Act 1996* (ACT) s 4; *Witness Protection Act 2000* (NT) s 5; *Witness Protection Act*

argued, that the existing legislation, while providing some consistency in the operation of witness protection programs, facilitates duplication of effort, excessive resource commitment across law enforcement agencies and financial inefficiency. The existing legislative regime reinforces siloing through the very nature of complementary legislation and the secrecy provisions contained in the Acts. It does not mandate cooperation and coordination between protection providers. It creates vulnerabilities for the safety and security of the participants and for information that could lead to their detection.<sup>781</sup>

This thesis recommends<sup>782</sup> a revised witness protection model and uniform legislation. The proposed model describes a three-tiered structure<sup>783</sup> and uniform witness protection legislation,<sup>784</sup> which, it is suggested, would provide a more holistic and integrated national scheme than is currently in place in Australia.

### **Including witnesses in witness protection programs**

Entry into a witness protection program must be voluntary.<sup>785</sup> There is no viable argument for compulsory inclusion because witnesses in these situations are not in custody. The thresholds<sup>786</sup> that apply for including a witness in a witness protection program in most jurisdictions require the witness to disclose a broad range of matters relevant to their circumstances. The commissioner must take those matters into consideration when making

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*2000 (Qld) s 5; Witness Protection Act 1996 (SA) s 4; Witness Protection Act 2000 (Tas) s 4; Witness Protection Act 1991 (Vic) s 3A; Witness Protection (Western Australia) Act 1996 s 5.*

<sup>781</sup> See Chapter 8.1 Analysis of online surveys, Cross-jurisdictional coordination, 205-213; and Chapter 9.4, Identity documents, 244-246, for discussion on the vulnerabilities created by uncoordinated activities.

<sup>782</sup> See Chapter 10.3 Can witness protection be done better in Australia, 268-280.

<sup>783</sup> See Annexure 11 for a description of the proposed model.

<sup>784</sup> See Annexure 12 for a description of the proposed legislation.

<sup>785</sup> Kramer, above n 15, 13; Douglas A. Kash, 'Hiding in Plain Sight: A Peek into the Witness Security Program' (2004) 73(5) *FBI Law Enforcement Bulletin* 25, 25.

<sup>786</sup> See Chapter 5.3 The Legislation by study theme, Inclusion in a witness protection program, 126-137; and Chapter 8.1, Analysis of the online survey responses, Inclusion in a witness protection program, 213-217, for discussion on the thresholds for inclusion in a program.

a decision about including a witness in a protection program. Victoria<sup>787</sup> and the Northern Territory<sup>788</sup> apply a different standard. There the commissioner has unfettered authority and the Acts do not specify the same level of disclosure by the witness as the Commonwealth and other state and territory legislation. The amendments proposed to the Victorian Act through the *Witness Protection Amendment Act 2014*<sup>789</sup> will bring Victoria into line with the disclosures required of witnesses seeking entry into the NWPP and other state and territory witness protection programs. The existing disparity between the inclusion arrangements creates an unnecessary inconsistency between Australian programs and results in different standards between the programs. The proposed model resolves this inconsistency and creates a common set of disclosure requirements for Tier 1 and Tier 2 programs across the integrated witness protection arrangements recommended.

The threat to the witness<sup>790</sup> is one of the fundamental reasons for their inclusion in a witness protection program. Therefore, a threat assessment should be required as part of the initial assessment process to determine the witness's suitability to be included in the program. Similarly, a risk assessment should be conducted once the participant is included in the program, but before relocation. These procedures recognise the nature of the threat to the participant warranting their inclusion in a witness protection program and the possible risks to the community into which the participant is relocated.

The terms 'threat' and 'risk' are often used interchangeably, but they are discrete terms, relate to very different issues and have different meanings as discussed previously.<sup>791</sup> This thesis suggests that definitions for both terms should be included in the legislation and that the Act should specify that a

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<sup>787</sup> *Witness Protection Act 1991* (Vic) ss 3B.

<sup>788</sup> *Witness Protection Act 2000* (NT) s 8.

<sup>789</sup> See Annexure 5 for a description of the amendments proposed in Victoria to come into operation in December 2014.

<sup>790</sup> Kramer, above n 15, 5.

<sup>791</sup> See Chapter 4.3 Witness protection and the Family Court of Australia, 106-115, for discussion about threat and risk.

threat assessment be conducted when an application is made for the witness to enter a witness protection program. Likewise a risk assessment should be mandatory where a participant is to be relocated to another community. The risk assessment should include a study of the likelihood of the participant re-offending in the new location or attempting to avoid rights and obligations and the consequences of any re-offending including the likely impacts on the new community.

Upon entering a witness protection program the witness is required to sign an agreement or a MOU. The MOU between the Commissioner and the participant contains issues relevant to the inclusion of a witness in a witness protection program and the rights and obligations imposed on the witness upon entering the program. The PJC referred<sup>792</sup> to the importance of the MOU as a mechanism to ensure certainty about protection and assistance arrangements. The OPI noted<sup>793</sup> that, in respect of matters associated with the MOU, the extent to which the conditions and benefits are to be provided under the protection arrangements, must be clear.

This thesis argues that the MOU should, in addition to the rights and obligations already described in the MOU, contain a clause specifying that the participant be required to give evidence to the best of their ability. Failure to honour that obligation should lead to the termination of protection and assistance on the basis that the participant materially breached the MOU. While not currently included in the MOU, the witness protection model and uniform legislation<sup>794</sup> contain such a clause. A participant in the Canadian program must ‘... give evidence ... as required in relation to the ... prosecution.’<sup>795</sup> This precedent supports the idea of a specific clause in MOU in Australian witness protection arrangements. Responses to the empirical

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<sup>792</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8, 3, 9-10.

<sup>793</sup> Office of Police Integrity Victoria, above n 9, 33.

<sup>794</sup> See Chapter 9 Discussion and Annexure 11 and 12 respectively.

<sup>795</sup> *Witness Protection Program Act 1996* (CA) ss 8(b)(1).

research<sup>796</sup> for this thesis also demonstrate support for the inclusion of such a clause and obligation in Australia.

### **Actions where a witness is included in a program**

A primary method of protection, where a witness is included in a formal program, is relocation and re-identification. Three related issues, which led to significant reforms to legislation and practice in witness protection in the United States of America in 1984,<sup>797</sup> are problems of participants in the program reoffending in their new location; enforcing judgments imposed on the participant in their former name; and obligations imposed by the family court in respect of access and visitation. Lawson,<sup>798</sup> Slate,<sup>799</sup> Montanino<sup>800</sup> and Graham<sup>801</sup> raised these issues in their research. Similarly, the PJC argued<sup>802</sup> that if a participant commits a crime, their criminal record under their old identity should be revealed to the responsible investigative agency. The Australian legislation<sup>803</sup> ensures that a participant is not able to hide behind their new identity to avoid rights and obligations.

Turning to re-identification, the PJC recommended<sup>804</sup> that legislation relating to the registration of births in each state and territory should be amended to provide a mechanism similar to that presently applying in cases of adoption. In this way a protected witness could be issued with a birth certificate in a

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<sup>796</sup> See Chapter 8.1 Analysis of the online survey responses, Inclusion in a witness protection program, 213-217.

<sup>797</sup> See Chapters 2.2 Witness Protection in the United States of America, 18-26; and Chapter 3.1 Previous Research in the United States of America, 58-68.

<sup>798</sup> Lawson, above n 54.

<sup>799</sup> Slate, above n 51.

<sup>800</sup> Montanino, above n 17, 128-130.

<sup>801</sup> Graham, above n 52.

<sup>802</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 91-92.

<sup>803</sup> *Witness Protection Act 1994* (C'th) s 9; *Witness Protection Act 1996* (ACT) s 5; *Witness Protection Act 1995* (NSW) s 8; *Witness Protection Act 2000* (NT) ss 10(2); *Witness Protection Act 2000* (Qld) ss 8(3); *Witness Protection Act 1996* (SA) ss 8, 10(2)(e); *Witness Protection Act 2000* (Tas) ss 8(2); *Witness Protection Act 1991* (Vic) ss 5(2); *Witness Protection (Western Australia) Act 1996* ss 11(2); See also discussion in Chapter 8.1 Analysis of the online survey responses, Inclusion in a witness protection program, 213-217.

<sup>804</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, (xiii).

new name that does not indicate that any change of name has taken place. The requirement for Court's supervision where an adoption order is sought is contained in state and territory legislation other than the witness protection Acts. State and territory witness protection legislation requires the supervision of the Supreme Court for a court order for an entry to be made into the register before a new identity document (birth certificate) can be produced. The situation in Queensland is different. There the supervision of the Supreme Court is not required, but an authorised officer in the Queensland police advises the Chair of the CMC if a new birth certificate can be produced.

It is argued that the current arrangements in all states and territories are inconsistent and create vulnerability for the identity of the participant by enabling additional people, involved in the processing work, to be able to access the name of the participant. Noting the PJC's recommendation, the proposed model and uniform legislation recommended in this thesis, empower the Police Commissioner responsible for the NWPP to authorise such an entry. The role of the Supreme Court in supervising that process would be removed.

A participant who undergoes a change of identity can also be issued with Commonwealth identity documents. Complementary legislation and Ministerial agreements are in place to allow access to Commonwealth documents for state and territory participants. While the Commonwealth could restrict access to Commonwealth identity documents to participants in the NWPP, thereby requiring the states and territories to use the NWPP on a cost recovery basis, Commonwealth and state and territory relations would be tested. There is precedent for this in Canada,<sup>805</sup> where once a decision is made to re-identify a participant included in a state or provincial program, an application must be made for that participant to be included in the federal

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<sup>805</sup> See Chapter 2.3 The Canadian experience with witness protection, 27-32.

program. Federal identity documents cannot be issued to participants not in the federal program.<sup>806</sup>

This thesis proposes the adoption of the Canadian practice as one mechanism in the tiered national witness protection model. A decision to re-identify a participant in a state or territory program would become the catalyst for an application for the state or territory participant to be included in the NWPP. The alignment of admission processes and disclosures by the witness, while not guaranteeing inclusion in the NWPP, would facilitate the process. The benefits of this arrangement would also be realised in more secure relocation practices because limiting relocations to the NWPP would significantly reduce the opportunity for compromise.

### **Arrangements with approved authorities**

In order to provide protection and assistance for witnesses and to provide identification documents and other logistics, police or protection providers in Australian jurisdictions must enter arrangements with certain authorities, referred to as approved authorities. The existing Australian legislation enables those arrangements. It specifies the characteristics of an approved authority and the mechanism of approval and it indemnifies officials and others in approved authorities acting in an official capacity, who alter records or issue new identity documents to participants, from any civil or criminal liability.<sup>807</sup>

This thesis proposes that witness protection arrangements under the current legislation allow too many protection providers to have access to approved authorities for the purposes of creating new identities or obtaining documents in the new identity. This creates vulnerability for witness protection and for the official or other person responsible for creating the documents. The model and uniform legislation limit access to approved authorities and new identity documents to the NWPP noting that the NWPP

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<sup>806</sup> *Witness Protection Program Act 1996 (CA)* ss 14(1).

<sup>807</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 86-87 [5.47]-[5.49].

would provide witness protection services for state and territory cases where the participant is to be relocated and re-identified. This would create a more secure process by limiting exposure and better managing requests for new identity document.

### **Governance and accountability**

External oversight and review of certain aspects of the operation of witness protection programs are key issues. Insofar as governance is concerned, this thesis endorses the role of the Ombudsman in reviewing certain decisions. It introduces the idea of a standing parliamentary committee to monitor Tier 1 and Tier 2 programs, but not direct witness protection operations. On the matter of accountability, the role and substance of annual reporting mechanisms is considered. For completeness, annual reporting of Tier 3 witness protection programs should be mandated in the legislation.

The PJC dealt with the issue of a participant having recourse to an independent third party to review a decision by the Commissioner not to include them in a program or to terminate protection and assistance.<sup>808</sup> The mechanism to handle complaints against police, in this case by aggrieved persons and witness protection, is included in legislation that authorises the Ombudsman in each Australian jurisdiction. The requirement was noted by the PJC of 2000.<sup>809</sup> The New South Wales review noted<sup>810</sup> the limited role of the Ombudsman's Secure Monitoring Unit in that state where decisions are taken by the Commissioner to either deny an applicant entry to the program or to terminate the participant's inclusion.

A participant in the Western Australian witness protection program only has a right of complaint in respect of the conduct of the Commissioner or a police officer in relation to the program. The JSCCCC suggested<sup>811</sup> that while the

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<sup>808</sup> Ibid (xi), (xiv), 88-89 [5.53]-[5.54].

<sup>809</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8, (vii), 4, 21-22 [1.12], [2.50], [2.56].

<sup>810</sup> New South Wales Parliament, above n 8, 7.

<sup>811</sup> Joint Standing Committee on the Corruption and Crime Commission, above n 408, xviii, xxii, 53, 57.

Commissioner has final authority regarding witness protection applications and other decisions under the Act, the participant should be given an option of determinative appeal by an independent authority such as the Ombudsman in cases of termination of protection or exclusion from the program. It is argued that this could have the effect of installing two decision makers for those significant decisions giving the Ombudsman a power of veto over the Commissioner's decisions and thereby suborning the authority of the Commissioner.

The Ombudsman also has a role in reviewing certain actions by police officers working in witness protection roles. For example, the Commonwealth Ombudsman conducted an investigation into the issue of substitute medical certificates under the *Witness Protection Act 1994 (C'th)*<sup>812</sup> at the request of the Commissioner of the AFP. The investigation was in response to an issue arising in the committal hearing of *R v Barbaro and Ors* (Unreported) in New South Wales, where a key witness, a participant in the NWPP, was unable to attend court because of a medical condition for which they were receiving ongoing medical care. The Ombudsman's investigation did not identify any wrongdoing by the participant, the police or the doctor who prepared the substitute certificate. The Ombudsman did however note<sup>813</sup> that the procedure used by the AFP to generate the substitute certificate was not done pursuant to any procedure laid out in the Act and while done in good faith was ill advised.

The thesis has demonstrated that the Ombudsman's responsibilities with respect to witness protection are not consistent across Australia. Parliamentary committees<sup>814</sup> review the programs in some jurisdictions albeit that none are established for the express purpose of overseeing the operation of witness protection programs. The model proposed in this thesis

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<sup>812</sup> *Witness Protection Act 1994 (C'th)* s13.

<sup>813</sup> Commonwealth Ombudsman, 'Special investigation into the issue of a substitute medical certificate under the Witness Protection Act 1994' (2003)

<sup>814</sup> The Commonwealth, Parliamentary Joint Committee on Law Enforcement; In Western Australia, the Joint Standing Committee on the Corruption and Crime Commission; In Queensland, the Parliamentary Crime and Misconduct Committee.

acknowledges the role of the Ombudsman and of Parliamentary committees and recommends strengthening their roles in respect of the administration of the programs. It is not suggested that the Ombudsman or a parliamentary committee should have the authority to direct the operation of the witness protection program; that should always remain the responsibility of the relevant Commissioner.

Now to consider the issue of more detailed reporting on the operation of witness protection programs. As noted above,<sup>815</sup> legislation in Australia at the Commonwealth<sup>816</sup> level and in Western Australia<sup>817</sup> and South Australia<sup>818</sup> and Queensland<sup>819</sup> requires annual reports to be prepared. In Canada, the RCMP, as the protection provider, is required to furnish an annual report<sup>820</sup> to the Minister on the operation of the programs and the Department of Justice is required to report on the operation of the American witness protection program. The legislation in New South Wales, Victoria, Northern Territory and Tasmania does not require the protection providers or the Minister to provide any annual reporting. The Australian Capital Territory annual report is contained in the NWPP report. Roberts-Smith,<sup>821</sup> JSCCCC<sup>822</sup> and OPI<sup>823</sup> also discussed reporting on the operation of the relevant programs in their inquiries. The PJC,<sup>824</sup> referring to the outcomes of its own review said, 'the public will be assured that they can have confidence in the general efficiency and effectiveness of the Program.'

The main problem with this proposition is that the review relied only on the statements of a number of public officials who attended the hearing and

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<sup>815</sup> See Chapter 5.3, Governance and accountability, 145-146.

<sup>816</sup> *Witness Protection Act 1994* (C'th) s 30.

<sup>817</sup> *Witness Protection (Western Australia) Act 1996* s 37.

<sup>818</sup> *Witness Protection Act 1996* (SA) s 28.

<sup>819</sup> *Crime and Misconduct Act 2001* ss 260, 292(f).

<sup>820</sup> *Witness Protection Program Act 1996* (CA) ss 16(1).

<sup>821</sup> Roberts-Smith RFD QC, above n 9.

<sup>822</sup> Joint Standing Committee on the Corruption and Crime Commission, above n 408.

<sup>823</sup> Office of Police Integrity Victoria, above n 9.

<sup>824</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8.

submissions received prior. No data was collected and analysed to make the assessment. The annual reports that are produced are deficient or scant in content. A more comprehensive data set<sup>825</sup> can be provided without jeopardising the participant or the program. This has been demonstrated in Western Australia and Queensland and more comprehensive reporting, proposed as part of the model described in this thesis, can be achieved without adversely impacting on the operation of witness protection programs.

### **Delays in dealing with matters involving protected witnesses**

The time a participant spends in a witness protection program can be stressful particularly if those periods are protracted and the participant is not able to resume some semblance of normality in their new location. To alleviate this and to minimise the time a participant is included in a program, the PJC considered<sup>826</sup> the issue of fast tracking cases involving protected witnesses. It said that procedures should be established whereby the hearing of cases in which protected witnesses are to testify can be expedited. This recommendation has not been progressed in any way and the issue of legal proceedings involving participants not receiving listing priority<sup>827</sup> was referred to again by the PJC in its 2000 report.<sup>828</sup> It was considered to be worthy of examination by the appropriate authorities. No other reports or reviews in Australia have seen this issue as significant enough to warrant mention or further comment, but the PJC referred to the desirability of cases involving protected witnesses receiving listing priority.<sup>829</sup>

While a study on the viability of such a regime is required, this thesis has considered the issue. The model and uniform legislation proposed herein set

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<sup>825</sup> See Annexure 13.

<sup>826</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 90-92.

<sup>827</sup> Australian Federal Police, 'Witness Protection Act 1994: Report on the Operation of the Act to 30 June 1999' (1999), 3.

<sup>828</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8, 7.

<sup>829</sup> Ibid 7.

out a mechanism for fast tracking to occur at the Tier 1 level and for considering expediting cases at the Tier 2 level.

## **6.4 Cooperation between police forces in Australia**

High levels of cooperation and coordination between Australian police forces are required in delivering witness protection arrangements. It is argued that cultural issues will likely impede communication between police forces performing witness protection roles, particularly in relocations. Police will conduct their operations without involving the police force of the host state or territory wherever possible. This will in time lead to compromise of protection arrangements and possibly to the death or serious injury of the participant in cases where the participant is identified by undesirable elements and police response is not timely.

Cross-jurisdictional coordination is necessary in respect of the relocation of witnesses between jurisdictions where one state police force identifies a need to relocate a witness to another state. With some exceptions, police in one state have no jurisdiction in another state and may choose to rely on the assistance and support of the police force in that state. While this level of cooperation occurs in joint investigations involving more than one police force, usually through joint task force operations, it seems to occur infrequently in witness protection operations. A corollary is the lack of control over the participant where state or territory police relocate the participant outside of the home jurisdiction. Only the AFP has jurisdiction and representation in all Australian states and territories and is able to operate freely without such jurisdictional barriers.<sup>830</sup>

The PJC noted<sup>831</sup> that police forces performing witness protection programs had made significant progress in the last few years. It went on to say that despite this, problems persisted with regard to relocations interstate, with the provision of documents to support identity change and the reluctance of

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<sup>830</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1.

<sup>831</sup> Ibid 73.

some police forces to develop cooperative arrangements. Roberts-Smith noted<sup>832</sup> the generally well-coordinated arrangements in place for witness protection in Australia even before the legislated arrangements after 1994. He acknowledged the existence of complementary arrangements and the national witness protection arrangement in Australia. Examples<sup>833</sup> of circumstances where arrangements between police forces enabled assistance were provided, but it was noted that as a general rule,<sup>834</sup> witness protection agencies relocate participants to other states without advising their counterparts.

In contrast, the 2005 OPI review in Victoria considered witness protection legislation in Queensland, Western Australia and Canada, but neglected the *Witness Protection Act 1994* (C'th) and the operation of the NWPP in Australia. The OPI report contained a number of comments and suggestions about the need for a national witness protection program in Australia. Had it considered the NWPP, the issues raised could have been conceptualised against the NWPP, but they were not. Surprisingly, another Victorian Police Report<sup>835</sup> in 2008 also reviewed programs in a number of countries overseas. It contained recommendations about the need for a national program in Australia, but, as with the OPI review, it did not assess the NWPP and the scope of measures already available in Australia.

While the NWPLC was not adopted, witness protection providers have embarked on an information-sharing program with the establishment of an annual Australasian Heads of Witness Protection Forum.<sup>836</sup> Annual Reports by protection providers in Australia also indicate the development of training programs for police officers and other projects of common interest. The role of the Australia New Zealand Police Advisory Agency (ANZPAA)

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<sup>832</sup> Roberts-Smith RFD QC, above n 9, 164-165.

<sup>833</sup> Ibid 35 [187], 41 [215], 67 [348].

<sup>834</sup> Ibid 165 [811].

<sup>835</sup> A. J. Glenane, 'Research Paper - Witness Protection' (Victoria Police, 2008).

<sup>836</sup> Western Australian Police, 'State Witness Protection Program Annual Report 2008 -2009' (2009).

through the Witness Protection Forum will deliver common standards of training and practice and procedure across witness protection programs. The absence of a mechanism to coordinate cross-jurisdictional relocations in Australia and overseas, leaves that aspect of witness protection vulnerable to compromise. It is argued that a disjointed approach to witness protection could have a negative impact on the effectiveness of witness protection and on the public's confidence in witness protection arrangements.

## **6.5 Elimination of duplication**

There are currently nine witness protection programs operating in Australia although the NWPP exclusively provides witness protection services for the Australian Capital Territory. With nine witness protection programs operating in Australia a range of opportunities for duplication and for potential conflicts between police operations are likely. This may have the effect of compromising the safety and security of the participant. The integrity of the programs themselves is also at risk particularly if a compromise occurs.

The legislation at two levels of government relies on complementary arrangements and each protection provider conducts its operations under the same legislative umbrella. This means that operations will be conducted using broadly the same methodologies, the same approved authorities approached and the same range of issues and constraints would apply. This can only lead to duplication of effort.

Relocating participants in foreign witness protection programs to Australia does not create any duplication and the NWPP is the only program authorised to undertake this work. The same cannot be said for relocating an Australian witness protection participant overseas. There is no impediment to state and territory police relocating participants in their programs overseas, with the agreement of the host country. This anomaly should be addressed through legislative amendments and the uniform witness protection act recommended in this thesis deals with the issues.

There are clear attempts to harmonise witness protection arrangements across Europe and a European Liaison network, coordinated by Europol, was established in 2000.<sup>837</sup> The arrangements suggested in this thesis would ensure significant harmonisation of witness protection in Australia as well.

## **6.6 Confidentiality versus other secrecy controls**

There is a compelling need to protect the identity and location of participants in a witness protection program, otherwise the program is not delivering one of its primary goals. The integrity of the program itself requires some matters to remain confidential, but the level of secrecy currently mandated by the Act may be too severe and might adversely impact on the good governance and accountability of the programs.

The PJC said<sup>838</sup> that the law should be clarified regarding the suppression of details identifying a protected witness. Where a participant has been provided with a new identity, that new identity must be protected including when the participant is giving evidence in court. Three issues might arise. Firstly, measures to ensure the participant's new identity and location are not revealed may be considered to impinge on the rights of the accused to a fair trial.<sup>839</sup> Secondly, some might say that the concept of witness protection offends the principles of open justice.<sup>840</sup> Finally, there may be suggestions that the credibility of the witness is affected because of their inclusion in a witness protection program.<sup>841</sup>

On the issue of informer privilege, that is, protecting the identity of informer, Mares<sup>842</sup> argues that precedent concerning the non-disclosure of informers

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<sup>837</sup> United Nations Office on Drugs and Crime, above n 12, 95-96; Council of Europe, above n 286, 25; Institute for International Research on Criminal Policy, above n 286, 13, 65.

<sup>838</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 91-92 [5.58-][5.59].

<sup>839</sup> See Chapter 8.1 Issues in the Court, 200-205.

<sup>840</sup> Ibid 204, see comments of DBR4.

<sup>841</sup> Ibid 204.

<sup>842</sup> Mares, Henry, 'Balancing Public Interest and a Fair Trial in Police Informer Privilege: A Critical Australian Perspective' (2002) 6 *International Journal of Evidence and Proof* 94.

names dates to 1794 and *The Trial of Thomas Hardy for High Treason, before the Court holden under a Special Commission of Over and Terminer, at the Session House in the Old Bailey: 35 George III. AD 1794, 24 St Tr 199*. The precedent has evolved over the intervening years so that in the 19<sup>th</sup> century the rule seems to have allowed disclosure of the informers' name 'when certain conditions are met'.<sup>843</sup> The rule was clearly stated by Pollock CB<sup>844</sup> in 1846 when he said that 'in a public prosecution, a witness cannot be asked such questions as will disclose the informer, if he be a third person' and 'the principle of the rule applies [also] to the case where a witness is asked if he himself is the informer'.<sup>845</sup> An exception to this rule emerged in 1890<sup>846</sup> when Lord Esher MR said the rule could be departed from when the judge is of the opinion that 'the disclosure of the name of the informant is necessary or right to shew the prisoners innocence.'<sup>847</sup>

Informer privilege is now seen as analogous with 'public interest immunity'<sup>848</sup> and the Australian *Evidence Act 1995*, at section 130, sets out, amongst other things, a schedule for the continuation of the informer rule. The effects of the exclusion of evidence on matters of state were tested in *Arthur Stanley Smith* (1996) 86 Crim R 308 (NSW CCA) where the Court reviewed an earlier Magistrates decision to order the disclosure of the identities of two informers. The Court held that the identities of police informers should be protected.<sup>849</sup> Mares argues that 'this outcome is consistent with the general tendency for judges in this area to weigh crime control interests over the fair trial principle.'<sup>850</sup> He goes further to note that consideration of whether non-disclosure would impair the accused's right to

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<sup>843</sup> Ibid 98.

<sup>844</sup> *Attorney-General v Briant* (1846) 15 M & W 169, 153 ER 808.

<sup>845</sup> Ibid, 814-815.

<sup>846</sup> *Marks v Beyfus* (1890) 25 QBD 494.

<sup>847</sup> Ibid 500.

<sup>848</sup> *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, 218.

<sup>849</sup> *Arthur Stanley Smith* (1996) 86 Crim R 308 (NSW CCA) 312.

<sup>850</sup> Mares above n 842, 112.

a fair trial are 'theoretically factors to be weighed in the judge's discretion'.<sup>851</sup>

Despite these concerns, methods of protecting the witness's identity and location are required. They might include closed courts or hearing protected witness evidence in private or in chambers depending on the nature of the evidence to be provided. A suppression order may be sought to prevent likenesses and images, photographs, sketches and descriptions being produced and publicised. It is argued that minimum requirements should be set out in the uniform legislation according to the tier within which the participant is situated.

Secrecy is a different matter and secrecy provisions are set out in the Acts. There is an argument that the legislation has gone too far by banning the release of any information gathered by a police officer as part of his/her duties in witness protection. Secrecy should apply to issues such as operating methodologies and the location and identity of the participant so that determined observers are not able to pre-empt actions by police and from there locate the participant.

Increasingly, governments are being required to achieve higher standards of governance and accountability. In a recent study,<sup>852</sup> the World Bank found there was a strong relationship between good governance and good government performance. The integrity of the program should not unnecessarily prevent legitimate enquiry about the operation of the programs. Reporting on the operation of the program, so as to inform a proper analysis of its effectiveness and efficiency, should include sufficient details to enable that analysis. Detailed reporting can be achieved without disclosing critical issues to do with the administration of the program. The

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<sup>851</sup> Ibid 122.

<sup>852</sup> <http://www.deloitte.com/publicgovernance> Public Governance and Accountability; <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPUBLICSECTORANDGOVERNANCE/0..contentMDK:23379111~pagePK:148956~piPK:216618~theSitePK:286305.00.html> The World Bank report is not available on the website, the link suggests only internal staff of the World Bank have access to it.

JSCCC found<sup>853</sup> that annual reporting was insufficient and that it should include performance indicators identifying the type of offences and type of charges and convictions/acquittals resulting. The OPI recommended<sup>854</sup> that reporting to parliament on the operation of the programs be required in Victoria and that such reporting include the number of criminal cases where participants have given evidence and other general information likely to be of interest to the public was also made.

It is worth noting that other areas of policing operations such as telecommunications interception, controlled operations and surveillance devices attract high levels of secrecy and confidentiality and also require annual reporting. The extent of that reporting is more complete than is the case with the operation of witness protection programs. While secrecy in these activities is also critical and is a necessary accountability measure, reporting is achieved without jeopardising investigations that rely on these measures for evidence gathering. Broader reporting requirements for witness protection operations would allow more robust analysis of the effectiveness and efficiency of those programs and could be achieved without compromising the integrity of the programs.

This thesis argues that too much secrecy can lead to suspicion about the operation of government programs. There is a strong requirement to ensure the identity and location of the participant and the operating methodologies and practices and procedures of the programs are protected. There is less of a requirement to deny all access to information about the administration of the program.

## **6.7 Policy Implications and recommendations**

The implications for government regarding ineffective or dysfunctional witness protection arrangements are numerous. They include adverse public perception of the ability of government and its institutions to provide

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<sup>853</sup> Joint Standing Committee on the Corruption and Crime Commission, above n 408, 47-50.

<sup>854</sup> Office of Police Integrity Victoria, above n 9, 44-45.

adequately for the protection of the community from the harm created by serious and organised crime.

The alternative model proposed in this thesis, entreats governments to adopt uniform witness protection legislation with multi-jurisdictional application across Australia. Such a measure would enable the structuring of consistent and consolidated witness protection programs and arrangements. It would alleviate instances of duplication, creating opportunities for security compromise. A tiered national structure could involve witnesses who require re-identification and relocation entering the NWPP – Tier 1 cases – and those requiring other protection measures remaining with the state or territory program – Tier 2 and Tier 3 cases.

A program under this model could provide scope for secondment of state and territory police to work in the NWPP, if their police force considers that appropriate. It would require full cost recovery for state and territory witnesses who become participants of the NWPP.

The benefits of adopting this model nationally include removing duplication, enabling more secure relocation arrangements and preserving the NWPP for serious and organised crime matters. The need for court supervision of birth certificates would no longer be required, removing another possible point where compromise could occur. Issuing Commonwealth identity documents would be streamlined and the management of other name change issues would rest with the NWPP, thereby reducing the demand for the organisations providing identity documents to deal with a multitude of police forces.

Enhanced reporting through the adoption of a more comprehensive set of metrics would achieve two goals. Firstly, it would enable a more robust assessment of the impact of witness protection on serious and organised crime. Secondly, it would provide a higher degree of accountability for the witness protection programs and more comfort to government and the public that witness protection was achieving its objectives.

## 6.8 Conclusion

Witness protection occupies an important place in the criminal justice system and competent programs enhance the contribution that witness protection can make to investigations and prosecutions of serious and organised crime matters. Increased public confidence in government and government institutions is the logical consequence of effective and efficient programs.

Witness protection programs are active in most Australian jurisdictions. They operate with high levels of secrecy thus increasing the strength of the programs on the one hand, but exposing them to potential compromise and to government and public criticism on the other. Arrangements to include witnesses in programs differ between some jurisdictions. This means entry to the programs across the country is inconsistent and open to 'cherry picking' by an astute witness.

All state and territory legislation requires Supreme Court supervision of authorisations for entries to be made to the register of births so that a new birth certificate can be produced, except in Queensland. This seems incongruous when considering the responsibilities of the commissioners in every other aspect of the programs.

Arrangements with approved authorities are consistent across the jurisdictions. Measures to protect the identity of the participant in court are also consistent, but the methods of achieving that protection are not explained in the legislation and are left to the discretion of the Magistrate or Judge hearing an application for suppression from the Prosecution. It would be useful for the Acts to provide a minimum set of rules that could be enhanced as the individual circumstances require, again, on application by the Prosecution.

Cooperation and national coordination of witness protection is cumbersome and disjointed. There is no requirement for agencies to meet and negotiate relocations or other matters to ensure conflicts between the programs do

not occur. This creates opportunities for compromise of protection and assistance arrangements and also for duplication of effort.

Issues of confidentiality and secrecy create problems. While there is no doubt that the participant's location and identity should be protected, and that operating methodologies employed by the protection providers should not be revealed, other data could be reported. A reasonable level of disclosure, that would not compromise security, could be achieved and through data analysis an assessment of the effectiveness and efficiency of the programs could also be achieved.

External oversight of the programs by the Ombudsman, the Integrity Commissioner and parliamentary committees differs across jurisdictions. There is no common or consistent method of parliamentary oversight of the programs. This is less than optimal and should be reviewed.

No research has been conducted in Australia, or anywhere else so far as this thesis has been able to find, of expediting matters involving protected witnesses, despite the urgings of both PJs. Likewise, nothing has been done to resolve the friction between the Family Court of Australia and witness protection despite the PJC in 2000 recommending the matter be reviewed. Resolution of those conflicts and scholarly research into the issues involved with them would possibly ensure a more complete and comprehensive national approach to witness protection in Australia in the future.

## Chapter 7. The Research Methodologies

This chapter describes the design and methodologies adopted in the research to achieve the objectives and aims of the study,<sup>855</sup> that is, to define witness protection, to examine the establishment and effectiveness of the existing programs and to identify whether witness protection could be done better.

The chapter explains how the research methods link to the questions and the use of questionnaires in that process. It describes the cohorts selected for the online survey and the reasons for their selection. The chapter discusses the instruments used to conduct the empirical research providing justification for their use. It notes alternative methods of data collection not adopted in this research. It discusses the procedures used to analyse the data collected through the empirical research.

The chapter discusses the ethical considerations for the research and the limitations that were experienced. The implications created by the lack of data collected in the empirical research phase are dealt with more fully in section 5 of this chapter, *Secrecy and its impact on the research*.

### 7.1 Methodology and design

The research for this thesis adopted a mixed methods approach incorporating both quantitative and qualitative methods of data collection. This thesis defines mixed-method as including quantitative methods designed to collect numbers and qualitative methods designed to collect words. Neither method is inherently linked to any particular enquiry paradigm.<sup>856</sup> The research used online questionnaires to collect both qualitative and quantitative data. The questionnaires and the questions were

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<sup>855</sup> See Chapter 1 Introduction, 10-11.

<sup>856</sup> Jennifer C. Greene, Valerie J. Caracelli and Wendy F. Graham, 'Toward a Conceptual Framework for Mixed-Method Evaluation Designs' (1989) 11(3) *Education and Evaluation and Policy Analysis* 255, 256.

framed around the themes of this thesis and were intended to collect information about specific aspects of the themes.

The mixed methods approach supports complementarity between quantitative and qualitative research methods<sup>857</sup> recognising that one method may provide further insight into the results obtained using another method. Triangulation, in the context of this thesis, refers to the 'designed use of multiple methods',<sup>858</sup> which works to verify the research findings<sup>859</sup> as using individual methods of enquiry 'inevitably yield biased and limited results.'<sup>860</sup> Triangulation, therefore, contributes positively to research and demonstrates the holistic nature of the process.<sup>861</sup> Mixed methods and triangulation involves an 'explicit systematic approach to finding things out using methods most appropriate to the question being asked.'<sup>862</sup>

The research methods link directly to the research problem<sup>863</sup> and provide the most likely methods of gathering existing information. To address the research problem through the empirical research and the documentary examination, some parameters need to be determined. The research had to determine who should be asked questions and what questions they should be asked. This provided the basis for how the thesis would answer the questions flowing from the research problem, specifically those arising from the themes of the study. Additionally, the research needed to gain an understanding of the implications of witness protection to the criminal justice system and issues arising from protected witnesses giving evidence in courts. The research focussed on the structures, practices and procedures

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<sup>857</sup> S. R. Hesse-Biber, *Mixed Methods Research: Merging Theory with Practice* (Guilford, 2010) 3-4.

<sup>858</sup> Greene, Caracelli and Graham, above n 856, 256.

<sup>859</sup> Hesse-Biber, above n 857.

<sup>860</sup> Greene, Caracelli and Graham, above n 856.

<sup>861</sup> R Sohler, 'Multiple triangulation and contemporary nursing research' (1988) 10(732) *Western Journal of Nursing Research* 242.

<sup>862</sup> Beverley Hancock, Elizabeth Ockleford and Kate Windridge, 'An Introduction To Qualitative Research' (The NIHR Research Design Services for Yorkshire & the Humber, 2009) 6.

<sup>863</sup> See Chapter 1.2 Introduction, The research problem 9.

adopted in the existing programs to identify what works well. This part of the research was further developed by the request for information that sought data on the existing programs so as to conduct an assessment of the effectiveness and efficiency of the programs. The research sought to identify strengths and weaknesses in the current arrangements and to identify opportunities for improvements that might lead to advantageous modifications to the way witness protection programs are delivered in Australia.

### **Collection methods used**

Three discrete collection activities were used to gather data: documentary examination; online surveys; and a request for information furnished to the Australian Police Commissioners.

A number of alternative methods were considered for the empirical research phase. Where it was decided to adopt online surveys other methods including focus groups and semi structured interviews were considered. Ultimately, online surveys were selected as the preferred option for a number of reasons. Online research provides the opportunity to carry out research within politically sensitive areas<sup>864</sup> because the researcher and respondent are protected by anonymity and distance. In the case of this thesis, witness protection is politically sensitive because the integrity of the program is paramount.<sup>865</sup> Mann and Stewart<sup>866</sup> suggest that of the potential online methods, e-mail is the most adopted method for accessing potential research respondents as it permits direct access to individuals without the use of intermediaries. In this thesis, however, intermediaries, or gatekeepers,<sup>867</sup> were used to gain access to potential respondents. Gatekeepers, in the form of the professional bodies, were approached

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<sup>864</sup> Pranee Liamputtong, *Qualitative Research Methods* (Oxford University Press, Fourth ed, 2013) 356.

<sup>865</sup> Stewart, above n 8, 540.

<sup>866</sup> C. Mann and F. Stewart, *Internet Communication and Qualitative Research: A Handbook for Researching Online* (Sage, 2000) 1.

<sup>867</sup> Liamputtong, above n 864, 20.

because they could distribute information; in this case the introductory message and the Uniform Resource Locator (URL) link to the online survey, to potential respondents. Gatekeepers can also take it upon themselves to deny access<sup>868</sup> and in this thesis, as noted earlier, Police Commissioners denied access to potential respondents in their organisations.

Survey or questionnaire, offers a range of advantages by enabling the selection of appropriate categories.<sup>869</sup> In this thesis, they were used to select those within a broader cohort, who have engaged in some way with participants in a witness protection program. Selection was attempted through multiple stages. Firstly targeting a broader cohort for example legal practitioners, through their peak bodies in each jurisdiction and the Commonwealth, then secondly, identifying those within the cohort who could provide an information rich, in-depth understanding<sup>870</sup> of witness protection issues. The research sought to identify that cluster of individuals within the broader cohort from which samples could be drawn.<sup>871</sup> Purposive sampling from a cluster within each cohort<sup>872</sup> was designed to enable the collection of crucial information. The research sought information from a cluster within the cohort within each state within the overall Australian population, who had been exposed to witness protection cases. This approach was used to gather information replete with individuals' experiences of witness protection cases.

The alternatives, focus groups and interviews were not used because while the cohorts to be approached were decided, the members of each cohort were not. In fact the members of the cohort who had specific knowledge of witness protection matters, apart from a few exceptions identified in some

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<sup>868</sup> R. S. Barbour, *Introducing Qualitative Research: A Student's guide to the craft of doing qualitative research* (Sage Publications, 2008) 76.

<sup>869</sup> W. Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (Pearson, Seventh ed, 2006) 241.

<sup>870</sup> Liamputtong, above n 864, 14.

<sup>871</sup> Neuman, above n 869, 257.

<sup>872</sup> Liamputtong, above n 864, 14.

Supreme Court records, were not ascertainable and therefore could not be approached directly.

Restriction also existed in relation to making direct approaches to members of specific cohorts, notably the police. The Police Commissioners had refused to assist the thesis research. To attempt to contact any of the 56,395 sworn police officers would have been unethical. Finding police officers prepared to take part in focus groups or interviews, who had some previous involvement with protected witnesses, from random telephone calls to police stations, would also have presented logistical problems. The same limitation would have been experienced trying to contact Judges and Magistrates, Barristers and Solicitors who number 67,583.

### **The cohorts for the empirical research**

Each cohort, or at least members from each cohort, have had different contact and experiences with participants in witness protection programs and therefore have a unique perspective to bring to the research. That said, because so little information is available on the operation of these programs, it was not possible to identify all the individuals within the cohorts who had actual dealings with participants. For that reason, the research took a broad approach, sending requests to as many people as possible within the three cohorts. The research was not intended to sample the wider community so the online survey link was sent only to the five cohorts as a defined group. The participation rate from each cohort could not be predicted and those within each cohort who had dealings with participants in witness protection programs could not be pre-determined. The online survey was therefore used as an attrition model to filter the potential cohort population down to an actual cohort population for the purposes of the data collection.

Police Commissioners were approached for two reasons, firstly to seek approval for police officers in their agencies to participate in the online survey, and secondly, to gather information that would enable an assessment of the effectiveness and efficiency of each of the witness protection programs. The Police Commissioners declined assisting the study with the

exception of the AFP Commissioner who agreed to members of the AFP, who had worked or were working in the witness protection function, volunteering for the survey. In the case of the states and territories, the Police Commissioners made the decision to ban participation in the survey citing the secrecy provisions of the various Acts. No witness protection operations have been undertaken by the Northern Territory and Tasmania police forces so no police officers have undertaken duties in witness protection in those locations. Nonetheless, their participation was sought for completeness.

## **Sample**

The empirical research focussed on five specific cohorts within the legal profession, Judges, Magistrates, Barristers, Solicitors and police officers. The 2012 Annual Reports for all Australian Courts, Bar Associations, Law Societies and police forces listed the potential survey candidate populations in Australia in each cohort. The Australian Bureau of Statistics website of the 2012 Census showed the current overall Australian population and the distribution of that population within each state and territory. These figures collectively identified the eligible number of potential survey candidates per head of population in Australia.

Judges and Magistrates (679 in Australia across all courts or .001% of the Australian population), Barristers and Solicitors (66,904 issued with practicing certificates in 2012 in Australia or .288% of the Australian population) and police commissioners (and police officers specifically in respect of the online survey) (56,395 police officers in eight jurisdictions in Australia or .242% of the Australian population) were considered the most likely to be able to contribute.<sup>873</sup> While these figures are raw there are significant difficulties in trying to identify or reduce the numbers to those who have actually been involved in cases where protected witnesses have given evidence. The variables are many and the information scant.

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<sup>873</sup> See Annexure 6A and 6B for the assumptions relied on for the calculations.

The potential population does not reflect the actual number in each cohort who had dealt with protected witnesses. That number is not ascertainable. The survey was developed as a tool to distil the actual number of individuals within each cohort who had the relevant experience. It then went on to pose questions to those with relevant experience. Nonetheless, a search of Supreme Court records in the Australia Legal Information Institute database, using 'witness protection' as the search term, identified 101 cases from 1997 and 2014 where witness protection was referred to. Some revealed actual references to persons included in witness protection programs and others referred more broadly to witness protection arrangements and considerations. Of those 101 cases, 48 specifically referred to witnesses in witness protection programs. In these cases, 53 Judges presided, 130 Barristers appeared and 115 Solicitors instructed Counsel.

It is likely that a significant number of those trials would have been preceded by committal hearings in lower courts, in some cases more than one committal hearing would have taken place. While some would have included the same legal teams, others could have seen different Solicitors and Barristers coming and going from both sides. Therefore, using the same 48 cases as previously referred to, assuming only one committal for each trial, there are 48 Magistrates to add to the potential respondent pool for that cohort. Assuming that some defendants changed legal representation during committal and or trial it is reasonable to add to the numbers of Barristers and Solicitors appearing. An arbitrary figure of one tenth could be used thereby adding 13 Barristers and 11 Solicitors to the earlier figures. Therefore, the totals are now 101 Judges and Magistrates, 143 Barristers and 128 Solicitors.

Assuming that a police protection team consists of four officers, 404 police may have been involved, however, given that some of the police would likely have been the same for presenting the witness to the committal as well as the trial a reduction on those numbers is appropriate. An arbitrary figure may be [say] 200.

On the basis that in the majority of cases involving protected witnesses it is unlikely that the 101 cases mentioned earlier is the total number of such cases in the various Supreme Courts in Australia. It is argued that 101 is a relatively small number when considering that 1,110 participants were possibly included in witness protection programs since 1995<sup>874</sup> and even that figure cannot be stated with any confidence because of the limited record keeping and reporting by Australian protection providers. If half of those participants actually gave evidence in the period 1997 to 2014, it is possible to assume 555 committal proceedings and 555 trials involving 1,110 Judges and Magistrates, 286 Barristers, 256 Solicitors and 400 police may have been involved. There remains a high level of scepticism about whether these are all the cases heard in Supreme Courts around Australia that have involved evidence being given by protected witnesses.

## **Recruitment**

In order to recruit members into the three cohorts and elicit assistance from the police commissioners for the online survey and the request for information, contact was made by telephone, email and letter.

Emails were sent to Chief Justices, Chief Magistrates and the Director of Public Prosecutions in each jurisdiction, Law Societies, Law Councils, Bar Associations and Police Commissioners in all jurisdictions explaining the research. A link to the online survey was also attached. Responding to the online survey was voluntary and provision was left for respondents to provide their name and contact details should they agree to be available for follow up interviews.

Only eight legal practitioners (three Prosecutors and five Defence barristers) partially answered the survey, which may have been for a number of reasons including perceptions of privilege and the availability of time or concerns about breaching provisions of the Act. Therefore, little information was gained from legal practitioners at the Criminal Bar or with the

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<sup>874</sup> See Chapter 1 Introduction, 8, for discussion about the overall numbers of witnesses in witness protection in Australia and the limited reliance one can have on that number.

Commonwealth Director of Public Prosecutions or the state and territory counterparts who have had contact with participants in witness protection programs. The valuable insights anticipated from individuals in this cohort in the empirical research therefore did not fully materialise. Included in the thesis at Annexure 7 is the survey questions and at Annexure 9 the request for information.

## **Instrument**

As previously established, the most widely used data collection technique in many fields of research is the survey<sup>875</sup> and in this study potential candidates were asked to complete surveys online, using an independent online survey site, Australian Survey Research (ASR).

As previously noted, the online survey was designed to gauge the opinions of as many representatives of the selected cohorts as possible. The survey questions followed the themes arising from the PJC enquiry. Questions to each cohort were framed in such a way as to elicit their experiences, gained through first-hand knowledge of working with participants (in the case of police and prosecutors in particular), or through managing a prosecution or defence in a court of law (defence barristers, magistrates, and judges). Judges of the Family Court of Australia were also included in the cohort because there have been instances where the Family Court has made contact orders in relation to children included in a witness protection program.<sup>876</sup>

Potential respondents were prompted to click the link, enter the survey site and complete the survey. As no identifying information was required, respondents were able to remain anonymous. The survey site is security protected, only allowing access to the response data by the administrator within ASR and the researcher. While the online survey was voluntary and anonymous, provision was made for those respondents who agreed to participate in an interview to provide their names and contact details. Eight

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<sup>875</sup> Neuman, above n 869, 308.

<sup>876</sup> Beatrice Gray, 'Child in Witness Protection Program - Can the Family Court Make Contact Orders' (1999) 5 *Current Family Law* 275, 455.

police officers provided contact details, but no follow up interviews were conducted.

Quantitative data were gathered through the online survey questions, which sought to capture information by recording the number of respondents in each cohort who agreed or disagreed with each question. This enabled rudimentary statistical analysis of the results not only identifying how many respondents provided a yes or no answer to the questions, but also the cohort the respondent was from. The analysis also provided a clear view of the respondents presented with a question, who chose not to answer, and the respondents not presented with particular questions.

Qualitative data were to be gathered through the comments, descriptions and observations provided by the respondents to the online survey questions. These would allow conclusions to be drawn about the nature and utility of the current Australian witness protection arrangements and possible alternative arrangements proposed by this thesis.<sup>877</sup> The data gathered would then be triangulated to verify the perspectives and identify the features that give witness protection its 'form and meaning.'<sup>878</sup> Analysis of the data gathered in the documentary examination, about the thesis themes, was applied to either validate the current practice or to support alternative propositions.

The survey was in three parts. Part One established the bona fides of the respondents and established that they had, at some time, had contact with participants in a witness protection program. Part Two remained focussed on the primary themes of the research so that a level of consistency carried across the cohorts. Part Three allowed space for respondents to leave contact details.

The questions contained in Part Two of the online survey related specifically to the themes outlined in this thesis. The questions to each cohort were

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<sup>877</sup> See Chapter 9; and Annexures 11, 12 and 13.

<sup>878</sup> Virginia Braun and Victoria Clarke, 'Using thematic analysis in psychology' (2006) 3(2) *Qualitative Research in Psychology* 77, 84.

tailored to elicit responses that reflected the individual's unique experiences. None of the questions in any way went to the identity or location of the participant or to issues that could compromise the witness protection program in any jurisdiction.

### **The research questions**

Questions posed to the cohorts were developed in such a way as to elicit responses drawing on their unique roles of each cohort in the criminal justice system and likely contact with protected witnesses. Some questions were posed only to one cohort and some to all five where a broader appreciation of the implications and impacts of witness protection were sought.

### **Questions to Judges or Magistrates**

The questions posed to Judges and Magistrates in the survey sought to identify whether the matter in which they presided involved a Commonwealth or a state or territory offence and whether the fact that a participant was giving evidence impacted on any court process or appeared to influence the jury in the trial in any way. The questions also sought data on whether the Judge or Magistrate thought the Defence was reasonably able to test the credibility of the participant in cross examination or whether there were other judicial issues arising because of the presence of a protected witness in court.

### **Questions to Defence Barristers**

The right to a fair trial is a cornerstone of the legal system in Australia. In seeking responses from Defence Barristers, the research was looking to identify whether the Defence strategy was adversely affected by the circumstances surrounding a participant giving evidence for the Crown and if the Defence believed their client had received a fair trial. Questions asked in the survey were whether: the Defence was reasonably able to test the credibility of the participant in cross-examination; the witness' credibility is

in any way compromised by virtue of their inclusion in a witness protection program; and the witnesses' credibility can be fully explored during cross examination.

The Defence was also asked whether they thought: the jury was adversely affected by the presence of a participant in court; the participant's presence could influence court proceedings; the doctrine of the right to a fair trial is influenced in any way.

### **Questions to Prosecutors**

Prosecutors, in most cases, would either be working for the Commonwealth DPP or the state or territory equivalents or be briefed from Chambers to prosecute the specific case on behalf of the DPP or police under an ex-officio indictment. The questions posed to Prosecutors were concerned with exploring whether: the participant's presence influenced the Prosecution's trial strategy; the Prosecutor believed the accused received a fair trial; and in the Prosecutor's opinion, the jury was in any way affected by the presence of the protected witness in court or other court processes were impacted.

Witness credibility is an essential element in a trial and therefore the thesis was interested in exploring whether any compromise to the credibility of the witness exists by virtue of their inclusion in a witness protection program. The survey also sought to identify whether the witnesses' credibility can be fully explored during cross-examination by the Defence, so questions on those issues were also posed to Prosecutors.

### **Questions to judicial officers, police officers and legal practitioners**

As the providers of witness protection services, questions to police officers were framed to gather information on the current arrangements for protection and assistance by state and territory police, the Crime and Misconduct Commission in Queensland, as well as the AFP. The questions in this part of the survey were open to the five cohorts because the survey was

not seeking to collect data on police practices and procedures in respect of the themes explored.

The issues canvassed in the survey centred on notions of national coordination of witness protection in Australia and on the effective cooperation and coordination in operating these programs. The questions focussed on a national approach and whether one national witness protection program would provide more effective arrangements for protected witnesses. Further questions explored a range of issues including: the utility of a National Witness Protection Liaison Committee (NWPLC); whether the current procedures for providing birth certificates are sufficient; and whether the permission of the court should be required each time a birth certificate in the witness' new name is required. Matters pertaining to the independent external oversight of witness protection programs in Australia were canvassed as well as those relating to fast tracking cases involving protected witnesses through court proceedings. Police were asked whether current MOUs carry sufficient weight to ensure the performance of rights and obligations of the respective parties and whether the MOU should include a requirement that the participant agrees to give evidence to the best of their ability.

The responsibility of the Family Court of Australia and its intersection with witness protection was also included in the survey. Questions were asked about whether the Court, acting in the 'best interests of the child', is well placed to consider the security implications in respect of access to the child where either the child or the non-custodial parent is included in a witness protection program.

### **Parameters of the research**

The study did not seek to collect data from participants in witness protection programs and therefore a decision was taken not to conduct surveys that would involve them in any way. Their exclusion from any form of the data collection was deliberate, noting their vulnerability.

Witnesses and participants in witness protection programs are particularly vulnerable because of the threats they face which resulted in their inclusion in a witness protection program. Vulnerable people may experience 'diminished autonomy due to physiological/psychological factors or status inequality.'<sup>879</sup> They may also be unable to make personal life decisions, maintain their independence or determine their own future.<sup>880</sup> Participants in witness protection programs are relocated and re-identified to protect them from harm. Their inclusion in a program is conditional on a range of confidentiality requirements, which has the effect of categorising the participant as vulnerable. They could be considered to be a 'hidden population', which has memberships that are not readily distinguished.<sup>881</sup>

The confidentiality and secrecy provisions of the Acts also means access to participants would be extremely difficult if not impossible. This could, however, be an avenue for future research into the implications of witness protection on the participants. Their separation from family and friends, the duration of their participation in a program driven by delays in court proceedings and the difficulties they face assimilating into society under a new identity, are factors that could also be considered.

## **7.2 Responses to the empirical research**

The online survey was left open for 12 months between June 2011 and June 2012. The first respondent to access the survey did so on 14 June 2011 and the last on 25 November 2011. The questions in the online survey are included in the thesis at Annexure 7.

The survey sought YES or NO answers to questions and invited the respondent to provide comments at the end of each section that dealt with a

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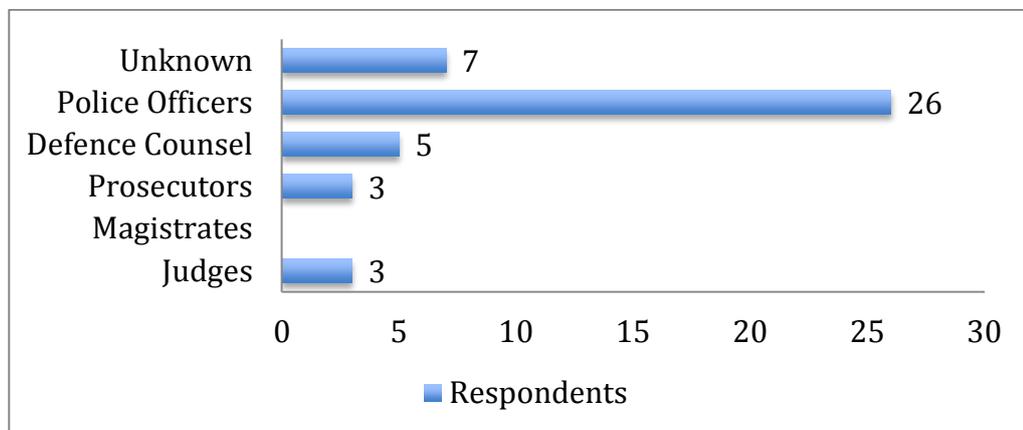
<sup>879</sup> M. C. Silva, 'Ethical Guidelines in the Conduct, Dissemination and Implementation of Nursing Research' (1995) *American Nurses Association* 15.

<sup>880</sup> L. W. Moore and M. Miller, 'Initiating research with doubly vulnerable populations' (1999) 30(5) *Journal of Advanced Nursing* 1034.

<sup>881</sup> W. W. Wiebel, 'Identifying and gaining access to hidden populations' in E. Y. Lambert (ed), *The Collection and Interpretation of Data from Hidden Populations* (National Institute on Drug Abuse, 1990).

substantive issue. In the survey data sheet the number 1 indicated a YES answer and the number 2 indicated a NO.

A total of 44 respondents including three Judges (7%), three Prosecutors (7%), five Defence Barristers (11%), 26 police officers (59%) and seven unknown persons (16%) partially answered the survey. The 26 who completed it make up 59% of those who partially answered it. Some statistics were available from the 18 respondents who partially answered the survey and those statistics are included in the results with some exceptions.



**Figure 1 - Respondents to the online survey**

Tables that describe the potential population in each cohort and the overall numbers of potential respondents are included in the thesis at Annexure 6A and 6B. The survey was only partially successful in distilling the actual number of respondents as evidenced by the small number of respondents who accessed it. Frequency tables for each question in the survey are included in the thesis at Annexure 8 for completeness.

### **Consent**

Preliminary questions sought to establish the consent of participants to complete the survey and for the information they provided to be used in the thesis. Respondents were advised they could withdraw from the survey at any time.

Thirty-seven respondents (84%) read the 'Information Sheet for Participants' and said any questions they asked had been answered to their satisfaction. Six respondents (14%) did not read the information sheet and one (2%) did not answer.

Thirty-nine respondents (89%) agreed to participate in the survey. Four (9%) did not agree, one (2%) did not answer and no further responses provided by these five were included in the analysis.

Thirty-eight of the 39 respondents (97%) agreed that research data they contributed by their answers could be published using a pseudonym. One respondent (3%) declined and therefore any further responses were excluded from the analysis. Of the remaining 38 respondents, 37 (97%) agreed to be quoted in the thesis using a pseudonym. One (3%) declined and no further responses provided by that respondent were included in the analysis.

The remaining 37 respondents were asked whether they would be prepared to take part in an interview – either face to face or over the telephone. Eighteen (49%) agreed to be interviewed and agreed that the interview could be audiotaped and transcribed. Nineteen (51%) declined. Of those who agreed, eight (44%) provided contact details for possible follow-up interviews.

### **Jurisdiction of respondents**

Questions about the jurisdiction in which the matter was heard attracted 35 responses. In 11 instances (31%) the matter was state based, two (6%) were Territory based and 22 (63%) were Commonwealth matters. The proportion of Commonwealth matters is not surprising when considering that the police who responded to the survey were AFP officers and therefore involved with witnesses in the NWPP.

## **Bona fides**

Establishing the experiences of survey respondents both in the judiciary and in law enforcement with participants in witness protection programs was an important step early in the survey.

Of the 11 legal practitioners who responded, one (9%) had presided in a matter involving a person included in a witness protection program; two (18%) had represented the accused at trials where a protected witness gave evidence for the Crown; and two (18%) had prosecuted a matter where a protected witness had given evidence for the Crown. One (9%) indicated they had been involved in a matter in another capacity, possibly as an instructing solicitor at another time in their career. A further respondent (9%) gave negative responses to both questions, which suggests they had neither prosecuted a matter involving a protected witness nor been involved in some other capacity. Four (36%) did not respond to this question.

In the case of the respondent who said no to both questions, a decision had to be made whether to include their responses in the analysis because the survey was targeted at individuals who had some involvement with protected witnesses. Two reasons influenced the decision to include the respondent's responses in the analysis. Firstly, their responses in this serial did not skew the results one way or the other and secondly, other respondents from the same cohort did not answer any further questions in the survey and it was considered useful to include the perspective of that cohort in the remaining analysis. Any contact this respondent had with protected witnesses could not be verified nor could it be positively discounted so the decision was made to use their responses in the analysis.

Police officers were asked whether they were currently serving in a witness protection function or whether they had previously worked in a witness protection function. Of the 23 police officers remaining in the survey, nine (39%) said they were currently serving in the witness protection function within the AFP and 14 (61%) said they had previously served in that function.

## 7.3 The Analysis

The analysis is grounded on an understanding of the benefits and problems of witness protection programs. Analysis of the data for this research was conducted in a range of ways. The documentary examination and the data informing the evaluation of the effectiveness of the programs was analysed using thematic and comparative techniques.<sup>882</sup> In this study, costs were used as one input and outcomes were used as another in evaluating the effectiveness of the programs. This led to some inferences about the financial investment in operating witness protection programs and the outcomes achieved by the programs. The quantitative and qualitative data collected during the empirical research was analysed using data consolidation and merging techniques.<sup>883</sup>

Thematic and comparative analysis was chosen in this study because it is accessible and theoretically flexible.<sup>884</sup> These techniques can be used across different research methods,<sup>885</sup> and can 'potentially provide a rich and detailed, yet complex, account of data.'<sup>886</sup> These techniques incorporate cognitive complexity and conceptualised a system of relationships.<sup>887</sup> Thematic and comparative analysis involves coding through a list of themes, in this case the primary themes of the study, so that the theme describes and organises the observations for interpretation.<sup>888</sup> Cognitive complexity appears to be the only prerequisite for using this analysis. It involves perceiving multiple causalities and multiple variables over time as well as the ability to conceptualise a system of relationships.<sup>889</sup> The variables

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<sup>882</sup> Richard E Boyatzis, *Transforming qualitative information: thematic analysis and code development* (Sage Publications, 1998).

<sup>883</sup> V. J. Caracelli and J. C. Greene, 'Data analysis strategies for mixed-method evaluation design' (1993) 15 *Educational Evaluation and Policy Analysis* 195-197.

<sup>884</sup> Braun and Clarke, above n 878, 77.

<sup>885</sup> Ibid 78.

<sup>886</sup> Ibid.

<sup>887</sup> Boyatzis, above n 882.

<sup>888</sup> Ibid.

<sup>889</sup> Ibid.

considered in this thesis include the driving force behind establishing witness protection programs, the ongoing conduct of those programs and, in Australia, the nature of federation and the independence of the states and territories guaranteed by the Constitution.

Data consolidation/merging techniques involve a joint review of both data sets, in this case the qualitative and quantitative data collected from the online survey, to either create new or consolidate existing data sets. The data were consolidated into numerical and narrative sets for further analysis.<sup>890</sup> This method enabled reconciliation of the two data sets by using each to confirm inferences with supporting evidence, as in triangulation.<sup>891</sup> The data collected from the online surveys was converted to a spread-sheet and the results are analysed and are discussed in Chapter 8.

A difference of opinion between cohorts, and also within cohorts, in the answers to some questions was anticipated. For example, state and territory police may have a different view on the establishment of a national witness protection program administered by the AFP, than the AFP itself. Likewise, where issues of fast tracking cases involving protected witnesses are concerned, differences between the responses of legal practitioners and of police would not be unexpected. The results of the empirical research are explored in Chapter 8.

## **7.4 The Request for Information**

The request for information sought data to support an analysis of the costs and benefits of witness protection in Australia. The purpose of this request was to enable a comparison between the costs of running witness protection programs in each of the jurisdictions, the relative success of prosecutions, and the types of crimes the participants were giving evidence and information about.

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<sup>890</sup> Caracelli and Greene, above n 883.

<sup>891</sup> L. L. Schurmerhorn, L. Williams and A. Dickinson, 'Project COMPAS [Consortium for operating and managing programs for the advancement of skills]: A design for change' (Illinois Central College, 1982) 95.

The metrics were designed to enable a robust assessment of the effectiveness and efficiency including the costs of running witness protection programs in their current format and the success rate of the programs given organised crime has continued to flourish despite the existence of such programs. The metrics consisted of a total of 12 questions and sought the same information for each financial year from the inception of the statutory witness protection program in each jurisdiction. The questions included: (1) the number of participants included in the agencies witness protection program; (2) the number of those participants who are not witnesses, but are/were members of the witness's family and are not themselves giving evidence; (3) the number of new participants included in the agencies WPP; (4) the number of participants who left the WPP following the conclusion of prosecutions they were involved in; (5) the number of those participants who are not witnesses leaving the WPP; (6) the number of participants who left the WPP through reasons other than the completion of the prosecution they were involved in; (7) the number of prosecutions protected witnesses were involved with; (8) the number of successful prosecutions involving protected witnesses; (9) the number of defendants in each prosecution in which the protected witness gave evidence; (10) the number of persons incarcerated from those prosecutions; (11) the types of crime (for example, outlaw motor cycle gang activity, drugs, money laundering, corruption, identity crime, other) in which protected witnesses gave evidence; and (12) the financial cost of running the program not including the cost of police infrastructure and operatives wages and overtime. These metrics were carefully selected to avoid any compromise of security matters or the integrity of the programs, or of jeopardising the identity of the witnesses or their location.

Overall, the questions sought to identify what worked, how well and what the benefits and limitations of the programs are. It was intended to determine whether witness protection is a valuable tool in the fight against serious and organised crime. The findings of the request for information and the relevant data collected from documentary examination are discussed at

Chapter 9.8 The effectiveness and efficiency of Australia's witness protection programs.

The request for information, framed against the theme of governance and accountability, sought quantitative data on a range of metrics. The metrics included data about the number of participants, the cost of operating the program, the nature of the crimes the participants were giving evidence about and the number of prosecutions from those cases. Analysis of that data might have assisted the evaluation of the effectiveness of the programs.

## **7.5 Ethics, limitations and secrecy and its impact**

Ethical considerations associated with conducting a study of this kind are critical because a question arises about the vulnerability of respondents based on their occupation or their actual involvement with witness protection cases. Questions asked of survey respondents were designed to enable data to be collected while conscious of the legal, ethical or privilege issues.

### **Ethical considerations**

Respondents to the online surveys were asked to acknowledge their consent in Part 1 of the survey prior to completing it. The surveys were sent to the whole of the professional cohorts and participation was entirely voluntary. There is little reason to believe any respondent would have felt obliged to complete the survey. Twenty-three AFP officers completed the survey and the Commissioner of the AFP had given his consent for members to complete it. The voluntary nature of participation in the survey and the limited number of responses indicates AFP members felt no obligation to participate.

Two variations to ethics approvals were sought from and given by the UNE Ethics Committee in relation to the online survey. The first was to extend the term of the survey, allowing respondents a further year to complete it, the second, to enable the researcher to directly contact potential respondents to

attempt to increase total number of respondents completing the survey. Neither variation led to the generation of additional data or to additional respondents completing the survey.

Advice was sought from the professional bodies of the survey cohorts about whether their organisations had ethics approval requirements over and above those set by the University ethics committee. The Victorian Police and Western Australian Police both have internal mechanisms for approving research requests of the sort needed for this study, which included ethics approval. The Office of Public Prosecutions in Victoria required a probity undertaking before circulating the survey to its members.

The anonymity and confidentiality of respondents was ensured throughout the research. All references to the names of those who completed the survey have been substituted in the thesis with pseudonyms that represent the occupation of the respondent, for example POL1 (and so on) refers to the police officers who have worked in witness protection in the AFP, SCJ1 and so on refers to a Supreme Court Judge, DBR1 etc., refers to Defence Barristers and PRS1 and so on, refers to Prosecutors who partially answered or answered the survey.

The survey results are retained on a USB stick that is secured in a Class B safe at the researcher's premises and will be transferred to the principal thesis supervisor upon completion of this doctorate.

## **Limitations**

Four specific limitations were identified in the research: the lack of previous research on witness protection in Australia and internationally; the lack of survey responses; the lack of responses to the request for information; and the secrecy provisions contained in the legislation which strongly influenced the second and third limitations noted above.

The lack of previous research has been explored in earlier chapters and does not need repeating here. The limited number of survey responses affected

the research inasmuch as more data from a larger number of responses to the survey would have given greater validation to the conclusions reached. It would also have enabled debate about issues to do with the appearance of participants in courts to give evidence. That element is missing from the research findings.

The lack of responses to the request for information, the direct result of the secrecy provisions of the legislation as interpreted by the police commissioners, restricted significantly the analysis of the effectiveness and efficiency of the programs and any real assessment of the benefits of witness protection in the fight against serious and organised crime.

While these limitations impact the empirical research and restricted the data available for evaluation and analysis, sufficient data was available from which to analyse and draw conclusions about witness protection in Australia today.

### **Secrecy and its impact on the research**

The greatest impediment to researching witness protection programs in Australia and in any other country is the secrecy that surrounds them. Secrecy relating to witness protection is understandable and necessary, but the level of secrecy applied is, in some cases, excessive and unnecessary. While the identity and the location of the participant must be protected at all costs and the operating methodologies of the programs themselves must be protected, there are aspects of the programs that can and should be made available. This thesis argues for the regular release of specific information about the annual operation of the programs and openness to requests for information to support legitimate research.

While detailed examination of the legislation is contained in Chapter 5, it is useful to consider some provisions in the Act in a discussion about the secrecy that has impacted the collection of data for this study. The Act

specifies<sup>892</sup> offences for the disclosure of information about individuals undergoing assessment for inclusion in the NWPP or information that may compromise the security of a Commonwealth or state or territory participant. The offences relate to the release of information about the identity of an individual regardless of whether the person disclosing the information is a participant or a person undergoing assessment for inclusion. Exemptions do apply where the Commissioner authorises the disclosure of the information or where the disclosure is for the purposes of the individual making a complaint to the Ombudsman or the Integrity Commissioner.

The Act also restricts the release of information about the NWPP<sup>893</sup> in relation to the participant, the identity of those officials in the AFP engaged in witness protection activities, details of the MOU and information about the way in which the program operates. It specifies that the offence relates to the disclosure or release of information that will adversely affect the integrity of the program or compromise the security of the Commissioner or of an officer who is or has been involved in witness protection duties. Use of the word 'will' in this context is telling: it requires that release of the information has a direct effect on the integrity of the NWPP or compromises the security of the Commissioner or an officer. Section 22 can be distinguished from sections 22A, which relates to the disclosure of information about state participants in the NWPP, and 22B, which relates to offences for disclosing information about the NWPP, in that an offence for disclosure of information under section 22 can be proved without the effect actually materialising. The offence exists if the release of the information creates a risk that the disclosure will have a particular effect. Section 22C ties sections 22, 22A and 22B to disclosures to a court or tribunal, a Royal Commission of the Commonwealth or a state or territory or any other commission of enquiry.

The Commissioner and officers are not required<sup>894</sup> to disclose information to a court, tribunal, Royal Commission or other commission of enquiry that

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<sup>892</sup> *Witness Protection Act 1994* (C'th) s 22, 22A.

<sup>893</sup> *Ibid* s 22B.

<sup>894</sup> *Ibid* s 26.

would either identify the participant or an AFP employee or that has come to the AFP employee as a result of the performance of their duties. The section extends to any information, matter or thing that has come to the officer's notice. It does not apply to the release of information about financial arrangements for the participant so long as the release does not identify the location in which the participant is located. The provisions of section 26 do not apply where disclosure is necessary so as to carry the provisions of the Act into effect and this relates to securing identity documents and other paraphernalia to do with the relocation and the re-identification of the participant.

Complementary legislation describes similar offences for disclosure of information about a participant, or an individual being assessed for inclusion in the program or about the operation of the program itself. The Commissioner can authorise a disclosure or a communication, but only under certain circumstances, including in relation to a complaint to the Ombudsman or where the disclosure is necessary so as to comply with an order from the Supreme Court. These provisions relate to disclosures by the participant or about the participant. It is also the case with complementary legislation that a person cannot be required to provide information to a court, tribunal or other enquiry as described in the Act. These provisions relate to the release of information about the identity of the participant or about the new or former identity of the participant, including in proceedings involving persons with a new identity.

The Western Australian Act describes a duty not to disclose information,<sup>895</sup> but leaves open the opportunity to share information as authorised by the Commissioner. The offence provisions focus on the identity of the participant and on information that would compromise the security of the participant.

The Commonwealth Act describes offences for the disclosure of information about the participant and the integrity or security of the program and any matter or thing coming to the notice of officers and any disclosures by the

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<sup>895</sup> *Witness Protection (Western Australia) Act 1996 s 27.*

participant. These provisions, it is argued, are intended to protect the identity and location of the participant and the integrity of the program in each of the Acts. This thesis has sought to encourage discussion and debate about witness protection, but also to ensure that it did not cross over into areas that would offend the principles associated with the safety and security of the participant and the security of the program. None of the areas covered in the study went to these matters, but nonetheless police forces hid behind the provisions of the Act. Police Commissioners in each state or territory police force and the chairperson of the CMC could have authorised the release of information that would have assisted the thesis, while preserving the integrity of the program and the identity and location of the participant.

The online surveys and the request for information yielded limited results. The secrecy provisions in the various Acts meant that police commissioners felt constrained and unable to provide data sought in the request for information or to authorise their members to respond to the online survey. Letters received from each of the Police Commissioner, with the exception of the Commissioner for the AFP, cited the secrecy provisions for their decision not to assist the research. Judges, Magistrates and legal practitioners might have considered themselves to be similarly constrained by the secrecy provisions, but it is also possible that other considerations impacted their decision not to complete the surveys.

The wall of silence may have become totally impenetrable and the fact that witnesses have been seemingly more prepared to come forward is not of itself sufficient to label the programs a success. Rather, it is important that the community derives some benefit either in terms of a reduction in the activities of organised criminals or a reduction in the volume of illicit drugs finding their way into the community. This is a matter that warrants further attention and research.

## 7.6 Conclusions

Empirical research in witness protection has been difficult for other researchers in the past and similar problems were anticipated in relation to this thesis. The secrecy provisions surrounding the operation of witness protection programs internationally have not been eased to any great degree over the past forty years. The refusal of most police commissioners to participate in the research, based on the secrecy provisions of the Acts, affected the overall empirical research. Reliance on those secrecy provisions, it is argued, is unnecessary when considering the nature of the research, the limited information sought, the respect shown in the research for the information that should be quarantined by authorities and the differences in reporting across jurisdictions.

The choice of methods used to collect empirical and other data in this thesis was based on sound rationale as discussed in this chapter. The use of online surveys combined with an attrition model to reach those with specific knowledge and a request for information to police commissioners focussed the information requirements. The online survey was pitched to a very wide audience within specific cohorts so as to maximise the opportunity to collect useful data on witness protection in the criminal justice system.

This thesis demonstrated that using alternative data collection methods would be unlikely to achieve a different result. The legal professions, who have knowledge of protected witnesses, were, except for some limited exceptions, reluctant to contribute to legitimate research on witness protection. No reasons were provided for not completing the survey means there is little prospect of tailoring research to ensure a greater contribution. A government sponsored inquiry or review, by a parliamentary committee or a commission of inquiry with coercive powers, would gain access to the data sought by this thesis but for much of the data, that level of inquiry should not be necessary.

It could be argued that the validity and the reliability of the empirical research are affected by the small sample size and the limited uptake by respondents. However, the fact that this is the first such survey and scholarly research into witness protection in Australia is just beginning, encouraging government to support and assist research on witness protection in the future, is appropriate and will be necessary.

## **Chapter 8. Results of the Empirical Research**

This chapter analyses the data from the empirical research gathered through the online survey. It does not present a detailed argument about the findings; rather it presents those data with brief comments and observations.

Discussion on the implications of the findings, including comparisons with findings from the documentary examination and the request for information, is contained in Chapter 9.

The chapter notes that while the online survey yielded few results, it did reveal some useful data, albeit that responses were small in number and limited insofar as the representative cohorts is concerned. That AFP officers were the only police officers to respond means that the state and territory perspective is not accounted for. The perception of only one witness protection provider is represented in the results, but the weighting demonstrates a strong preference for a national approach. A different result may have been reached if a wider pool of responses had been received including responses from state and territory protection providers. The responses from the legal professions and presiding officers was also small in number, but it at least includes responses from three of the four cohorts, Judges, Defence Barristers and Prosecutors. Again, this limitation means that the perceptions of a small section of the cohort are all that is represented in the results. The results may have been different with a broader response from these cohorts.

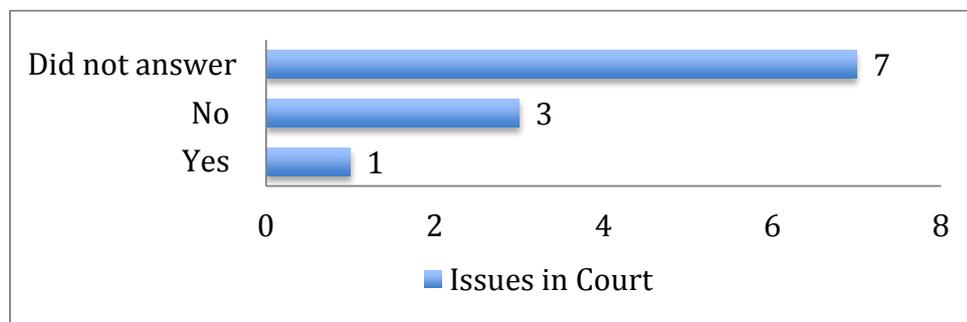
This chapter accepts these limitations and contains analysis of the information provided by respondents to the online survey, which enabled a picture to be developed against the themes of the research. A more comprehensive study would have been possible with responses from a larger number of respondents. Certainly the research would have benefitted from a greater contribution from each cohort.

## 8.1 Analysis of online survey responses

The survey included scope for respondents to provide comments supporting or qualifying their answers to the survey questions. Not all of the themes contained in the survey attracted comments; in some cases respondents simply answered the question and moved on to the next question. The data provided below contains quantitative analysis of responses to the survey questions, and qualitative analysis of the comments provided where appropriate.

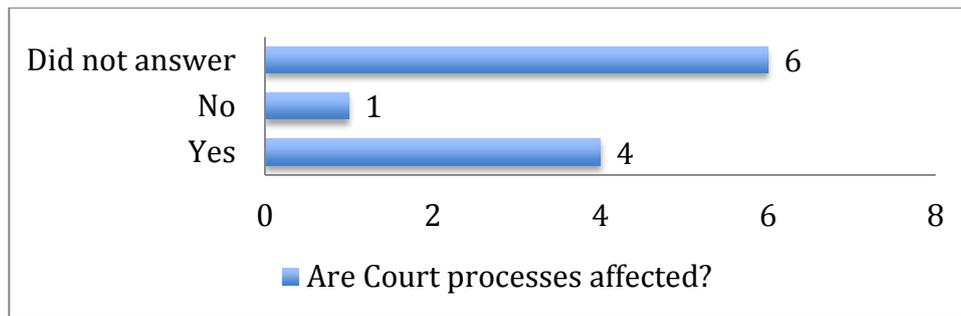
### Issues in the court

The first series of questions was directed to legal practitioners including the judiciary within four of the five cohorts, (police were not asked to answer questions in this first series), 11 responded. Respondents were asked if they believed the jury was influenced by the presence of a protected witness in court. One (9%) said they believed the jury was influenced, three (27%) did not believe so and seven (64%) did not respond.



**Figure 2 - Issues in Court from the appearance of a protected witness**

Respondents were asked whether the fact that a protected witness appeared at the trial affected court processes. Four respondents (36%) believed court processes were affected, one (9%) did not and six (55%) did not respond.



**Figure 3 - Are Court processes affected by the appearance of a protected witness at trial?**

While the majority of respondents left no comments for this question, the proposition supporting the notion that the jury was not influenced is that the ‘jury were not told that the witness was in witness protection. That fact was excluded ...’.<sup>896</sup>

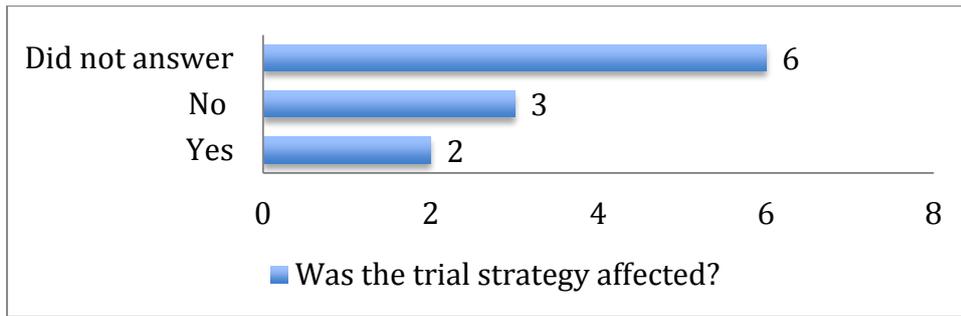
It is argued that the jury is an active participant in court proceedings and there is always scope for assumptions to be made about the presence of a protected witness in a trial. The protection against inferences being drawn by the jury exists in the directions provided by the presiding Judge to the jury. It is possible that the jury may assume that the witness is given special treatment and the general nature of what is provided<sup>897</sup> as a result of questioning by Defence counsel going to the credibility of the witness, but the jury ‘are warned by the trial judge against doing so.’<sup>898</sup>

The next question was directed to Barristers and Solicitors and respondents were asked whether the fact that a protected witness was involved in the trial affected their trial strategy. Two (18%) said it was and three (27%) said it was not. Six respondents (55%) did not answer the question.

<sup>896</sup> SCJ2

<sup>897</sup> Ibid.

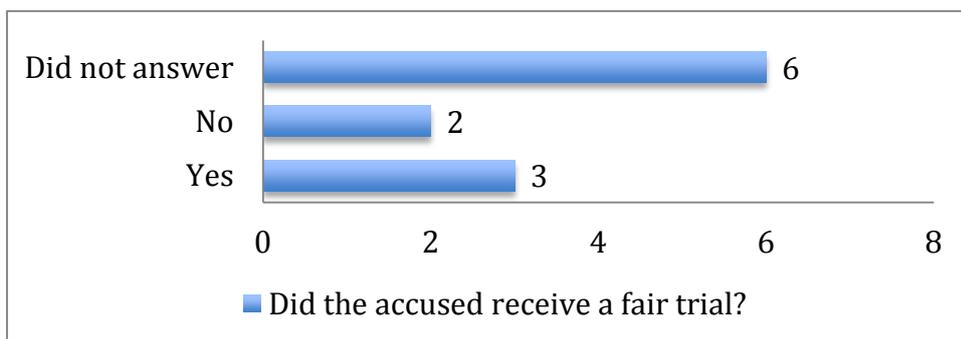
<sup>898</sup> PRS3.



**Figure 4 - Was the trial strategy of the Defence of Prosecution affected by the appearance of a protected witness at trial?**

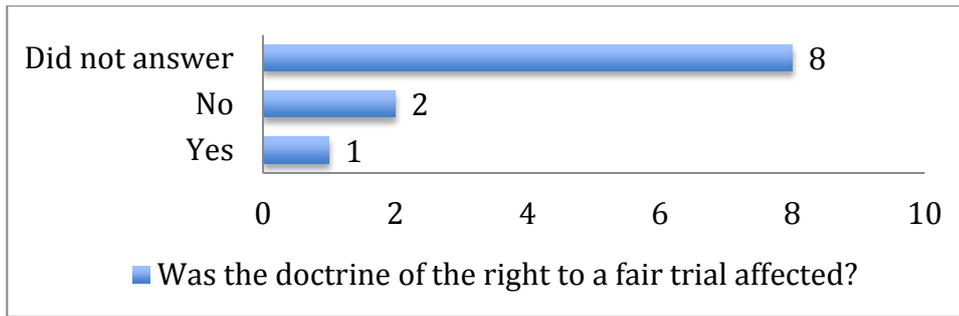
In the absence of any qualifying statements or comments by respondents, this thesis suggests that the Defence might consider they were restricted from exploring certain aspects of the witness’s credibility while cross-examining a protected witness. Respondents may have considered that this restriction impeded their trial strategy. As will be seen in response to the survey question about testing the credibility of the witness, the Defence faces limited restrictions.

The next two questions dealt with whether respondents believed the accused received a fair trial and whether the doctrine of the right to a fair trial was affected by the appearance of a protected witness at the trial. Three respondents (27%) believed the accused received a fair trial while two (18%) did not. Six respondents (55%) did not answer the question.



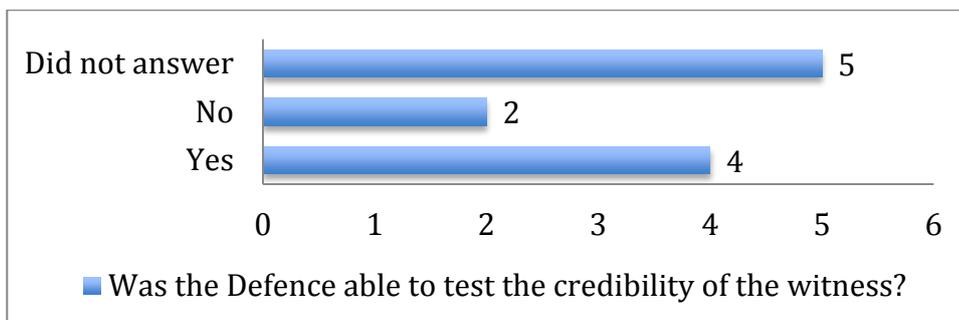
**Figure 5 - Did the accused receive a fair trial?**

One respondent (9%) believed the doctrine of the right to a fair trial is affected by the presence of a protected witness in court, two (18%) did not and eight (73%) did not respond to the question.



**Figure 6 - Was the doctrine of the right to a fair trial affected by the appearance of a protected witness at trial?**

These responses show a slightly higher proportion of respondents suggested that the right to a fair trial is not affected by the presence of a protected witness giving evidence. Most respondents did not answer either of these questions, which is disappointing, because consequently no clear distinction can be drawn. While it may be convenient to suggest that the Prosecutors believed the accused received a fair trial and the Defence did not, a closer inspection of the responses showed that this was not the case. Respondents were asked whether they believed the Defence was able to effectively test the credibility of the protected witness. Four (36%) said yes, two (18%) said no and five (46%) did not respond.



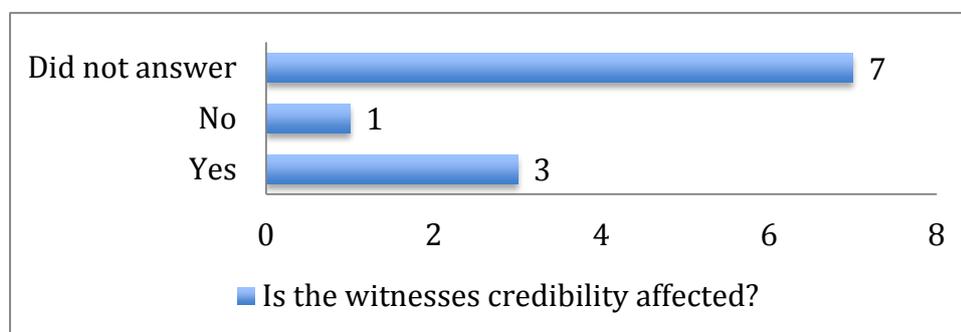
**Figure 7 - Was the Defence able to test the credibility of the protected witness?**

While more respondents believed the Defence was able to effectively test the witness's credibility one said<sup>899</sup> that the 'Defence was at large to explore inducements, plea negotiations, prior criminal history and other matters that

<sup>899</sup> Ibid.

went to the credibility of the witness.’ It is argued therefore that the mere fact that the witness is a participant in a witness protection program makes little difference to the ability of the Defence to effectively explore the credibility of the witness.

The fact that a witness is included in a witness protection program may have more of an effect on the perception of the credibility of the witness. Insofar as the credibility of the witness is concerned, three (27%) respondents said the credibility of the witness was compromised as a result of their inclusion in a witness protection program, one (9%) said it was not and seven (64%) did not respond.



**Figure 8 - Is the witnesses credibility affected?**

While a slightly higher number responded in the affirmative, it was suggested that witness protection programs ‘offend the principles of open justice on the say so of the witness, often without any objective facts to support the protection.’<sup>900</sup>

It is argued that this type of response, while understandable, is made in ignorance of the reasons for the protection. It is clear that parties involved in the matter will have an understanding that the protection has been provided to the witness because of threats they are facing. It is also obvious that the police providing the protection will not have provided details of the threat to the court and therefore most parties involved will be unaware of the nature and seriousness of the threat. That a significant number of respondents did not answer the question means a trend is difficult to assert. The responses

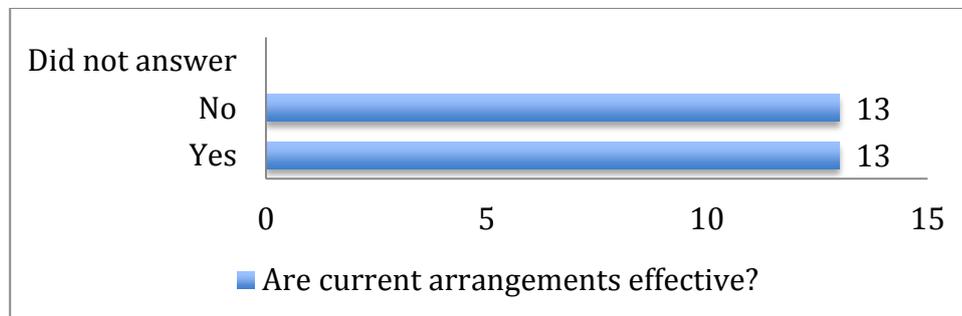
<sup>900</sup> DBR4.

that were provided make it clear that the perception exists that the credibility of the witness is compromised by their inclusion in a witness protection program. In the absence of any qualifying comments or remarks to this question, further research would be necessary to ascertain justifications for this perception.

The next phase of the survey included responses from legal practitioners, including the judiciary, and police. It canvassed specific elements of the thesis themes. In all, 26 respondents answered questions in this part of the survey.

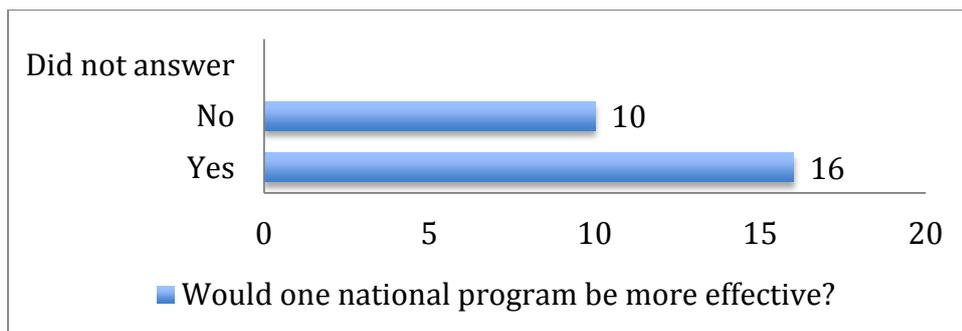
### **Cross-jurisdictional coordination of witness protection**

Questions asked in this section of the survey explored the concept of a national witness protection program, the coordination of witness protection nationally and the utility of a NWPLC. Respondents were asked whether current witness protection arrangements are effective. Thirteen (50%) said that they are and 13 (50%) said they were not.



**Figure 9 - Are current witness protection arrangements effective?**

Sixteen (62%) said that one national witness protection program would be more effective while 10 (38%) did not believe that to be the case.



**Figure 10 - Would one national witness protection program be more effective?**

It is worth noting that while the responses were mixed, the police cohort strongly favoured a national witness protection program. Members of the AFP provided the vast majority of the comments in the survey. The analysis does not benefit from jurisdictional contributions. The comments provided by respondents support the proposition argued in this thesis, that a national approach to witness protection, through the implementation of a tiered and integrated witness protection model, is required.

It was suggested in the survey that: local issues required a local response, questioning whether a national body would be able to cater for them;<sup>901</sup> ‘segregation is a key to participant security’;<sup>902</sup> and ‘there is safety in options.’<sup>903</sup> Although it was also suggested that ‘limitations on State legislation and scope of operation make it exceedingly narrow in such a small country.’<sup>904</sup>

It is argued that the recognition of such limitations supports the need for a national approach. It was acknowledged in the survey that: a national program to ‘manage high level threat matters and ... the placement and management of witnesses throughout Australia’<sup>905</sup> is in place; and state (and presumably territory) matters requiring ‘... a higher level of security or

<sup>901</sup> SCJ2.

<sup>902</sup> POL2.

<sup>903</sup> POL6.

<sup>904</sup> POL1.

<sup>905</sup> POL4.

managements, and/or relocation outside of the jurisdiction of that State ... should be referred to the NWPP.<sup>906</sup> Such an approach would mean that the Commonwealth would 'perform high profile/high risk WP functions whilst state/territories provide tier II protection.'<sup>907</sup> This is consistent with the proposition advocated in this thesis for a tiered national approach to witness protection. The existence of multiple witness protection programs in the states and territories and the NWPP at the Commonwealth level is 'cumbersome.'<sup>908</sup> This further supports the revision of current arrangements.

It was said that divergent practices and procedures across each state are unhelpful and a national program would 'ensure uniformity across the board.'<sup>909</sup> A 'centralised function undertaken by one agency would provide clarity and effective management of a national WP program'<sup>910</sup> and one agency providing witness protection 'promotes a higher standard of professionalism in conducting WP activities.'<sup>911</sup> It was also suggested that one national program would assist witnesses to be relocated across all Australian jurisdictions, including internationally, without individual jurisdictions having to have a multitude of agreements between them.<sup>912</sup>

It is argued that from an operational perspective, one national program, run by one agency, would have the effect of streamlining 'the relocation and identification process'<sup>913</sup> and reducing 'vulnerabilities of agencies operating independently of others and making decisions on cross border relocations of witnesses.'<sup>914</sup> A national program would 'enable better consistency [and a]

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<sup>906</sup> Ibid.

<sup>907</sup> POL8.

<sup>908</sup> POL7.

<sup>909</sup> Ibid.

<sup>910</sup> POL9.

<sup>911</sup> POL15.

<sup>912</sup> Ibid.

<sup>913</sup> POL9.

<sup>914</sup> Ibid.

central coordination point when liaising with offshore partners.<sup>915</sup> It should be noted that only the NWPP is empowered by legislation to accept foreign nationals into witness protection in Australia.

It was suggested that a national approach would ensure the easy transfer or relocation of witnesses within Australia to new locations.<sup>916</sup> Less duplication of what are very expensive programs<sup>917</sup> and limiting the opportunity for two agencies to relocate participants in their respective programs to the same location<sup>918</sup> would also be important outcomes.

Insofar as the relocation of participants out of the home jurisdiction is concerned, the 'problem with State WP is that it is limited to only the state. They cannot relocate the witness to another State and still maintain control.'<sup>919</sup> This may be because the constitutional arrangements that limit the ability of the state '... to operate nationally and in many respects internationally ... do not exist for the AFP.'<sup>920</sup> Therefore those responsible for providing protection arrangements should be best placed to 'deal with Commonwealth, State and Territory and International counterpart agencies as well as stakeholders.'<sup>921</sup> It was said that a 'seamless system that has limited possibility of compromise and can deal globally with outcomes that benefit the witness as well as the legal system'<sup>922</sup> was the most desirable outcome.

This thesis notes that these reasons are consistent with the findings of the PJC. They support the reasons put forward for a revised national witness protection model structured in three tiers, which would deliver fully integrated witness arrangements for the whole of Australia.

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<sup>915</sup> POL14.

<sup>916</sup> POL22.

<sup>917</sup> Ibid.

<sup>918</sup> POL24.

<sup>919</sup> POL19.

<sup>920</sup> POL25.

<sup>921</sup> Ibid.

<sup>922</sup> Ibid.

The proposed arrangements also provide the opportunity for secondments from state and territory police into the NWPP, a matter also canvassed in the online survey. It was suggested that a national program 'would and could include officers of other jurisdictions'<sup>923</sup> and that it would 'reduce costs associated with national, state and territory Witness Protection programs being operated independently of the other.'<sup>924</sup> It was said that a 'national approach ... would provide more resources and all protected witnesses would receive the same service and have access to the same resources.'<sup>925</sup> It was suggested that secondments create issues<sup>926</sup> because of different practice and procedure and may result in less than optimal performance in the delivery of witness protection; 'the involvement of different agencies increases risk to operational security';<sup>927</sup> and 'it is far better and more secure to use a single agency, that is completely independent and impartial to the investigation or case.'<sup>928</sup> This thesis does not advocate the creation of a new single agency to provide the tiered witness protection arrangements recommended. Rather, it suggests refinements to the existing arrangements that would likely deliver greater efficiency and effectiveness in the protection of witnesses.

Operational integrity is critical in witness protection, and, it was suggested, if one agency was tasked with providing witness protection in Australia the integrity of the program could be put at risk.<sup>929</sup> Also, that while the protection program may be more effective, security and methods of operation might be compromised.<sup>930</sup> It was suggested that operational efficiencies could be achieved through one national program, including that the 'process of assessment for admission to the programs is necessarily

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<sup>923</sup> POL9.

<sup>924</sup> Ibid.

<sup>925</sup> POL20.

<sup>926</sup> POL12.

<sup>927</sup> POL15.

<sup>928</sup> Ibid.

<sup>929</sup> Ibid.

<sup>930</sup> POL19.

subjective and reflects the particular requirements and circumstance of each jurisdiction.<sup>931</sup> In this respect, it was said that consistent legislation, security practice, professionalism and standing operating procedures are important.<sup>932</sup> These matters all have an effect on the credibility of witness protection and confidence that credibility engenders.<sup>933</sup> These comments, as with others presented in the survey, support an integrated approach to witness protection in Australia rather than the segregated arrangements currently adopted.

A useful suggestion, highlighted in the survey, which is also incorporated into the uniform witness protection legislation advocated in this thesis, is that state witness protection programs offer short-term protection arrangements for participants.<sup>934</sup> It was suggested the use of these short-term arrangements is because the state is 'unable to expend the considerable funding required in the NWPP.'<sup>935</sup> Regardless of the reasons for its use, short-term arrangements are legislated in some states in Australia, particularly while the witness is undergoing assessment for inclusion in the program, and this option is considered both relevant and viable.

The survey canvassed the need for the coordination of witness protection between states and the Commonwealth. Respondents were asked whether the coordination of witness protection through a NWPLC was desirable. Nineteen (73%) agreed that it was while the remaining seven (27%) did not consider such arrangements necessary.

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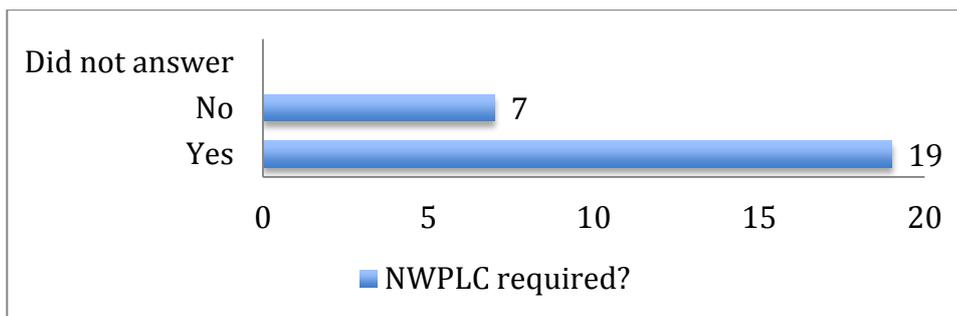
<sup>931</sup> POL17.

<sup>932</sup> POL24.

<sup>933</sup> Ibid.

<sup>934</sup> POL26.

<sup>935</sup> Ibid.



**Figure 11 - Is a National Witness Protection Liaison Committee required?**

It was suggested that despite the existence of ‘local issues, many witnesses in the program are relocated interstate’<sup>936</sup> and the establishment of a NWPLC ‘would ensure consistency across the board.’<sup>937</sup> A NWPLC would reduce risk to the organisation that referred the witness to the national program and would ‘assist in the benchmarking of standards’,<sup>938</sup> but the nature of witness protection would preclude the coordination of resources. A NWPLC could ‘set the appropriate thresholds for acceptance in the program [and be required] to establish a set of guidelines for all jurisdictions to adhere to.’<sup>939</sup>

It was also suggested that witness protection arrangements under a NWPLC ‘would be underpinned by formalised MOUs, funding and oversight’<sup>940</sup> although no terms of reference for a NWPLC were described in the survey. A NWPLC, it was said, ‘would also assist in coordinating and reporting responses to the respective Police Services on the effectiveness of a national witness protection program and outcomes.’<sup>941</sup> It would enable ‘representation from each jurisdiction ... to provide oversight ... and a level of reassurance to states that their witnesses were being managed appropriately.’<sup>942</sup> Further, it was said that a NWPLC ‘would be required to

<sup>936</sup> SCJ2.

<sup>937</sup> POL7.

<sup>938</sup> POL17.

<sup>939</sup> POL22.

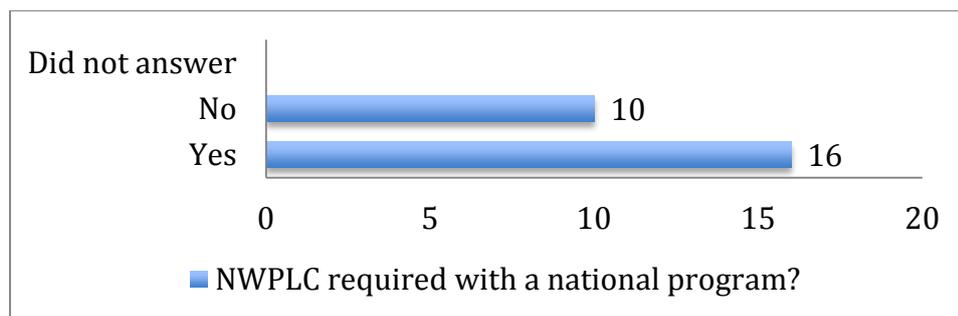
<sup>940</sup> POL9.

<sup>941</sup> Ibid.

<sup>942</sup> POL14.

provide oversight only'<sup>943</sup> because witness protection operates on a 'need to know principle'<sup>944</sup> and 'committees have members who really do not need to know.'<sup>945</sup> Engaging the 'right people'<sup>946</sup> in the NWPP would, it was said, alleviate the need for 'non-productives to jeopardise the system.'<sup>947</sup>

A single national witness protection agency 'would negate the need for the committee'<sup>948</sup> although police commissioners should 'meet in a regular fashion to discuss the program and identify new requirements or trends that may impact on witness protection.'<sup>949</sup> While this thesis does not advocate the establishment of a NWPLC it does argue for a model and external oversight that would ensure greater scrutiny of witness protection operations nationally. Sixteen (62%) said that a NWPLC would be required even if one national agency provided witness protection arrangements. The remaining 10 (38%) said it would not be required.



**Figure 12 - Would a NWPLC be required if one national program was operating?**

While a NWPLC was considered necessary it was not said to be the best solution. It was suggested that 'a national, independent WP agency be formed that all jurisdictions would use on a user pays basis.'<sup>950</sup> This

<sup>943</sup> POL24.

<sup>944</sup> Ibid.

<sup>945</sup> Ibid.

<sup>946</sup> Ibid.

<sup>947</sup> Ibid.

<sup>948</sup> POL25.

<sup>949</sup> Ibid.

<sup>950</sup> POL15.

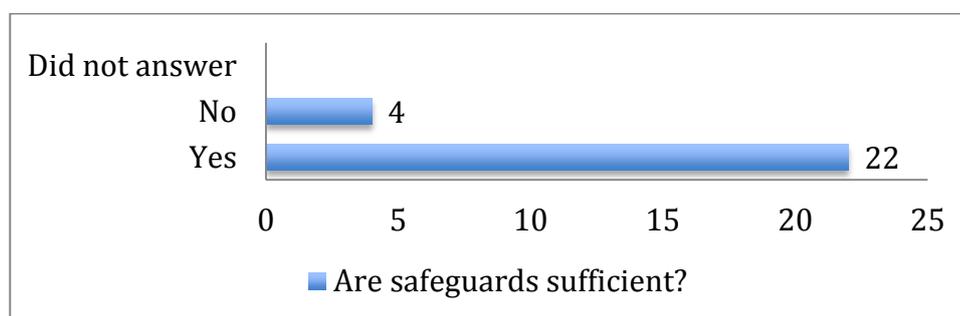
arrangement, it was said, would alleviate the need for a NWPLC ‘although liaison officers dealing with the agency’ would be required.<sup>951</sup> The role of a NWPLC would, however, ‘as with all committees ... become another hurdle, as well as further delays in an already slow moving process.’<sup>952</sup>

It is therefore argued that the adoption of a NWPLC would prove beneficial in the absence of other mechanisms for coordinating witness protection arrangements in Australia. In time though, a NWPLC may become obsolete particularly if an integrated witness protection model was introduced.

### **Inclusion in a witness protection program**

The three questions asked in this series are linked to the inclusion of witnesses in a witness protection program. They included the admission process, the legal weight of the MOU and the performance of rights and obligations particularly an obligation for the witness to provide evidence to the best of their ability.

Respondents were asked whether they believed sufficient safeguards exist in the relevant legislation to support the Commissioner’s decision to include or deny inclusion in a witness protection program where the applicant/witness does not make full discloses as required by the legislation. Twenty-two respondents (85%) agreed the existing safeguards are sufficient while four (15%) did not.



**Figure 13 - Are existing safeguard sufficient?**

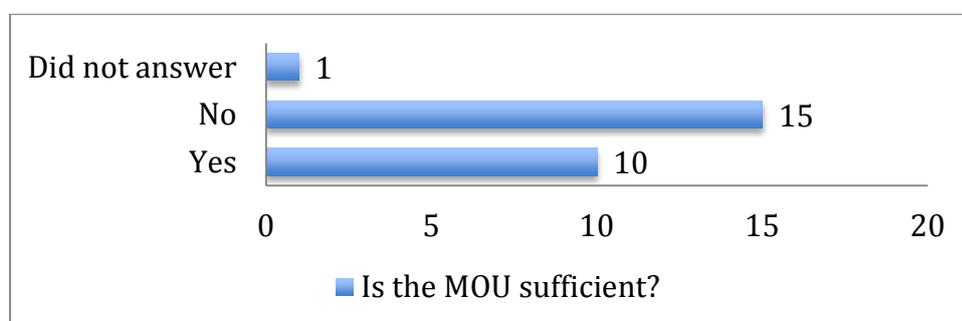
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<sup>951</sup> Ibid.

<sup>952</sup> POL20.

The responses to this question should not be taken in isolation, particularly in light of the comments provided in the previous series of questions about the NWPLC and its possible role in ensuring appropriate thresholds for acceptance into the program. Looking also at the disparity between admission thresholds for the NWPP and for the Victorian and Northern Territory programs, an argument for comparable thresholds across all programs exists.

A critical element in the inclusion of a witness in a witness protection program is the MOU. Respondents were asked to consider whether: the MOU carries sufficient legal weight to ensure the performance of rights and obligations of the respective parties; it should include a requirement for the participant to give evidence to the best of their ability; the MOU should enable the termination of protection and assistance where the participant fails to discharge their obligations. Ten respondents (38%) agreed that the current MOU carries sufficient legal weight to ensure performance of rights and obligations while 15 (58%) did not agree. One (4%) did not respond to the question.



**Figure 14 - Is the MOU sufficient?**

It was said that MOUs are unenforceable, have little legal weight and are in any event ‘a bluff’<sup>953</sup> and that ‘termination based on the MOU has problems because of the lack of weight attributed to them. The agreement needs to be contractual or legislated.’<sup>954</sup>

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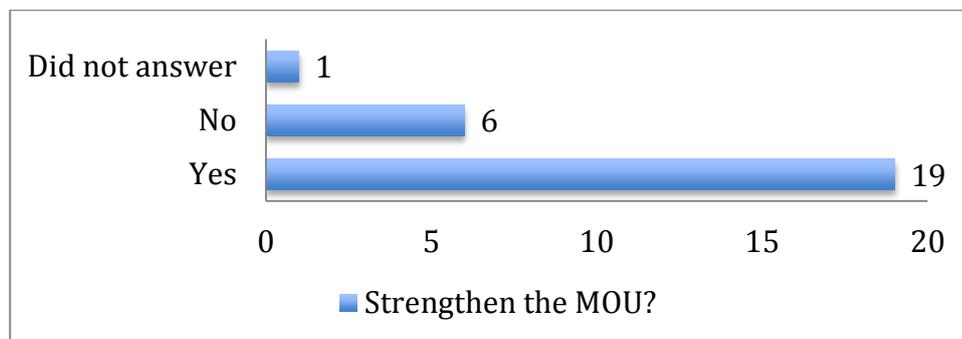
<sup>953</sup> POL22.

<sup>954</sup> Ibid.

It was said that Courts rely on the commissioner’s undertaking on compliance with the MOU, but that the Court has no supervisory role in ensuring either the commissioner’s or the participant’s compliance.<sup>955</sup> Where the participant does not comply there ‘is no legal consequences if it does not occur, except perhaps for the witness.’<sup>956</sup> It was said that it is ‘all about the deal, if they do not stick to the deal they pay the price.’<sup>957</sup>

The Commissioner can make decisions to cease protection and assistance for material breaches of the MOU; the Act permits that. It may be that for other reasons a breach of the MOU does not lead to the cessation of protection, but in the absence of data supporting that contention, it remains unsubstantiated.

When asked whether the MOU should contain provisions for the termination of protection where the participant fails to discharge his/her commitment to give evidence to the best of their ability. Nineteen (73%) agreed, six (23%) did not agree and one (4%) did not respond to the question. There is strong support amongst survey respondents for the proposition and little reason not to include it in the MOU.



**Figure 15 - Should the MOU be strengthened?**

Respondents were asked whether the MOU should include a requirement that the participant agrees to give evidence to the best of their ability.

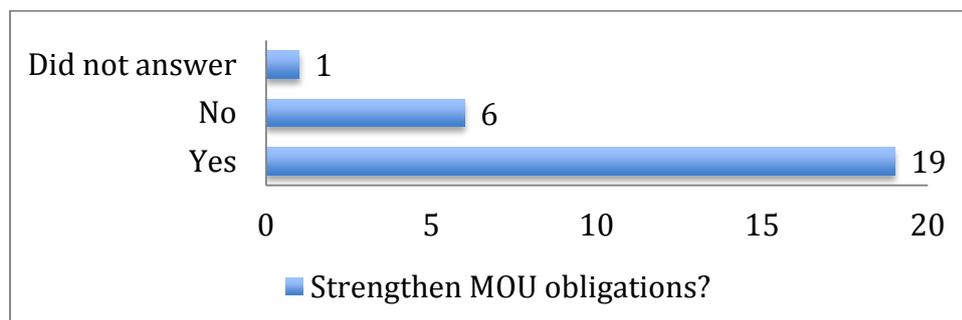
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<sup>955</sup> SCJ2.

<sup>956</sup> Ibid.

<sup>957</sup> POL24.

Nineteen (73%) considered the inclusion of a clause worthwhile while six (23%) did not. One (4%) did not respond to this question.



**Figure 16 - Should the MOU require the participant to give evidence to the best of their ability?**

It was said that ‘once the witness has decided to testify and enter the program, there should be no misunderstanding on the expectations of the witness.’<sup>958</sup> The ‘MOU should contain the objectives of a formalised arrangement [and] consequences for failing to meet those objectives. The sponsors should conduct that assessment.’<sup>959</sup> The support for the proposition establishing rules for terminating protection and assistance where a participant fails to satisfy this obligation is clear from these statistics.

These responses make it clear that the MOU should clearly express the obligations of both parties, including giving evidence and consideration of suspension from the program if the participant fails to comply. It was suggested that the participant knows, on entering the program, of their obligations however over time start to question their inclusion in the program.<sup>960</sup> It was said that this doubt might arise from ‘loss of contact with friends and relatives - delay in court proceedings’,<sup>961</sup> but in any case should

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<sup>958</sup> POL15.

<sup>959</sup> POL17.

<sup>960</sup> POL7.

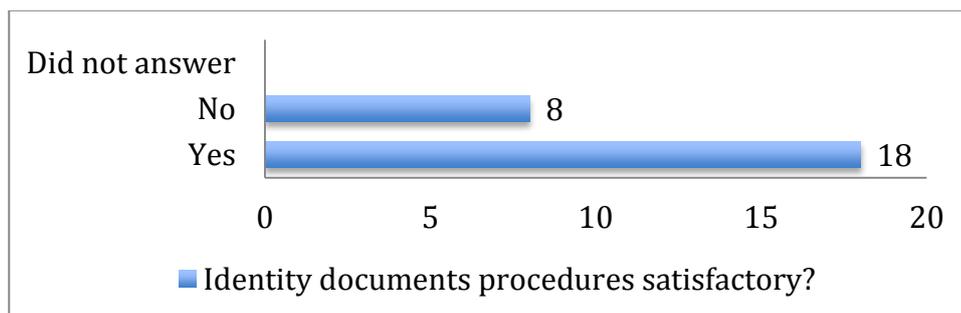
<sup>961</sup> Ibid.

be managed by the protection provider and the MOU should contain the terms of the necessary support.<sup>962</sup>

In respect of the participant's evidence, it was suggested 'the discharge of a witness's evidence is subjective and would create challenge if protection were to be withdrawn in these instances.'<sup>963</sup> It was said that an obligation in the MOU requiring the participant to give evidence to the best of their ability was, 'heading towards an inducement'<sup>964</sup> and 'if the court believes that the participant is not providing best evidence then that is for prosecution to argue.'<sup>965</sup> If the participant failed to give evidence 'the threat is severely diminished thus precluding the necessity for WP.'<sup>966</sup>

### **Identity documents**

In this series of questions, respondents were asked whether, in their opinion, the current procedures for providing birth certificates for protected witnesses and others included in witness protection programs are satisfactory. Eighteen respondents (69%) said they were and eight (31%) said they are not. It was said that the 'current (Commonwealth) arrangement allow an entry to be made and subsequent certificate issued, that does NOT indicate a change of name has occurred.'<sup>967</sup>



**Figure 17 - Are current identity document procedures satisfactory?**

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<sup>962</sup> Ibid.

<sup>963</sup> POL9.

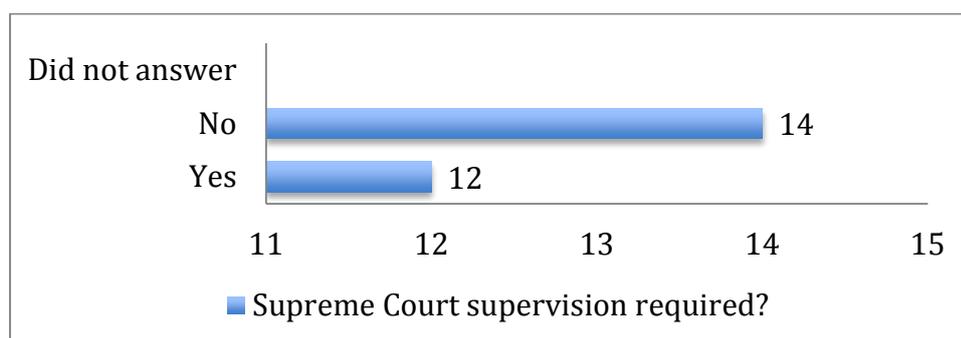
<sup>964</sup> POL22.

<sup>965</sup> POL13.

<sup>966</sup> POL17.

<sup>967</sup> POL11.

Witness protection legislation mandates certain actions for sourcing and providing identity documents to participants in witness protection programs. Respondents were asked to consider whether those current arrangements afford the most efficient and effective methods in respect of state and territory identity documents, particularly birth and death certificates. Twelve respondents (46%) said an order from the Supreme Court in the relevant jurisdiction should be required each time new identity documents are required. Fourteen (54%) said it should not be required.



**Figure 18 - Is Supreme Court supervision required for birth certificates?**

Current arrangements were considered to be satisfactory although in need of simplification and that the permission of the court should not be required where a birth certificate is to be provided. Responsibility ‘should rest with a senior member of the relevant Commonwealth department.’<sup>968</sup>

It is argued that judicial supervision of the process to obtain birth certificates is unnecessary and creates vulnerabilities. Survey responses suggested that judicial oversight ‘should be required to ensure transparency and accountability of the respective agencies’,<sup>969</sup> but judicial officers should be ‘cleared and vetted.’<sup>970</sup> A concern was expressed in the comments that once authorised, all relevant documents should be returned to the requesting agency. Security implications for the participant exist in the current

<sup>968</sup> POL15.

<sup>969</sup> POL9.

<sup>970</sup> Ibid.

arrangements and it was suggested that ‘currently the trail of a person’s identity can be traced backwards’<sup>971</sup> and ‘it would be preferable if the birth certificates cannot be traced at all.’<sup>972</sup> It follows then that ‘the less people involved in the process, the less chance information in relation to a protected witness is released.’<sup>973</sup> It was said that ‘a Court should be involved, however, it produces another record that can be located and true identity of a person determined’<sup>974</sup> and that ‘there must be some oversight of process.’<sup>975</sup> The court should not be required to approve amendments.<sup>976</sup>

Once a decision has been made to place individual/s into a witness protection program there should be recognition that the agency providing that protection will act legally and in the best interest of the witness.<sup>977</sup> The differences between procedures adopted by the AFP and the states and territories, could, it was said, lead to security compromises and risk to the participant<sup>978</sup> although no description of the differences was provided. These procedures could become part of the remit of a NWPLC.<sup>979</sup>

Respondents were asked if the Act should be amended to enable the police force providing witness protection to authorise adding an entry into the register in the participant’s old name in the case of the death of the participant. Nineteen (73%) said the Act should be amended and seven (27%) did not believe legislative amendment was necessary. The defect in the fact a death is not recorded in a person’s original name, at the time of actual death and not before should be addressed.<sup>980</sup>

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<sup>971</sup> POL22.

<sup>972</sup> Ibid.

<sup>973</sup> Ibid.

<sup>974</sup> Ibid.

<sup>975</sup> POL24.

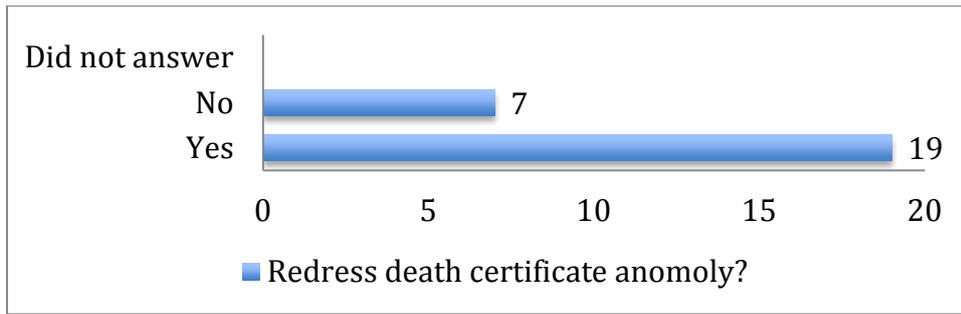
<sup>976</sup> POL25.

<sup>977</sup> Ibid.

<sup>978</sup> POL7.

<sup>979</sup> Ibid.

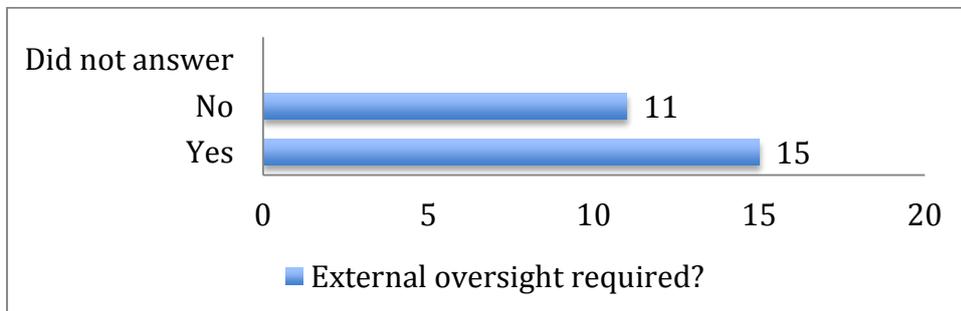
<sup>980</sup> POL11.



**Figure 19 - Should the anomaly for death certificates be redressed?**

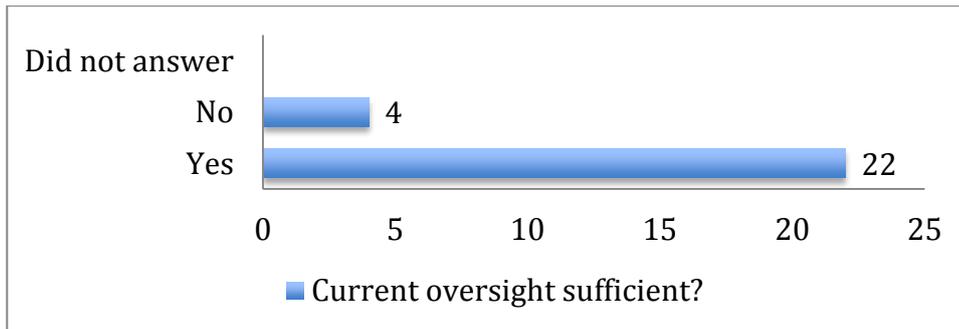
### **Governance and Accountability**

Respondents were asked whether they thought independent external oversight responsibility should exist with respect to all witness protection programs in Australia. Fifteen (58%) said yes while 11 (42%) said it was not necessary. While respondents provided no comments or suggestions, it is argued that external oversight of the administration of witness protection programs is required and is necessary for the good governance of witness protection programs.



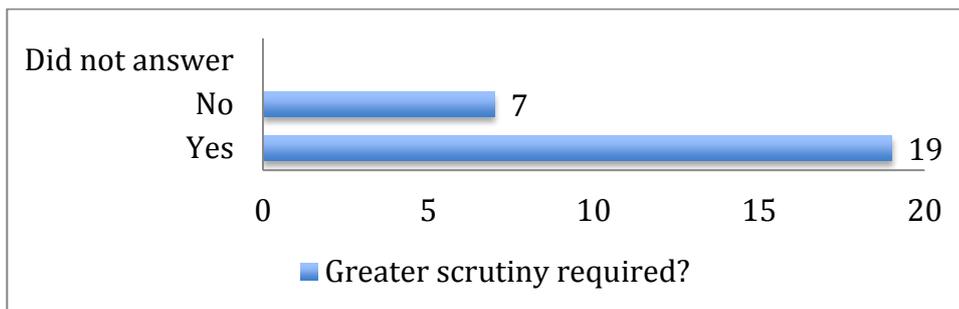
**Figure 20 - Is external oversight of the programs required?**

Respondents were asked whether the current oversight arrangements by a Parliamentary Joint Committee, the Ombudsman or another formal body in the relevant jurisdiction are sufficient, including in the case of complaints from persons aggrieved by decisions made by agencies in the administration of witness protection schemes. Twenty-two (85%) said the arrangements were sufficient while four (15%) did not think they were.



**Figure 21 - Are current oversight arrangements sufficient?**

Nineteen (73%) thought greater scrutiny was required whereas seven (27%) did not. The position taken in this thesis is that differences in oversight arrangements across the jurisdictions create sufficient reason for a more complete oversight regime and more holistic governance arrangements.

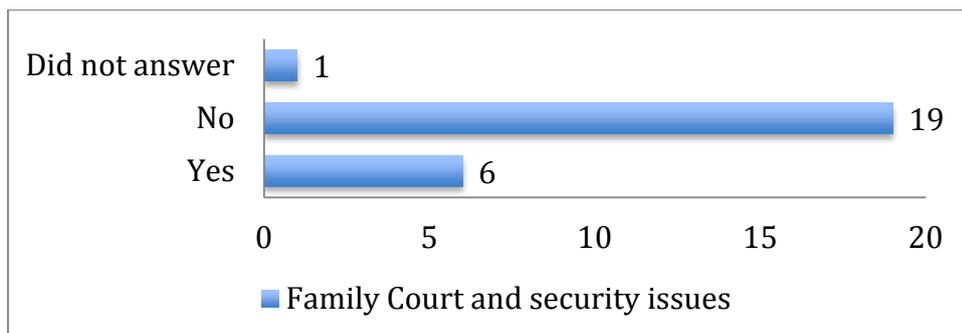


**Figure 22 - Is greater scrutiny of witness protection programs required?**

### **Witness protection and the Family Court of Australia**

The tension between the Family Court of Australia and witness protection has been referred to in reviews<sup>981</sup> and is discussed at length in this thesis. Respondents were asked to consider whether the Court acting in the best interests of the child is well placed to consider the security implications associated with access and visitation. Six (23%) answered yes, 19 (73%) said no and one (4%) did not respond to the question.

<sup>981</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8, vii, 30-31 [3.20]-[3.25], 33 [3.31].



**Figure 23 - Is the Family Court of Australia best placed to consider security implications of contact orders?**

This is a difficult issue, the Court's reliance on the police commissioner's undertakings in relation to access and visitation where children of a broken marriage are concerned and the limited comfort the court can take from those undertakings.<sup>982</sup> The concern is based on the possibility that the 'witness protection order may effectively prevent the children from having future contact with a parent or even knowing the identity of a parent.'<sup>983</sup>

Access, according to some respondents,<sup>984</sup> must not be denied to the non-custodial parent and the custodial parent must not be provided with an opportunity to avoid his/her obligations in providing access. This contact would never amount to any formal custody arrangements, but a custodial parent should never be allowed to cite security concerns as an excuse to prevent a non-custodial parent access. It was said<sup>985</sup> that NWPP participants must be required to continue with maintenance arrangements and children should not be penalised.

The Court, it was said, 'is determining such matters constantly. This Court is always best placed to stand up for the Child's rights.'<sup>986</sup> It was also said<sup>987</sup> that the Court is best placed to make decisions about access and visitation

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<sup>982</sup> SCJ2.

<sup>983</sup> Ibid.

<sup>984</sup> POL24.

<sup>985</sup> Ibid.

<sup>986</sup> POL22.

<sup>987</sup> POL4.

and that witness protection programs have the capacity to ensure contact arrangements. Noting of course that the legislation allows for disclosures by the witness protection providers about the security implications associated with contact orders. The Court ‘should have a designated officer who will deal with these sensitive issues.’<sup>988</sup>

It is argued that the risk to the participant and children arising from a Court decision on contact orders could be problematic where ‘the location and circumstance of a reunion are not managed by those fully briefed on the threat.’<sup>989</sup> Contact orders, access and visitation creates vulnerabilities for both the participants and the police responsible for protecting them.<sup>990</sup> The inference is that a contact order has the ‘potential to place a participant’s family in risk as well as responsible police’<sup>991</sup> and that the contact orders may have ‘the adverse effect of protection being withdrawn or compromised to a point where protection cannot be ensured.’<sup>992</sup> It was said that such an outcome would ‘reflect poorly on the family court’<sup>993</sup> and that it is ‘only due to the diligence and professionalism of the officers involved that a serious compromise has not already occurred.’<sup>994</sup> This thesis suggests a legislated solution to the problem noting that the Commissioner can choose to release information about the nature and seriousness of the threat to the participant to the Court.

As the Court does not regularly deal with clients involved in witness protection, the particular Judge might not be able to fully appreciate the security implications of contact orders.<sup>995</sup> It was suggested that dedicated Family Court Judges be ‘fully briefed and provided extensive background

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<sup>988</sup> POL7.

<sup>989</sup> POL17.

<sup>990</sup> POL9.

<sup>991</sup> Ibid.

<sup>992</sup> POL9.

<sup>993</sup> Ibid.

<sup>994</sup> Ibid.

<sup>995</sup> POL14.

information on witness protection and these Judges were used for WP matters.’<sup>996</sup>

It was suggested that the security of the participant cannot be guaranteed when dealing with persons not included in the witness protection program. Concerns were expressed about a parent disclosing sensitive information to others who ‘may be a threat to the Participant’<sup>997</sup> making the present situation unworkable.<sup>998</sup> It was said that it ‘... is mind boggling the Family Court directed this to occur.’<sup>999</sup> The decisions by the Court, adverse to the security advice provided by the police providing protection and assistance, exposes ‘the protected witness to discovery, it is placing the child in the line of added pressure to reveal the location of the protected witness.’<sup>1000</sup>

Contact, access and visitation should, it was said, be ‘at the discretion of the organisation that is providing protection to that participant.’<sup>1001</sup> This was because the Court ‘may not be in the best position to make this decision and certain information may not be disclosed to the Family Court for security reasons.’<sup>1002</sup>

Respondents were asked to consider whether the relevant legislation should be amended to provide clear instructions to the Court in the case of security reasons preventing visitation at a time and place determined by the Court. Twenty-one (81%) agreed that legislative amendment is required and five (19%) disagreed.

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<sup>996</sup> Ibid.

<sup>997</sup> POL19.

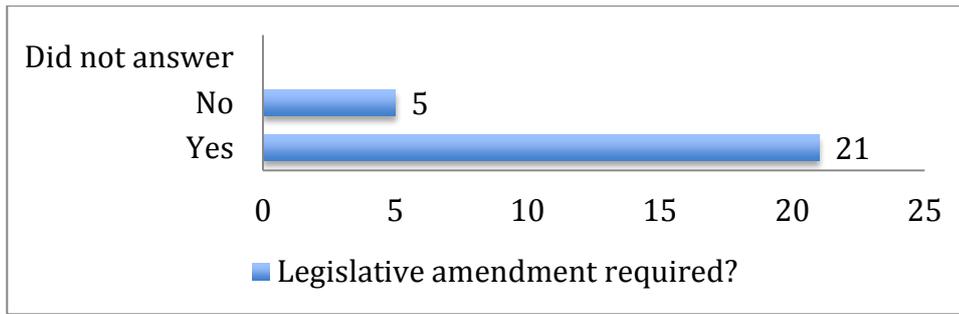
<sup>998</sup> Ibid.

<sup>999</sup> POL20.

<sup>1000</sup> Ibid.

<sup>1001</sup> POL13.

<sup>1002</sup> Ibid.

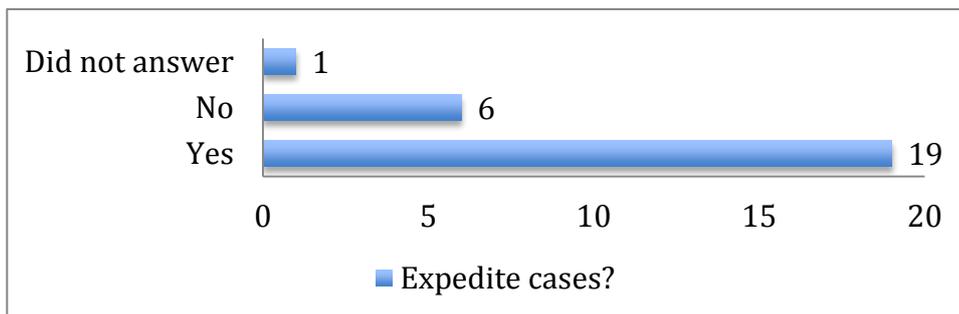


**Figure 24 - Are legislative amendments required in relation to Family Law?**

As noted, this thesis recommends legislative amendment to avoid a situation where a participant and their children are put at greater risk as a result of a Family Court of Australia decision.

**Expediting cases involving protected witnesses**

The questions in this series ask whether cases involving protected witnesses should be expedited and whether expediting those cases would affect the rights of the accused to a fair trial. Respondents were asked whether they thought there were any circumstances in which an argument exists to fast track cases involving protected witnesses through committal proceedings and trial. Nineteen (73%) agreed, six (23%) did not and one (4%) did not respond to the question.

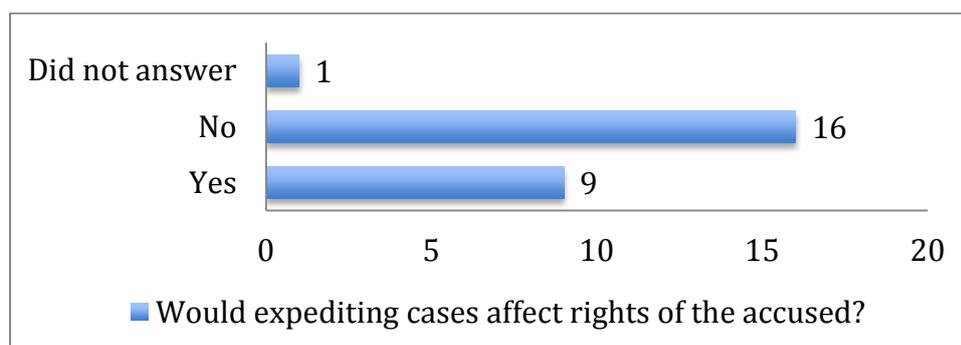


**Figure 25 - Should cases involving protected witnesses be expedited?**

While there was strong support for expediting these matters, little by way of comment was provided. Nonetheless, the sheer weight of support from the survey responses suggests this is an area that warrants further research and consideration by governments.

Expediting matters through trial was considered by some to be appropriate ‘to allow the protected witness to establish themselves in their new location, career etc. rather than having the threat of appearing in court in their near/far future.’<sup>1003</sup> The ‘sooner a protected witness is given the opportunity to testify, the safer that person is and the less likely the testimony will be affected.’<sup>1004</sup> This position recognises the greater strain experienced by a protected witness as compared to that experienced by a witness who is not included in a witness protection program.

Respondents were then asked whether they believed expediting cases would adversely impact the rights of the accused to a fair trial. Nine (35%) thought it would while 16 (61%) did not consider the rights of the accused would be adversely affected. One (4%) did not respond to the question.



**Figure 26 - Would expediting cases involving protected witnesses affect the rights of the accused?**

There is little doubt that expediting cases involving protected witnesses carries with it some implications and that any attempt to fast track cases would require consideration of those implications. Expediting matters may affect the accused person's ability to prepare for trial<sup>1005</sup> or severely hamper the accused rights to a fair trial.<sup>1006</sup> It was said<sup>1007</sup> that protected witnesses should not receive preferential treatment simply because they were assisting

<sup>1003</sup> POL20.

<sup>1004</sup> POL15.

<sup>1005</sup> SCJ2.

<sup>1006</sup> POL7.

<sup>1007</sup> POL9.

police as that might play into the hands of other offenders. There was a perception that the fact the participant is receiving protection 'should be reward enough'<sup>1008</sup> and that witness protection should not be seen as 'a reason for fast tracking proper judicial processes or providing an advantage to either the prosecution or defence.'<sup>1009</sup> It was suggested that careful balancing between fast tracking and an inference of the value of the evidence the protected witness is to provide would be required.<sup>1010</sup> The jury should not know the witness is a protected witness,<sup>1011</sup> and as previously noted the Judge will warn the jury against considering that fact. It 'would be for Defence counsel to argue issues of fairness if they believed that fast tracking was prejudicial.'<sup>1012</sup>

The financial cost involved with witness protection and the opportunity to reduce those costs by expediting trials<sup>1013</sup> means there is a need to balance fast tracking with the right to a fair trial for the accused.<sup>1014</sup> That remains an important consideration in any discussion of expediting matters. It was said that there 'are sufficient safeguards in place to ensure natural justice is not affected.'<sup>1015</sup> The process would reduce the opportunity for delaying tactics, but that the normal operation of the legal system would mean that individuals involved in the case would not be any more disadvantaged and in any case would have recourse to existing processes for avenues of redress. The 'Court processes and procedures, rules of evidence, due process etc. would still apply.'<sup>1016</sup>

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<sup>1008</sup> Ibid.

<sup>1009</sup> POL4.

<sup>1010</sup> POL11.

<sup>1011</sup> Ibid.

<sup>1012</sup> POL13.

<sup>1013</sup> POL22.

<sup>1014</sup> Ibid.

<sup>1015</sup> POL24.

<sup>1016</sup> POL14.

## 8.2 Conclusions

The information captured through the empirical research has resulted in some reasonably clear trends for each of the themes of this study and has afforded the opportunity to make some observations about possible amendments to the legislation and changes to practice and procedure. The online survey produced some tentative outcomes aided significantly by the participation of members of the profession outside of policing.

Clearly the survey size is small and the contributions limited when considering the number of potential respondents. The trends noted in the results may well alter with a higher and more diverse survey population. Contributions by state and territory police in the survey would likely have produced a different result in a number of the themes, particularly in relation to those questions dealing with coordination and one agency providing witness protection where relocation out of the original jurisdiction is required.

A broader cross-section of experienced Judges, Magistrates, Defence Barristers and Prosecutors participating would have also contributed significantly to the richness of the data. That said it is encouraging that any responses were received from those cohorts because some excellent comments were provided which enhance discussion in Chapter 9.

## Chapter 9. Discussion

This chapter discusses the overall findings of the research in stages starting with an assessment of the adequacy of current arrangements using the themes of this thesis as the framework. The benefits and the problems associated with witness protection in Australia are included in that discussion.

The chapter describes the findings of the research bringing together elements of the documentary examination and the empirical research. The chapter then describes the results of the attempted assessment of the effectiveness and efficiency of witness protection programs in Australia. The request for information (RFI) used to gather data to inform the assessment of the effectiveness and efficiency of the programs, enabled some analysis, but because of the limitations arising in the data collection, the assessment is not as robust as had been anticipated. The assessment, although incomplete and not covering all the metrics outlined in the RFI, relied on data available in annual reports and other government reviews. Some conclusions about the effectiveness of the Australian programs were achieved.

The chapter makes a number of observations about what could be done to overcome some of the issues raised in each theme. Solutions by way of an alternative witness protection methodology and a uniform legislation, are referred to in this chapter and are detailed in the conclusions of this thesis.

This chapter discusses some of the future threats to witness protection arising globally from the introduction and mass marketing of biometric and facial recognition technology. The anonymity of the participant and the applicant who does not become a participant is in jeopardy as a result of that technology and the invasive social media environment of today.

## **9.1 The adequacy of current Australian witness protection arrangements**

Existing witness protection arrangements have not changed markedly since being introduced in 1995. The practices are very similar to those employed prior to the passage of legislation in Australia. This is because a number of programs in Australia had been operating since 1981 and much had been learned from the American federal witness protection program in developing witness protection arrangements here. Two questions posed in this thesis were, firstly, whether the current arrangements for witness protection in Australia satisfy the objectives set by government and those imposed by the operating environment, and secondly, whether witness protection could be done better.

### **Strengths and weaknesses**

Witness protection in Australia today has a number of strengths and weaknesses that have been highlighted in the preceding chapters. Some could be seen as strengths and weaknesses, a double-edged sword of sorts. It is argued in this thesis that issues that seem outwardly to offer the most desirable outcome might be to the longer-term detriment of the program. For example, witness protection programs are protected by secrecy provisions, which make any effort to find out how they operate difficult, if not impossible. This means that the programs themselves are secure and the location and identity of the participants are also secret, but there are vulnerabilities with the level of secrecy applied to witness protection. Firstly, members of the police force providing protection may pass information on to others, which could compromise the safety and security of the participant. Secondly, excessive reliance on secrecy may prevent effective coordination and cooperation between police forces when relocating participants from one jurisdiction to another. Thirdly, the lack of accountability for the operation of witness protection programs, in the context of good governance and accountability, is affected. Finally, restrictions imposed by the legislation

and the general secrecy that surrounds the programs limits opportunities to analyse their effectiveness and efficiency and make any sort of value judgements about the impact witness protection has had on serious and organised crime.

Secrecy may also hinder access to the program. Witnesses and informants in need of the special assistance the program offers may not be made aware that witness protection might be available in their circumstances. This could be because the police officers undertaking the investigation are not aware of the program or if they are, how to access it, resulting in the witness not being informed and not seeking protection. This issue was highlighted in the 2001 review of witness protection arrangements in New South Wales.<sup>1017</sup> While a recommendation was made in the review to provide more training for New South Wales police officers on the witness protection program, this research is unaware if that training has taken place. Confirmation would have been possible if the New South Wales Police had been required to provide annual reports on the operation of the program and the metrics and reporting requirements advocated in this thesis were applied. Through such measures, government and the public could have greater confidence that the program was achieving an expected outcome.

A strength of the existing arrangements is that one complementary legislative regime applies and to a significant degree the complementary statutes are consistent. Further refinement by way of uniform legislation could ensure greater cooperation and coordination between police forces thereby strengthening the protection arrangement applied to the participants regardless of which program they are included in.

Another strength is the rules involving the inclusion of a witness in most programs. The disclosures the witness is required to make highlight issues impacting on the protection and assistance. They also ensure the Commissioner is aware of all relevant information prior to including the witness in the program. Discrepancies between the disclosure requirements

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<sup>1017</sup> New South Wales Parliament, above n 9.

create inconsistencies that are not helpful to a consistent approach to witness protection in Australia.

Expediting matters involving protected witnesses has not been explored by any government inquiry since the recommendation was made by the PJC in its 1988 report. Participants remain at the mercy of slow court processes. This of course comes at a cost, not outwardly to the courts, but more likely to the participant who is under significant stress and has given up much upon being included in the program. It is argued that this is a significant weakness in witness protection arrangements. Some may argue that the witness has evaded liability for their crimes as a result of turning Crown's evidence because of plea-bargaining or immunity from prosecution. The reality is that without witnesses and witness protection the flow of information to assist police in serious and organised crime investigations may be at risk.

Witnesses seeking to enter witness protection programs in Australia are required to undergo a psychological assessment. The Act requires this during the initial assessment process to help determine whether the witness is capable of adapting to a new life. Participants are also provided ongoing welfare support and assistance during their inclusion in the program. Despite this, the participant is disadvantaged in respect of their resettlement and re-assimilation into society for having performed a service for the government. It remains the case that the participant has given up their linguistic name and everything that attaches to it and will spend the rest of their lives looking over their shoulder never quite sure whether those they gave evidence against are there.

The tension between witness protection and the Family Court of Australia (the Court) following the ruling in *T&F* has not been resolved.<sup>1018</sup> It seems likely that it will only be a matter of time before the Court is again asked to make a decision regarding contact orders relating to a child or children and a non-custodial parent. As part of that decision the Court might have to

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<sup>1018</sup> See Chapter 4.3 Witness Protection and the Family Court of Australia, 106-115, for discussion about the judgment in *T&F*.

examine whether it has authority to require the cessation of protection and assistance so that access and visitation according to the contact orders made by the court can be assured. As suggested in the earlier discussion on this case, the court is not well versed in issues of threat and risk and of the implications for the participant and therefore the criminal prosecution. This represents another weakness in witness protection arrangements and is one that, this thesis proposes, be resolved through legislation.

The themes of this thesis highlight a range of issues that are described in more detail below. In all cases the research results provide guidance insofar as the support or otherwise of the cohorts polled for the issues explored.

## **9.2 Cross-jurisdictional coordination**

The survey undertaken for this thesis asked questions about the effectiveness of current arrangements for witness protection in Australia. Questions were asked whether a national program, or the introduction of a National Witness Protection Liaison Committee (NWPLC), would be an improvement on existing arrangements. The survey also sought views on whether a fully functioning national program and a national liaison committee would be required at the same time. While half of the respondents said that the current arrangements are effective the other half said they were not, but 62% said that one national program would be more effective. A large majority of respondents, 73%, said that coordination by way of a NWPLC was desirable and 62% said that a NWPLC would continue to be required even if one national agency provided witness protection.

The current arrangements for witness protection in Australia seem counterintuitive to the effective operation of witness protection. In their current form, witness protection programs do not appear to achieve effective cross-jurisdictional coordination, and the NWPP appears little known, poorly understood and poorly patronised, possibly because of parochial attitudes. The extant arrangements also reveal division between the police forces

operating them because the agencies are not required to cooperate, rather, they do so only where they have a particular need to.

In his report, Roberts-Smith<sup>1019</sup> described the NWPLC proposed by the PJC and interpreted arrangements suggested by the NPRU<sup>1020</sup> to be ‘the creation of a national scheme to be utilised by the States on a user pays basis.’ This thesis argues that the arrangements described by the NPRU did not amount to a national witness protection program. They suggested cooperative arrangements between police forces, that were already in place, be maintained. Moreover, the NPRU approach relied on agencies working closely together to deliver witness protection services. Roberts-Smith suggests<sup>1021</sup> this is not common practice, saying<sup>1022</sup> that the general practice is for agencies to relocate participants to different jurisdictions without advising the receiving jurisdiction unless there are compelling reasons to do so. Arguably, what was missing was legislation and a statutory national witness protection program.

Legislation to create a national witness protection program was passed in 1994 following the PJC inquiry.<sup>1023</sup> A national witness protection scheme was devised through the establishment of the NWPP under the *Witness Protection Act 1994* (C’th) and the passage of complementary witness protection legislation in all Australian states and territories. Some more minor amendments to the legislation have been passed over time, but they have not materially affected the operation of the programs. The NWPP and state and territory programs operate according to the legislation created as a result of the PJC inquiry.<sup>1024</sup>

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<sup>1019</sup> Roberts-Smith RFD QC, above n 9, 20.

<sup>1020</sup> McGrath, above n 8, 5-9.

<sup>1021</sup> Roberts-Smith RFD QC, above n 9, 165 [811].

<sup>1022</sup> *Ibid.*

<sup>1023</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1.

<sup>1024</sup> *Ibid* (xiii)-(xv).

While the *Witness Protection Act 1994* (C'th) creates the NWPP<sup>1025</sup> it does not compel its use by state and territory agencies when dealing with the protection of witnesses in serious and organised crime cases. Without a mechanism to ensure the NWPP is used, states and territories are free to include witnesses who require relocation and re-identification in their programs. This has the effect of shunning the NWPP except in cases where the NWPP is, in the opinion of the state and territory protection providers, better able to deliver the requirements of specific operations. The NWPP annual reports refer to funding recovered from non-Commonwealth agencies. This suggests state and territory police forces and others requiring the protection services of the national body, do use the NWPP for some witness protection operations.

One of the reasons for the reluctance by some states to use the NWPP is seen in discussions in the PJC enquiry of 2000.<sup>1026</sup> There the Victorian Government<sup>1027</sup> said it considered the NWPP, because of criteria<sup>1028</sup> the Commissioner is required to consider when including a witness in the NWPP, too restrictive and therefore not benefiting a national complementary witness protection scheme.<sup>1029</sup> The PJC heard evidence<sup>1030</sup> that a witness who was deemed suitable to be included in the NWPP might not be accepted into the Victorian program because there the Victorian Chief Commissioner of Police has unfettered authority to decide who is admitted into the Victorian program and when. The Victorian government did not expand on this rationale. It could be inferred though that the Victorian government representative was suggesting that the Victorian Chief Commissioner would apply a more rigorous standard for determining whether a witness could be included in the program. The comments do tend to indicate a belief that the entry requirements for the NWPP are too stringent because the words 'too

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<sup>1025</sup> *Witness Protection Act 1994* (C'th).

<sup>1026</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8, 27.

<sup>1027</sup> *Ibid* 27.

<sup>1028</sup> *Witness Protection Act 1994* (C'th) s 7-8.

<sup>1029</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8, 27.

<sup>1030</sup> *Witness Protection Act 1991* (Vic) ss 3B(1).

restrictive' were used. It is argued that the proposition put to the Committee was flawed in the context of logic and practice and in any case is an unlikely scenario.

In response to Victoria's comments, the NCA said,<sup>1031</sup> 'in our federal-state arrangements the states are at liberty to do whatever they wish to do in that context.' This comment was directed to the unfettered authority<sup>1032</sup> of the Chief Commissioner of Police in Victoria to decide who is included in the Victorian program. When asked to comment, the Commonwealth Ombudsman said that the criteria applied in the NWPP 'appeared to be an appropriate set of considerations that should properly be kept in mind when a decision is made on a matter of this nature.'<sup>1033</sup> He also suggested the approach adopted in the Victorian legislation was inconsistent with public accountability measures adopted by the Commonwealth Parliament.<sup>1034</sup> The amendments proposed to the Victorian witness protection legislation,<sup>1035</sup> to become operational in December 2014, will align the disclosure requirements in the Victorian Act with those in the Commonwealth and most other state jurisdictions.

It is highly unlikely that the AFP would seek to have a participant in the NWPP included in the Victorian program or programs run by any of the states or territories. There is simply no need. This issue does reflect the independence of the states and territories in law enforcement and other matters. It highlights a deeper issue identified by the earlier PJC<sup>1036</sup> when the Victorian Government<sup>1037</sup> and the Attorney General<sup>1038</sup> both said, that, 'the

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<sup>1031</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8, 2 Evidence of Mr Peter Lamb, General Manager NCA Operations.

<sup>1032</sup> *Witness Protection Act 1991* (Vic) ss 3B(1).

<sup>1033</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8, 27.

<sup>1034</sup> *Ibid.*

<sup>1035</sup> *Witness Protection Amendment Act 2014* (Vic); See also Annexure 5 for details of the proposed amendments to the Witness Protection Act 1991 (Vic).

<sup>1036</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 74.

<sup>1037</sup> *Ibid.*, citing In Camera Evidence, Victorian Government, 588.

<sup>1038</sup> *Ibid.*, citing In Camera Evidence, Attorney General, 717.

area of witness protection is one bedevilled by territorial jealousy and mistrust, a fact admitted by some police forces.’ This might be a more substantial reason for the lack of reliance on the NWPP and the continued adherence to the state and territory programs under the umbrella of a national scheme based on complementary legislation. With all the jurisdictions involved in the PJC enquiries and in developing Australian witness protection legislation, it is surprising to see calls in Victoria in 2005<sup>1039</sup> and 2008<sup>1040</sup> for the establishment of a national witness protection program. These two reviews examined legislation and witness protection programs in Australia and overseas, but astonishingly, both failed to include the NWPP in their comparisons.

While the NWPP is accessible<sup>1041</sup> to witnesses from state and territory jurisdictions, most state and territory police apparently prefer to manage their own programs and participants with very few referrals to the NWPP. The then Director of the Victorian Office of Police Integrity, G. E. Brouwer, said in 2006<sup>1042</sup> that ‘witness protection programs in the states and territories already co-operate extensively’ and that relocation to another jurisdiction occurs while control of the participant remains with the police force that originally included the witness in their program. In the same report, Brouwer went on to say that Australia is amenable to the creation of a national scheme, but his study failed to recognise the existence of the NWPP. Brouwer’s concept of a ‘single co-operative program’<sup>1043</sup> suggests he is opposed to the existing arrangements in Australia. It also indicates he was dismissive of the NWPP, but in the absence of any given reason for his objection to the existing NWPP, the conclusion to be drawn is that witness protection is still an area of policing experiencing some degree of rivalry in Australia. That proposition can be traced back to the PJCs in 1988 and

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<sup>1039</sup> Office of Police Integrity Victoria, above n 9.

<sup>1040</sup> Glenane, above n 835.

<sup>1041</sup> *Witness Protection Act 1994* (C’t’h) ss 8(1).

<sup>1042</sup> Office of Police Integrity Victoria, above n 9, 30 [7.4].

<sup>1043</sup> *Ibid.*

2000.<sup>1044</sup> These issues highlight the fact that states and territories prefer a cooperative scheme, which maintains their independence, over a national program that would likely deliver more effective and efficient protection arrangements for those who are in need of witness protection.

Witness protection programs in the states and territories are increasingly being used for cases other than serious and organised crime. This may be the normal evolutionary trend for witness protection programs. The American program started out as a tool to combat the Italian Mafia in the 1960s and 1970s, but its use was expanded to include other instances of serious and organised crime. Australian states and territories are, on their own admission,<sup>1045</sup> using the programs to provide witness protection for matters to do with domestic violence and possibly other crimes where violence is identified. No definitive figures are available to demonstrate a national trend, however, Western Australia started reporting that domestic violence cases were being referred to witness protection in that state in the 2007/2008 Annual Report. The use of the programs is entirely at the discretion of the protection providers. Their use in matters outside of serious and organised crime reflects the earlier discussion in this thesis about assistance to vulnerable and intimidated witnesses<sup>1046</sup> and measures needed to encourage those witnesses to give evidence.<sup>1047</sup> It is also consistent with the comments of the PJC<sup>1048</sup> that witness protection could be used for matters other than serious and organised crime.

A question arises whether witness protection is, for witnesses and victims in domestic violence and other crimes, the avenue of last resort and whether all other options have been exhausted. It may be that witness protection is a convenient tool where some form of protection is required in cases outside of those involving serious and organised crime. It may be that domestic

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<sup>1044</sup> Parliamentary Joint Committee on the National Crime Authority, above n 8, 27.

<sup>1045</sup> Joint Standing Committee on the Corruption and Crime Commission, above n 9, 7.

<sup>1046</sup> See Chapter 3 Review of the Literature.

<sup>1047</sup> See Chapter 2 History of Witness Protection.

<sup>1048</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 15-16 [2.21].

violence is interpreted to be serious crime for the purposes of the witness protection program in some jurisdictions. The use of witness protection for matters falling short of serious and organised crime is catered for in the tiered structure for witness protection advocated in this thesis. Protection and assistance at the Tier 2 and Tier 3 levels ensure a level of protection commensurate with the issue, with effective linkages to Tier 1 arrangements where necessary given the seriousness of the threat to the witness.

Adoption of a NWPLC under the APMC was relatively well supported in the online survey however it did not find favour with the APMC in the past.<sup>1049</sup> There can be little doubt but that the introduction of an annual Australasian Heads of Witness Protection Forum<sup>1050</sup> and the work of the ANZPAA<sup>1051</sup> Witness Protection Forum<sup>1052</sup> in developing standards and competencies for witness protection, lends great strength to the overall continuity of practice. The adoption of standard training programs<sup>1053</sup> for all agencies should lead to consistent practice and procedure. As identified in the empirical research<sup>1054</sup> in this thesis, that does not seem to be the case. These forum and training courses demonstrate some consistency amongst witness protection providers in Australia and the region through ongoing dialogue on issues in witness protection.

More effective and closer cooperation between European protection providers is evident in the development of the Model Witness Protection

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<sup>1049</sup> See Chapter 2.5 The development of witness protection in Australia, 39-50; and Chapter 4.1 Inquiries into witness protection, 85-92.

<sup>1050</sup> See Chapter 6.4 Cooperation between police forces in Australia, 161-163.

<sup>1051</sup> <https://www.anzpaa.org.au/>

<sup>1052</sup> There is no reference to the Witness Protection Forum on ANZPAA's public website, but through contact with ANZPAA on the availability of NPRU research on witness protection, this thesis is aware of the work of ANZPAA in common police services, including witness protection standards and competencies.

<sup>1053</sup> Crime and Misconduct Commission, 'Crime Misconduct Commission Annual Report 2008-09' (2008-2009); Western Australian Police, '*Witness Protection (Western Australia) Act 1996* Annual Report - 2011-2012' (2012) 3.

<sup>1054</sup> See Chapter 8.1 Analysis of online surveys, Cross-jurisdictional coordination of witness protection, 205-213.

Bill,<sup>1055</sup> the *Good Practices For The Protection Of Witnesses In Criminal Proceedings Involving Organized Crime*,<sup>1056</sup> the *EU Standards for Witness Protection and Collaboration with Justice*.<sup>1057</sup> The recent actions of Europol informally coordinating witness protection arrangements across Europe,<sup>1058</sup> also demonstrates an appreciation of the need for greater coordination and cooperation. This Europol group meets regularly to discuss issues to do with witness protection, to exchange ideas, develop good practice and make recommendations for harmonising national legislation.<sup>1059</sup> These are presumably issues similar to those discussed in the Australasian Witness Protection Forum and ANZPAA, while they are important, do not assist in determining the relocation issues for witness protection programs operating Australia.

Such coordination is clearly necessary in Europe with its composition of smaller countries and the need to relocate witnesses outside of the original jurisdiction. A higher level of coordination could be achieved in Australia because this is not a federation comprised of eight separate countries, but one country with eight states and territories. The argument put forward in this thesis is that a committee providing oversight in cases where re-identification and relocation are required would be necessary in the absence of a single agency providing Tier 1 witness protection arrangements in Australia.

National coordination and relocation can only effectively be done by a Commonwealth agency because of jurisdictional issues faced by state and territorial police and the logical choice for this task in relation to witness protection is the existing NWPP established and maintained by the AFP, a point well made by the PJC.<sup>1060</sup> Unfortunately, because of the lack of

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<sup>1055</sup> United Nations Drug Control Program, above n 26.

<sup>1056</sup> United Nations Office on Drugs and Crime, above n 12.

<sup>1057</sup> Institute for International Research on Criminal Policy, above n 286.

<sup>1058</sup> United Nations Office on Drugs and Crime, above n 12, 84.

<sup>1059</sup> *Ibid.*

<sup>1060</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 76-82 [5.30]-[5.39].

response to the survey, the issue of the national coordination of witness protection under the NWPP is left open to interpretation from comments and omissions in the reports<sup>1061</sup> referred to above. It may be more likely that the states and territories would agree to an independent Commonwealth agency providing a national witness protection role rather than the AFP. No clear reasons are expressed in any of the research why that would or should be the case or why it would make a difference whether it was the AFP or another Commonwealth agency. Any further discussion in Australia about an effective and efficient national witness protection program would require a dispassionate consideration of the issues in the absence of bias or parochial mindsets.

In practice, state and territory police, unlike the AFP, generally have no jurisdiction outside their state or territory. Their scope to relocate participants outside their own state is more restricted unless they call on the assistance of state or territory police in the area of the relocation. An argument exists for considering the British model of transferring a participant from one protection provider to another under a user pays arrangement. There are a number of attractions to this option. A participant is unlikely to be relocated to a location where they may still be in danger from individuals associated with those he or she is giving evidence against. While a threat assessment is conducted to justify that requirement of entry into the program and should be shared with the original police force, that original police force may not be fully aware of the undesirable elements in the location chosen for the relocation in the same way as the police force in that new location. The national witness protection arrangements in the United Kingdom have been criticised<sup>1062</sup> as not providing an effective national program. Nonetheless, transferring participants from one witness

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<sup>1061</sup> Roberts-Smith RFD QC, above n 9; Office of Police Integrity Victoria, above n 9; Glenane, above n 835.

<sup>1062</sup> Paul Cahalan, 'Police chiefs call for new national system of witness protection', *The Independent* (London (UK), United Kingdom, London (UK)), 2011, 8 <http://search.proquest.com.ezproxy.une.edu.au/docview/873683732?accountid=17227>.

protection program to another is an option considered at the Tier 2 level in the arrangements recommended in this thesis.

### **9.3 Inclusion in a witness protection program in Australia**

The empirical research revealed a vast majority of respondents (twenty-two or 85%) considered the safeguards contained in the Commonwealth Act were appropriate and sufficient. The safeguards referred to are the disclosures required of the witness when applying for inclusion in the NWPP and some state and territory programs in Australia. The high survey score suggests the disclosures are a useful element of the inclusion process. This supports the position taken by Commonwealth agencies in the PJC of 2000 on the question of the difference between the Commonwealth and the Victorian requirements. The uniform legislation proposed in this thesis models the disclosure requirements on the existing Commonwealth legislation.

Few issues are raised in relation to the inclusion of participants in a witness protection program in the thesis. The legislation is clear on the requirements of the witness's disclosure and the matters commissioners must take into consideration before admitting a person into the witness program they administer. Entry into the program is voluntary; that requirement is sacrosanct and noted in much of the literature referred to in this thesis. Equally, voluntary cessation of protection and assistance must always remain a feature of the program because participants are not prisoners of the NWPP or state or territory programs. The termination of protection and assistance is described in the Act, but there were issues raised in the online survey about terminating protection and assistance for breach of the MOU.

The online survey raised three questions relating to the MOU. Firstly, whether the MOU carried sufficient legal weight to ensure the performance of rights and obligations; only 38% agreed that the MOU carries sufficient legal weight. Secondly, whether the MOU should contain a clause requiring

the participant to give evidence to the best of their ability; 73% of respondents agreed that a clause to that effect would be worthwhile. Finally, whether the MOU should contain provisions enabling cessation or termination of protection as a consequence of the participants' failure to discharge his or her commitment; again 73% agreed. The Act already allows for the termination of protection where the participant fails to disclose certain issues,<sup>1063</sup> where there is a material breach of the MOU,<sup>1064</sup> or where the participant fails to give evidence,<sup>1065</sup> but not where the prosecution raises concerns about the participant's performance when giving evidence.

Two separate responses to questions on this issue in the online survey are worth noting. SCJ2 said that the MOU could include a paragraph requiring the participant to give evidence to the best of their ability. The only consequence attaches to the participant through the possible termination of protection should they fail to do so. A police respondent suggested that a requirement for the participant to give evidence to the best of their ability, expressed in the MOU, would put the onus on protection providers to determine whether the participant was giving evidence to the best of their ability. This is not necessarily the case because it could be argued that it is for the Prosecutor to make that judgement and, if not satisfied, to inform the protection providers that the participant's services are no longer required by the prosecution.

Such a notification would become the trigger for the cessation of protection. It is suggested that the decision about the performance of the protected witness in court is not one for the protection provider whose authority to terminate protection is confined to matters affecting the performance of the protection arrangements caused by the actions of the participant. Where a decision is taken to cease protection and assistance based on advice from the Prosecutor, a further decision would, of course, have to be made about the whether the termination or cessation of protection necessitated the

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<sup>1063</sup> *Witness Protection Act 1994* (C'th) ss 18(1)(b)(ii).

<sup>1064</sup> *Ibid* ss 18(1)(b)(i).

<sup>1065</sup> *Ibid* ss 18(1)(b)(v).

restoration of the former identity of the participant or whether it simply meant the early finalisation of protection and assistance. In these situations, restoration of the former identity to the now former participant would be the most likely outcome because of the material breach of the MOU. The facts would have to be weighed on a case-by-case basis by the protection provider noting the avenue of complaint to the Ombudsman for an aggrieved participant or former participant. Other issues, for example, an indemnity from prosecution that may have been granted to the participant, would have to be considered, but this remains an issue for the Prosecutor, not the protection provider.

It is relevant to note that the Canadian legislation requires<sup>1066</sup> a participant in that program ‘to give ... evidence ... as required in relation to the ... prosecution to which the protection provided under the agreement relates.’ The Australian legislation does not contain a similar requirement to be included in the MOU although it is argued that the terms and conditions<sup>1067</sup> of the MOU could be expanded to accommodate a similar, or more direct, clause.

## 9.4 Identity documents

The research for this thesis did not identify any particular issues with the provision of identity documents for participants. There is a question of whether the supervision of the Supreme Court in the states and territories is required for a birth certificate to be created in the participant’s new identity. The state and territory Acts, with the exception of the Queensland Act,<sup>1068</sup> require an order from the Supreme Court authorising an entry to be made so that a birth certificate in the participant’s new identity can be produced. The results of the empirical research in this thesis were ambivalent about court supervision in that there was neither strong support for, nor strong

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<sup>1066</sup> *Witness Protection Program Act 1996* (CA) ss 8(b)(i).

<sup>1067</sup> *Witness Protection Act 1994* (C’t) ss 9(2)(a).

<sup>1068</sup> See Chapter 5.3 Legislation by study theme, Identity documents, 137-139.

opposition to it, in the context of an order to make an entry into the Register of Births.

The survey results indicated that 54% of respondents believed the Supreme Court should not be involved in the process because this creates another vulnerability in respect of the participant's identity. One survey respondent expressed concerns that documents relied on in the application to the Supreme Court for an order to make an entry to the register, were not returned to the protection provider once the court had dealt with the request. This means that, firstly, court staff other than the presiding Judge might gain access to the documents, which creates vulnerability for the new identity of the participants, and, secondly, the documents are not appended to the register of participants according to the Act.<sup>1069</sup>

An anomaly exists in the legislation because two sections of the Act are inconsistent. The Act requires the identity of the participant to be kept secret and provides protections such that a police officer cannot be compelled to disclose information to a court, tribunal or other commission of enquiry about the participant's identity. The Act also requires the protection provider to reveal the participant's name to the Supreme Court Judge when seeking an order for an entry to be made to the register for a new identity document to be produced. This creates an inconsistency. The Act also requires<sup>1070</sup> police involved in witness protection to be granted a national security clearance, but the same is not required for the Supreme Court Judge hearing the application for an order.

The witness protection legislation<sup>1071</sup> makes the Commissioner responsible for all matters to do with the administration and operation of the program. In relation to identity documents, the NWPP must comply with

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<sup>1069</sup> *Witness Protection Act 1994* (C'th) ss 11(5).

<sup>1070</sup> *Ibid* s 3 referring to designated positions within the NWPP.

<sup>1071</sup> *Ibid* s 4; *Witness Protection Act 1996* (ACT) s 4; *Witness Protection Act 1995* (NSW) s 5; *Witness Protection Act 1991* (Vic) s 3A; *Witness Protection Act 1996* (SA) s 4; *Witness Protection (Western Australia) Act 1996* s 5; *Witness Protection Act 2000* (Tas) s 4; *Witness Protection Act 2000* (NT) s 5; *Witness Protection Act 2000* (Qld) s 5.

arrangements relating to obtaining birth certificates included in state and territory legislation.<sup>1072</sup> The same is not the case for state and territory programs accessing Commonwealth identity documents where the limitation is that complementary legislation be in place.<sup>1073</sup> The Commonwealth identity documents are available to participants without the requirement of a Court Order and without the need for the participant to be included in the NWPP. The Canadian model requires<sup>1074</sup> that where a participant of a provincial witness protection program requires Federal identity documents, an application must be made to include the participant in the federal witness protection program. The participant must be included in the federal program before they can be provided with Federal identity documents.

It is argued in this thesis that the legislation should be amended, with a new clause to be substituted for the old clause requiring a Supreme Court authorisation to produce an identity document. The new clause would give the AFP Commissioner the power, as the custodian of the NWPP, to authorise an entry to be made in the appropriate register in the relevant state. This proposition received support in the survey.

### **Issues to do with changing a participant's identity**

Changing the identity of the participant and relocating them are the central goals of witness protection programs and are measures adopted internationally to ensure the safety and security of participants. Changing a participant's identity is inextricably linked to Montanino's theory<sup>1075</sup> of 'social death and social rebirth'. The problems associated with that

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<sup>1072</sup> *Witness Protection Act 1994* (C'th) ss 13(2)(a); *Witness Protection Act 1996* (ACT) s 7 but note the ACT limits authority to apply for a court order to the Chief Police Officer, it does not permit an approved authority to apply for a court order; *Witness Protection Act 1995* (NSW) ss 15(1A); *Witness Protection Act 2000* (NT) ss 14(2); *Witness Protection Act 2000* (Qld) s 15-17; *Witness Protection Act 1996* (SA) ss 13(2)(a); *Witness Protection Act 2000* (Tas) ss 9(2); *Witness Protection Act 1991* (Vic) ss 6 (1A); *Witness Protection (Western Australia) Act 1996* ss 20(2).

<sup>1073</sup> *Witness Protection Act 1994* (C'th) s 24.

<sup>1074</sup> *Witness Protection Program Act 1996* (CA) ss 14(1).

<sup>1075</sup> Montanino, above n 304.

phenomenon are described earlier.<sup>1076</sup> There is also a natural connection between the concept of fast tracking cases involving protected witnesses and continued psychological assistance for the participant throughout their inclusion in the program. While psychological assessments and ongoing psychological assistance appear to be accepted as part of the program, the issue of fast tracking cases is not. This thesis argues that expediting cases involving witness protection cases requires further research insofar as the impact on the participant is concerned.

## 9.5 Confidentiality

The next matter to deal with is the confidentiality that surrounds the operation of witness protection programs in Australia. These issues have been canvassed in this thesis,<sup>1077</sup> but, while secrecy is essential, there is a question about whether the secrecy provisions of the relevant Acts were intended to restrict access to all information about the programs.

The level and quality of reporting on the operation of witness protection programs by Australian agencies varies both in form and substance. Currently, reporting generally includes the overall cost of running the program, the number of participants included (although this is also inconsistently recorded) and the number of active operations in the year. Little reporting exists on the types of crime including drugs, fraud, cyber crime etc., on which the protected witness is giving evidence. If a broader range of information were available, government would be better able to understand the impact of witness protection and other measures, on serious and organised crime. More effective disruption programs to combat serious and organised crime might be able to be developed, but in the absence of meaningful performance measures that can demonstrate the effects of witness protection, little analysis can be done.

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<sup>1076</sup> See Chapter 3.1 The previous research in the United States of America, Adjusting to a new life, 64-66, for further discussion on the implications of 'social death and social rebirth' of the participant.

<sup>1077</sup> See Chapter 7.5 Secrecy and its impact on the research, 193-196; and Chapter 6.6, Confidentiality versus other secrecy controls, 164-167, for broader discussion on the issues.

A more comprehensive set of metrics<sup>1078</sup> would enable a more complete analysis of witness protection programs, without affecting the safety and security of the participants and the integrity of the program. It is clear from the annual reports provided by Queensland and Western Australia and from the observations of at least two reviews,<sup>1079</sup> that more information could be reported without jeopardising security. While the Act stipulates that officers cannot be required to disclose or communicate information about the program or matters or things that come to their attention, it is argued that those provisions of the Acts are intended to limit the release of information about the identity and location of the participant only.

The confidentiality of information about a witness, including the disclosure of information both by and about a witness or a participant and about the program itself, is well catered for in the Act. The Act and complementary legislation do not deal with the use of suppression orders and closed courts to protect the identity and location of participants while giving evidence well. The Magistrate or Judge manages these matters on a case-by-case basis. This thesis though, recommends that a minimum set of standards should be set out in the uniform legislation to apply to all Tier 1 and Tier 2 matters going before the courts.

## **9.6 Fast tracking cases involving protected witness**

Expediting cases involving protected witnesses is achievable. The survey indicated that 73% of respondents agreed that cases involving protected witnesses should be fast tracked. Interestingly, when asked whether fast tracking these cases would adversely impact the rights of the accused to a fair trial, 61% said it would not. Fast tracking should never be done at the expense of the right of the accused to a fair trial. There is a question though and that is whether a fair trial should take up to ten years to complete. There

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<sup>1078</sup> See Chapter 1 Introduction; Chapter 9.8 The effectiveness and efficiency of Australia's witness protection programs, 254-260; and Annexure 13.

<sup>1079</sup> Office of Police Integrity Victoria, above n 9; Joint Standing Committee on the Corruption and Crime Commission, above n 408.

is an argument that more active case management should be adopted to reduce significantly the time taken to complete the trial. A more actively managed approach has been used in relation to other matters to good effect.<sup>1080</sup>

The impediments to fast tracking include the historical approach to the adversarial system of justice in Australia and the importance of the doctrine of the right to a fair trial for the accused. On the other hand, there are many reasons to consider expediting cases involving protected witnesses. For example, the stress and psychological harm to the participant, witness dependence on the support they receive from police and the lack of an ability to assume a normal place in society in the new name because of continued delays in court cases. These are real and pressing issues, which demonstrate the need to ensure the participant is able to leave the program after court processes are concluded in a more reasonable timeframe.

It may be a convenient truth that the criminal justice system needs these witnesses and upon inclusion in a program, the protection provider and the government assume some responsibility for their well-being. Efforts to alleviate the stress associated with the threat to life, the social death and social rebirth of the participant and giving up their entire history, falls within that responsibility, even if only morally and ethically.

As has already been established, no studies have been conducted on fast tracking cases involving protected witnesses in Australia. Expediting cases involving participants in witness protection should be explored as a means of reducing the time protected witnesses spend in formal protection programs.

## **9.7 Governance and accountability**

External oversight and review could be managed through the evaluation of agencies performance delivering witness protection with an eye to the

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<sup>1080</sup> See Chapter 4.4 Court Case Management, 115-117, for discussion about the research that has been done in relation to expediting matters.

success of the program and the resource impost. In this area there are three specific issues to consider. Firstly, whether regular oversight by a parliamentary committee would ensure the NWPP was delivering the outcomes expected of it. Secondly, whether the role of the Ombudsman and the Integrity Commissioner are appropriate and necessary. Finally, whether an assessment of the effectiveness and efficiency of the program is possible and if not, how such an assessment could be facilitated.

### **External oversight and review**

Parliamentary committees oversee the operation of witness protection programs at the Commonwealth<sup>1081</sup> and state<sup>1082</sup> and territories. Of those, arguably only the Parliamentary Joint Committee on Law Enforcement (PJCLE) at the Commonwealth level and the Parliamentary Crime and Misconduct Committee (PCMC) in Queensland have direct oversight of the witness protection program in those locations. In Western Australia, the police operate the Witness Protection Program and the JSCCCC is an oversight body for the Corruption and Crime Commission, not the police.

The survey sought views on the oversight arrangements as they currently stand for witness protection programs. Fifteen respondents, or 58%, said that external oversight of the programs is necessary and twenty-two or 85% said that current measures are sufficient. On the other hand, nineteen respondents, or 73%, said that greater scrutiny is desirable. This is a relatively high percentage even taking into account the small numbers, suggesting overall support for independent external oversight for the programs. This does not suggest a role for a parliamentary committee in decision-making about witness protection programs, rather in ensuring transparency of the administration of the program and some role in evaluating their effectiveness and efficiency.

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<sup>1081</sup> Parliamentary Joint Committee on Law Enforcement.

<sup>1082</sup> In Western Australia the Joint Standing Committee on the Corruption and Crime Commission; In Queensland the Parliamentary Crime and Misconduct Committee.

Examples of judicial determination in relation to aspects of witness protection are seen in two cases cited by Caslon Analytics.<sup>1083</sup> The first in 2007<sup>1084</sup> involved an informant in the case against slain Melbourne crime underworld figure Mario Condello. In this case, the informant went to the Victorian Supreme Court to prevent himself and his wife being removed from witness protection by the Victoria Police who argued that he was no longer at risk and his behaviour was unacceptable. The original arrangement between the informant and the Victorian Police allegedly featured overseas relocation and financial measures worth around \$1 million. The Court rejected his claims.

The participants appealed to the Director of the Office of Police Integrity against the decision of the Chief Commissioner to terminate protection and assistance. The Director, after considering the appeal, dismissed the applicants' appeal against termination from the witness protection program. The participants appealed to the Victorian Supreme Court of Appeal. At issue in this case was whether the Director of the Office of Police Integrity in Victoria erred in defining the nature of the appeal insofar as the extent of his decision making powers and responsibilities. The Court found that the Director was not precluded from making a decision, on the facts presented to him that might be different from the decision made by the Chief Commissioner of the Victorian Police Force.

In considering the appeal by the participants against the Chief Commissioner's decision to terminate protection and assistance, the Director wrongly determined that his role was to examine the Chief Commissioner's decision and determine whether it complied with the requirements of the statute and whether the decision was reasonably open to the Chief Commissioner to make. The Court, after explaining the appeal in this case, was an appeal involving a hearing de novo, determined that the Director had

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<sup>1083</sup> Caslon Analytics, above n 22.

<sup>1084</sup> *Applicants A1 & A2 v Brouwer & Anor* [2007] VSCA 139 (28 June 2007); *Applicants A1 & A2 v Brouwer & Anor (No 2)* [2007] VSCA 269 (29 November 2007); *Applicants A1 & A2 v Brouwer & Anor (No 3)* [2008] VSCA 99 (4 June 2008).

three decision-making steps. Firstly, the decision of the Chief Commissioner to terminate protection and assistance, secondly, confirmation or otherwise of the Chief Commissioner's decision and finally, the decision of the Director in relation to the appeal.

The Court noted that while the Chief Commissioner had sole responsibility for deciding whether or not to include a witness in the witness protection program the same absolute authority did not exist in relation to termination from the witness protection program. In the view of the Court, the Director was required to conduct a merits review of the original decision standing in the shoes of the original decision maker and that his decision should replace the original decision. In doing so, the Court set aside the decision of the Director dismissing the applicant appeal and remitted the 'appeals to the Director for hearing and determination in accordance with the law.'

The second<sup>1085</sup> involved a National Crime Authority witness, 'Mr Gray' and his wife, who sued for damages (including a \$127,457 income tax bill for benefits of around \$45,000 a year) after spending seven years on the New South Wales witness protection program. The Grays claimed police had made promises that they would be looked after. When they were removed from the program in 1998, they were penniless and forced to live off charity after having enjoyed a more affluent lifestyle prior to participation. They were awarded \$400,000 compensation in 2002, but the New South Wales Court of Appeal reduced that sum in 2003.

The Grays brought an action in the New South Wales Supreme Court in equitable estoppel seeking compensation from the defendant on the grounds that they had entered the witness protection program relying on the representations made by the defendant about their future financial security. Those representations included that they would be looked after and not be financially disadvantaged, that the officer giving the undertakings had authority to give them, that while they had serious concerns for their safety, the Grays relied on the representations and finally, that they acted to their

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<sup>1085</sup> *Gray v National Crime Authority* [2003] NSWSC 111.

detriment by relying on the representations. In finding for Mr and Mrs Gray, the Court determined that the representations made by the NCA officer, Inspector Small, were made by that officer exercising the appropriate authority and that the Grays were entitled to rely on those representations. The Court was at great lengths to examine carefully the claims made by the Grays and the evidence of Inspector Small and noted that the evidence of both parties was generally consistent particularly in respect of the representations that the Grays would be looked after.

As an aside earlier discussion in the thesis noted the desirability of a substantial separation between the investigation and the witness protection operation. It seems clear from this case that Inspector Small, as the lead investigator for Operation OMO, had a significant amount to do with the witness protection operation involving Mr and Mrs Gray. Noting the Court's reference to the timing of the agreement between Mr Gray and Inspector Small, particularly that Mr Gray stated that the agreement took place before cooperation commenced and Inspector Small's recollection was that it took place after the cooperation commenced. If the agreement occurred after cooperation commenced the inference to be drawn is that Mr and Mrs Gray had already been included in the witness protection program and presumably the Grays and the Commissioner of the New South Wales Police had been signed a MOU. This issue was not explored by the Court, however, the contents of the MOU, in respect of financial assistance to the Grays, may have been relevant and may have confirmed the nature of the agreement.

The role of the Ombudsman and the Integrity Commissioner have been described in Chapter 5 and there is no need to revisit this except to say that the arrangements are different across jurisdictions. In any case they relate to the review of decisions made by the Commissioner in exercising their authority under the witness protection legislation. It might be preferable if the legislation (the Act and the complementary legislation) was consistent, but in the current circumstances that seems not to be necessary. There are occasions when the courts have considered decisions made by the Commissioner in respect of protected witnesses, but these are infrequent

and the Commissioner's decisions have not necessarily been the primary issue considered by the courts.

## **9.8 The effectiveness and efficiency of Australia's witness protection programs**

Assessing the effectiveness and efficiency of witness protection programs is a difficult process. This is because of the limited data, which is overall incomplete and uneven, and because access to the information is problematic. Some researchers<sup>1086</sup> have noted that insights about the operation of witness protection programs are not readily available. This is clearly understandable, however, the Crime and Misconduct Commission (CMC) and the Western Australian police have included data and examples in their annual reports that will assist if refined further.

Of the annual reports currently provided, the report on the NWPP is the most complete, although more recent reporting from Western Australia is relatively complete. The reports from Queensland, when the annual reports and the three yearly reports are read concurrently, provide in-depth information while the reporting from South Australia is particularly poor. What is required is consistent and sufficiently detailed reporting that does not compromise security. There are grounds for recommending that the reporting arrangements be reviewed and that reporting should include more comprehensive metrics. This would assist and support the external oversight of witness protection and afford government and the public more visibility on expenditure for witness protection and the effect that expenditure was having on the fight against serious and organised crime.

Witness protection is not the only measure available to the police repertoire that can be used against serious and organised crime. Human sources, undercover policing, telephone intercepts, listening devices and enhanced surveillance capabilities are all effective measures. The question remains, why is serious and organised crime still attracting more and more

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<sup>1086</sup> Caslon Analytics, above n 22; Slate, above n 51; Fyfe and Sheptycki, above n 77.

government attention, effort and expense? Are law enforcement treatments not effective, are they being pitched at the right quadrant and are they having an effect in respect of illicit drugs and illicit money flow or are they still lagging behind the capabilities of serious and organised crime for some other reason or a range of other reasons?

This thesis identified the lack of empirical data from which to conduct an assessment of the effectiveness and efficiency of witness protection programs in Australia. This key gap in knowledge about witness protection was described in Chapter 3.6.<sup>1087</sup> In order to complement the information available from witness protection annual reports and data recorded in official government reviews,<sup>1088</sup> a request for information was provided to Australian Police Commissioners seeking further information on their programs.

The request for information sought to gather sufficient suitable and non-identifying information from which to base an assessment of the effectiveness and efficiency of witness protection programs in Australia. The metrics<sup>1089</sup> were designed in such a way as to maintain the integrity of the participant's new identity and their location, that of the programs themselves as well as ensuring police operating methodologies were not exposed. The metrics for this thesis cover many of the same reporting requirements suggested by Office of Police Integrity (OPI)<sup>1090</sup> and the JSCCC<sup>1091</sup> and some which are already contained in the Three Yearly Reports of the operation of the CMC in Queensland.<sup>1092</sup> The Western

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<sup>1087</sup> A significant gap in research and knowledge 79-80.

<sup>1088</sup> See Annexure 10 for the results of the data collection from annual reports and government enquiries that informed the analysis of the effectiveness and efficiency of witness protection programs in Australia.

<sup>1089</sup> See Chapter 7.4 The Request for Information, 189-191; and Annexure 9.

<sup>1090</sup> Office of Police Integrity Victoria, above n 9, 44-45.

<sup>1091</sup> Joint Standing Committee on the Corruption and Crime Commission, above n 408, 47-50.

<sup>1092</sup> Queensland Government, 'Report 79: Three Yearly Review of the Crime and Misconduct Commission' (2009) 93; Queensland Government, 'Parliamentary Crime and Misconduct Committee (QLD), Report No 86, March 2012, Three Year Review of the Crime and Misconduct Commission' (2004) 132-133.

Australian Police annual reporting has recently expanded the areas covered to include prosecutions, not in all cases, but at least in some.

The Police Commissioners did not provide the information sought, rather they cited the secrecy provisions of the Act in their jurisdiction as limiting their ability to provide the data sought for the research. The information gathered from the documents on the public record gives a limited overview of the cost of operating programs in some jurisdictions. In some cases the number of witness included and removed from the programs in each calendar year is available and for some it is not. Current reporting does not provide adequate results to enable an extrapolation across the whole of Australia. However it enables some observations about the future of witness protection. The recommended metrics for annual reporting is contained at Annexure 13.

The total number of operations run by the NWPP from the commencement of the program in 1995 is 291, noting that this figure does not include separate data for 1995 and 1996 and that data is rolled into the figures presented in the 1997 annual report. Operations concluded in its time of operation, 23 that include 80 participants, but no data were available for 1995-1997. Assessments conducted in the relevant period are 18 that include 38 witnesses although data is not available for 1995, 1996, 1997, 1999 and 2000. In the review period, participants in the NWPP made 14 complaints to the Commonwealth Ombudsman, but no data is provided for 1995, 1996, 1997 and 1998. The total cost of operating the program from 1995 to the end of the financial year 2012 was \$21,931,285.17 of which \$7,846,242,82 was recovered from 'non-government' agencies.

The next almost complete data set relates to the Queensland CMC witness protection program and unlike the NWPP, records for the CMC program extend back to 1988 when the Criminal Justice Commission operated the program. The total number of operations conducted is 1,325, but there are no figures available for 2009, 2010, 2011 and 2012. The CMC received 2673 referrals and commenced 524 operations involving 1167 participants, but

data was not available for operations between 1988 and 1994, 1997, 2001 and 2008 and 2012. Corresponding data on participants was not available for 1988 to 1994, but was available for the remaining years. The CMC concluded 553 operations with 726 participants, but data was not available for 1988 to 1994, 2004, 2005, 2009, 2010, 2011 and 2012. The cost of operating the CMC program was \$43,400,000 for the period 2004 to 2012. No financial data was available for the period 1988 to 2003 inclusive.

In Western Australia, where the program commenced in 1996, reporting is relatively complete and has become more consistent in recent years with the exception of reporting on the number of participants included in the program in the relevant financial year. Figures in this category were discontinued in the annual reports from 2009 to the present and figures for the number of operations conducted did not appear in the annual report until 2004, so there are none recorded between 1997 and 2003. The 2013 annual report indicated 20 participants currently in the program and that figure has fluctuated from as few as seven in 1999 to as many as 27 in 2011. The number of assessments conducted in 2013 was 28 and that number has varied from as low as four in 2002 to as many as 38 in 2008. Western Australia began reporting domestic violence cases and organised crime cases being considered for witness protection in 2008. On the available data, 47 participants have been included in the Western Australian Witness Protection Program, but without data for 2009-2013 this figure is deficient. It is not possible to calculate the number of participants included each year by manipulating the data for the total number of participants less those for whom protection and assistance has been terminated and those who have left voluntarily because an exercise calculating against those figures shows them to be incorrect.

Nonetheless, on the data provided protection and assistance was terminated for a total of 68 participants since 1997, noting there is no information for 2003. A total of 284 assessments have been conducted, not counting 2003 and a total of 91 operations are recorded, but none for 1997 to 2003. Financial expenditure information is available for the Western Australian

program between 1997 and 2013, with the exception of 2003 and it is calculated at \$3,957,062.82. Western Australia now reflects in its annual report the cost of maintaining the participants and the cost of operating the program, insofar as the Witness Protection Unit costs are concerned, separately. Other annual reports for the NWPP, CMC and South Australia do not show the operating costs separately and there is a question about whether operating costs are included at all in the figures reported.

The witness protection program has been operating in South Australia since 1996, and the data from annual reports is particularly limited. Reporting indicates 330 operations between 2008 and 2010, but no further data is available. In 1997 the South Australian program had 15 participants in it, 10 assessments were conducted and no new participants were included. In 1999 three participants had protection and assistance terminated and in 2000 the program provided protection and assistance to 35 participants while terminating protection for two. Between 2006 and 2010, 13 participants had protection and assistance terminated and in 2007 seven new participants were included. No further data is available from the annual reports.

New South Wales<sup>1093</sup> had 160 dormant and 30 active cases in 2001 and Victoria<sup>1094</sup> spent about \$4.5 million dollars on one operation involving the protection of two witnesses in 1983. No other data could be located for the programs operating in those states.

While it might be tempting to add the figures for the categories addressed above, the outcomes would in no way reflect the actual situation for any of the categories. The data available from each jurisdiction is manifestly inadequate to be meaningful in any assessment of the effectiveness and efficiency of the programs nationally. Even the total combined figure of \$69,288,347.99 for the cost of operating those programs for which some data is available, does not include amounts for some years of operation of the

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<sup>1093</sup> New South Wales Parliament, above n 9, 6.

<sup>1094</sup> Office of Police Integrity Victoria, above n 9, 6.

Queensland and or any data for South Australia, New South Wales and Victoria. It is likely though that the cost of operating the eight witness protection programs would run to something in excess of \$150,000,000.00.

The costs of operating the programs provided in annual reports reflect participant costs, not the total cost of operating the program, except in Western Australia where participant costs are separated from the Witness Protection Units operating costs. The costs of police and administration staff salaries, travel, training and other such costs are not generally included in the other annual reports, neither are office and office supply costs.

Measures for other categories lack the specificity required to make them useful and in any case it is unclear whether each of the annual reports refer to the same thing. For example, does an 'operation' mean the number of witness protection cases on hand or is it the number of visits to court, relocations, family visits and other such operations conducted by the police in connection with participants. The term could have different meanings that produce a different result and that are used differently by each witness protection provider.

No complete figures are available on the number of participants included in the relevant program at the end of each financial year. The figures that are provided give no confidence as to the actual number of participants in the program because none can be reconciled. Additions and subtractions of participants being included in the program or leaving the program respectively is not possible. Thus it is not possible to draw any accurate conclusions from the available data.

	<b>Total operations</b>	<b>Total cost</b>
<b>NWPP</b>	291	\$21,931,285.17
<b>NSW</b>	190	Unknown
<b>VIC</b>	1	\$4,300,000
<b>QLD</b>	1325	\$43,400,000
<b>WA</b>	91	\$3,957,062.82

<b>SA</b>	330	Unknown
<b>ACT</b>	0	0
<b>TAS</b>	0	0
<b>NT</b>	0	0
<b>Total</b>	<b>2228</b>	<b>\$73,588,347.99</b>

**Table 1 - Witness protection operations and costs**

## 9.9 Future threats

The use of biometrics, facial recognition software, and iris scanning and social media technology are a significant emerging problem when ensuring the safety and security of the participant. This matter has been recognised by protection providers and is mentioned in the Western Australian Police annual reports for witness protection.<sup>1095</sup> There is little detail in those reports, however, the reference includes a notation that the matter has been referred to the Western Australian Police Legal Branch for consideration and that it has been discussed in the Australasian Witness Protection Forum. Undoubtedly it will also have been discussed in other similar fora in recent times and is likely to be considered a ‘wicked problem’<sup>1096</sup> and one with intractable ramifications for witness protection and for other covert policing methods.

These future threats defy legislative solutions because most of the technologies are Internet based and regulation on the Internet is fraught. In most cases, most social media such as Facebook provides the facility for anyone with an account to upload and tag photographs with the name the

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<sup>1095</sup> Western Australian Police, 'Twelfth Annual Report for the Period 1 July 2007 to 30 June 2008' (2008), 3.

<sup>1096</sup> <http://lexicon.ft.com/Term?term=wicked-problem> Popularised in the 1973 article *Dilemmas in a General Theory of Planning* by Horst Rittel and Melvin Webber, the term wicked problem refers to a complex problem for which there is no simple method of solution. Wicked problems are ones for which there is no clear stopping rule – you cannot say for sure that you are done with the problem. Working on it more might well bring forth a better solution. There is no single right answer and every attempt can matter because it affects the things people depend upon.

person in the photograph, without the consent of the photographed person. One of the fastest growing forms of biometrics is facial recognition and that technology might be the way of the future.<sup>1097</sup> Ben Ianotta, described the work being done by the Federal Bureau of Investigation in the United States of America as developing 'biometrically enabled intelligence'<sup>1098</sup> to manage and utilise technology to match fingerprints, iris scans and other data about people. While government agencies are engaging in research in this field<sup>1099</sup> and making significant progress, Google, a prominent Internet search engine and the computer company Apple, are using biometric 'algorithms in their social media and photo management software'<sup>1100</sup> which are extremely accurate in identifying 'individuals from a pool of 1.6 million mug shots with 92% accuracy.'<sup>1101</sup> Advances in facial recognition technology are developing at a staggering rate, halving error every two years.<sup>1102</sup>

Some of the issues for witness protection raised above are glaringly obvious. It will be more difficult to hide participants in new communities because the chances that the participant or a family member will have been active on social media are growing. Criminal syndicates have a lot to lose and will no doubt go to great lengths to find those who are or will give evidence against them, and facial recognition software increases the chances they will be found.

Privacy is also an issue for police performing witness protection duties because while they may not be active on social media and may not tag photographs of themselves on the Internet, others may, and that makes identifying and locating the police officer easier. There are, therefore,

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<sup>1097</sup> Ben Ianotta, 'Biometrics C4ISR' (2013) *American Psychological Association* 5, 2.

<sup>1098</sup> Ibid.

<sup>1099</sup> Ibid; Michael Endler, 'FBI's Facial Recognition Program: Better Security Through Biometrics' (2012) *Informationweek - Online*; Ann Cavoukian, 'It's a reality: facial recognition and privacy', *The Globe and Mail* (Toronto), 2011.

<sup>1100</sup> Ianotta, above n 1097, 2.

<sup>1101</sup> Endler, above n 1099, 1.

<sup>1102</sup> Ianotta, above n 1097, 2 quoting Jonathan Phillips, a facial recognition expert at the National Institute of Standards and Technology.

implications in respect of assumed identities<sup>1103</sup> for police in witness protection as well as other police operations.

This is a new threat to the safety and security of participants that defies a legislated solution because of the unregulated and global nature of the Internet. Further research will be beneficial in identifying a solution for the vulnerability this threat represents to witness protection.

## **9.10 Conclusion**

The data gathered to assess the effectiveness and efficiency of witness protection programs reveals a very haphazard and inconsistent method of reporting. There are no standard metrics applied across police forces and the CMC and there is no consistent method adopted for accounting for the number of operations undertaken, or even to describe what is meant by an operation. The number of participants in a witness protection program is impossible to determine from the data available and there is no reporting that gives any confidence about the successes or failures of the programs.

The inconsistent and uneven reporting in annual reports from the AFP, CMC, Western Australian and South Australian Police meant that no meaningful analysis could be conducted. This highlights a significant gap in knowledge, but it also raises questions about the level of secrecy applied to witness protection by different protection providers. While most declined to provide any data and that which is contained in the annual reports is limited, the CMC reports on the broadest range of issues.

The Three Yearly Reviews of CMC conducted by the Parliamentary Committee for the CMC, demonstrates the level of activity in witness protection as well as describing successes in witness protection. They identify the crime types in which protected witnesses have given evidence and mention some of the matters for which convictions have been secured.

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<sup>1103</sup> *Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010 (No. 4, 2010)* (C'th).

The amount of information provided by the CMC is very useful in considering the benefits of the program operating in Queensland. Coupled with the financial data and indications of the number of participants in the program it almost completes the picture of effectiveness and efficiency of the program in that state. What it does demonstrate quite clearly is that the information sought for this study is available and could be provided by protection providers without offending the secrecy provisions of the Acts and without jeopardising the safety and security of participants of witness protection programs or the integrity of the program itself.

## Chapter 10. Conclusion

This thesis, 'A critical examination of witness protection in Australia', set out to explore and evaluate the structure and organisation of witness protection in Australia.

This chapter highlights the key findings of this thesis in respect of the four thesis questions,<sup>1104</sup> while addressing the themes of the research within the bounds of the argument that *after 30 years, 18 under legislation, it is time for a complete review of the operation of the programs at the state, territory and federal level.*

The primary reasons for undertaking this thesis were a deep and profound interest in the role of witness protection in Australia's criminal justice system; the lack of research done on witness protection in the past and the implications of social media on the utility of witness protection in the future. The prospect of critically reviewing witness protection in Australia against the primary themes of the study,<sup>1105</sup> through scholarly research, was compelling.

This chapter advocates an alternative model for witness protection in Australia based on a three-tiered structure. Enhancing the operation of witness protection programs is proposed with an undeniable interest in the participants' safety and security. These enhancements were developed with the benefit of experiences from other jurisdictions and the contributions of the respondents to the online survey undertaken as part of the thesis research. A more complete description of the proposed three-tiered witness protection model is contained in Annexure 11 of this thesis.

The chapter describes an alternative legislative regime to support the arrangements recommended in the new model. Titled the Uniform Witness Protection Act (UWPA), the proposed statute is based on the existing

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<sup>1104</sup> See Chapter 1.2 The research problem, 9.

<sup>1105</sup> Chapter 1 Introduction, 2.

Commonwealth Act and draws on additional measures described in some state and territory acts. These additional measures include temporary protection where a person is undergoing assessment for inclusion in the program, training requirements for officers performing roles in programs and assumed identity protections. The UWPA also incorporates some provisions of the Canadian and British legislation that restrict access to Commonwealth identity documents and enable the transfer of participants from one program to another respectively. It is proposed that to receive Commonwealth identity documents, the participant must be included in the NWPP (Tier 1 program). A statutory mechanism, including cost recovery arrangements, would be established to facilitate the transfer of participants in Tier 2 and Tier 3 programs from one jurisdiction to another.

The UWPA addresses the issue of expediting cases involving protected witnesses, protections for participants in court, directions to the Family Court of Australia in the case of contact orders and children and witness protection and an enhanced annual reporting regime for the program providers. A more detailed explanation of the proposed UWPA is contained at Annexure 12.

The primary outcome of the thesis is to recommend that a fresh approach be considered for a nationally coordinated witness protection effort, which streamlines the existing structures and legislation while enhancing the effectiveness and efficiency of the programs. **This chapter includes recommendations relating to the issues identified in the thesis that would enhance the future operation of witness protection in Australia.** The recommendations incorporate lessons learned from overseas reviews, the findings from the empirical research in this study and the previous work done in Australian government reviews. The recommendations set out against the themes of this thesis in the discussion below are consistent with the model and UWPA set out in Annexure 11 and Annexure 12 respectively.

## 10.1 What the thesis found

This thesis is as robust a review of the history, legislation and operation of the existing Australian witness protection programs from a national and a jurisdictional perspective as could be managed within current limitations. The thesis explored issues to do with witness protection in Australia, from its origins, to its place in the broader response to serious and organised crime and its importance in the criminal justice system. It reviewed witness protection in the United States of America, Canada and Britain including the problems identified and solutions adopted in those countries. The thesis reviewed work undertaken to benchmark witness protection in South Africa against a number of other countries including Australia. It also examined research on witness protection programs in Europe, where authorities seek to coordinate witness protection arrangements and develop practices, procedures and consistent legislation across Europe. The European research on harmonising witness protection informed some of the measures suggested in the UWPA. Alongside that, the thesis examined Australian inquiries and reviews, which led to the introduction and operation of statutory programs as well as their successes and deficiencies.

The thesis identified that Australian programs were initially established under administrative arrangements through the early 1980s. A complicated and cumbersome approach was created as police forces developed their programs individually and without any effective coordination or formal cooperation. Programs in Britain, the United States of America and Canada also developed within police forces in the first instance and then, over the following years, specific legislation replaced the early ad-hoc arrangements.

The Australian arrangements were enshrined in legislation in 1994 so that today, eight witness protection programs operate independently of each other. There is no imperative to cooperate or coordinate operational activity. This has led to a situation where relocations are conducted in isolation of the receiving state or territory and without any coordination between protection providers resulting in potential compromise to witness protection

operations. This matter was referred to in the empirical research and it was indicated that the example provided in the results of the empirical research<sup>1106</sup> was not the only time a compromise of that nature had occurred. The proposed model and legislation resolves this issue.

The thesis also found that witness protection should be considered a last resort<sup>1107</sup> recognising, amongst other things, the stress and disruption to the lives of those who enter the programs. The expectation is that other avenues to protect the witness should be considered and exhausted before witness protection is used. The programs operating throughout the world are almost identical insofar as the arrangements and legislation are concerned. The methodologies, re-identification and relocation, are universally adopted as the most beneficial in providing a safe and secure environment for the participant. The ability to relocate participants will be more difficult in the future as the implication of social media are better understood.

This thesis makes the observation that far from being beaten, organised crime is on the rise. In 2010 the Commonwealth government's concern about serious and organised crime led to three initiatives to help combat the growing problem. The Prime Minister announced that serious and organised crime was a threat to national security, and the Organised Crime Strategic Framework and Organised Crime Response Plan were launched. As a consequence of the additional focus on the phenomenon, measures such as witness protection, which will include witnesses in terrorism cases, will be in greater demand. It is necessary to ensure the practices and procedures adopted in Australia afford the opportunity to use witness protection to its best effect.

## **10.2 Why is it needed?**

Witness protection programs have been used in response to a range of different types of crime. In the United States of America witness protection

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<sup>1106</sup> See Chapter 8.1 Cross-jurisdictional coordination of witness protection, 204-211.

<sup>1107</sup> Bakowski, above n 15; Kramer, above n 15, 12.

was first used in Italian Mafia cases, but was also adopted in other serious and organised crime matters. In Canada and the United Kingdom witness protection's origins are rooted in serious and organised crime and the need to protect vulnerable and intimidated witnesses from harm or retribution. In Australia, while the Italian mafia was identified as a specific problem, it was the broader concept of serious and organised crime that influenced government to introduce witness protection programs. They are now used in some Australian jurisdictions in domestic violence and other crime matters. While this is an example of the flexibility of the programs, it is an issue that influenced the development of the three-tiered model advanced in this thesis.

This thesis has indicated that organised crime is flourishing despite the attention it receives from law enforcement agencies and governments. It has also identified that witness protection is a critical tool for law enforcement globally because of the role it plays in protecting crucial witnesses in the criminal justice system. In most cases, witnesses have been able to more freely give their evidence and have not been exposed to retribution. Assertions have been made about the effectiveness of witness protection based on the fact that no fatalities of participants included in programs in other countries have been recorded, but that is a particularly limited parameter.

### **10.3 Can witness protection be done better in Australia?**

The argument advanced in this thesis is that significant improvements could be found in the way witness protection is performed in Australia. A coordinated and unified model would, it is argued, ensure greater benefits for the witness, the police investigation and the prosecution. To describe the findings of the thesis against the themes of the research each theme is addressed along with the improvements recommended in this thesis.

***National coordination; a three-tiered structure and a uniform witness protection act***

**Recommendation 1** – Cross-jurisdictional coordination in Australia:

1(a) Adoption nationally of the three-tiered witness protection structure described in Annexure 11 to appropriately manage and coordinate witness protection in Australia on a national level;

1(b) Adoption nationally of one *Uniform Witness Protection Act* to repeal and replace all current witness protection acts in Australia;

1(c) AFP, through the NWPP, is to provide Tier 1 arrangements where a participant requires relocation and re-identification either interstate or overseas; and

1(d) User pays arrangements for state and territory referred participants to the Tier 1 program or transferred to the care of another state or territory program in the case of Tier 2 cases.

The research for this thesis showed that the PJC recommended a national witness protection program and a role for the AFP in the national coordination of witness protection. It advocated the establishment of a NWPLC under the auspices of the APMC to provide greater cooperation between the jurisdictions in witness protection operations. The research also showed that effective coordination of witness protection operations elude Australian law enforcement agencies and that the legislative arrangements in place do little to ensure that coordination.

Government adopted the recommendation for a NWPP run by the AFP through Commonwealth legislation, but declined to establish the NWPLC. In doing so, it could be argued that the Commonwealth failed to create a national arrangement for witness protection. States and territories are not compelled to use the NWPP for their witness protection operations, rather, they continue to operate their own programs albeit under complementary legislation. There is no legislative requirement for existing Australian

witness protection programs to coordinate their operations with each other or with the NWPP.

The problems associated with state and territory police operating in jurisdictions where they have no legal powers have been raised. While it could be argued that the level of cooperation between police forces in witness protection matters is at an acceptable level, it is more likely that they cooperate with each other only when necessary. Whether any coordination of relocations occurs is highly unlikely and this creates an unacceptable risk of compromise to witness protection operations. This issue was identified in the empirical research and is one that requires attention.

The solution recommended in this thesis is that one national agency provides witness protection where re-identification and relocation are required, leaving the states and territories to continue to provide witness protection services not rising to that threshold. It is proposed that in cases where a participant is relocated by a state or territory program, the NWPP must be consulted so that accidental compromise of another witness protection operation does not occur. Where relocations at the Tier 2 and Tier 3 levels are undertaken, scope to transfer the participant from the witness protection program of the originating police force to that of the host police is accommodated in the UWPA. This measure would resolve jurisdictional and operational issues currently experienced by state and territory police forces when relocating participants' interstate. The methodology to enable these transfer arrangements is set out in the revised structure and UWPA described in Annexures 11 and 12 respectively.

### ***Inclusion of a witness in the NWPP or a WPP***

**Recommendation 2** – Inclusion of witnesses in a witness protection program is done according to the seriousness of the offences, the nature of the threat and the importance of the witness to the case:

2(a) serious and organised crime – Tier 1;

2(b) serious crime including domestic violence – Tier 2; and

2(c) crime involving threat of retribution and violence, but where re-identification and relocation are not required – Tier 3.

Few issues were raised in the thesis regarding the inclusion of witnesses in different witness protection programs. One issue that was identified is the Victorian government's objections to the disclosures required by the Commonwealth Act and most other Australian legislation, for witnesses seeking inclusion in the NWPP. The matter was raised and discussed at the PJC inquiry in 2000 and was explored in this thesis. The Victorian and the Northern Territory Acts leave the decision about the inclusion of witnesses, disclosures by the witness notwithstanding, to the Commissioner of Police. This means that in those jurisdictions, the Commissioner has unfettered authority to include or exclude a witness in their witness protection programs. Amendments to the *Witness Protection Act 1991* (Vic) to come into operation in December 2014 will bring Victoria into line with the Commonwealth and most states and territories.

The empirical research showed that 85% of respondents considered the safeguards in the Commonwealth Act appropriate in respect of disclosures by the participant. While this suggests the disclosures are a useful element in the inclusion process, the over-representation of AFP in the survey must be noted. At the same time, the fact that most states and territories incorporated the same or similar disclosure requirements in their Acts must be recognised. The inconsistency created by different admission rules should be resolved so that entry requirements are the same across all jurisdictions. The revised model and uniform legislation sections are modelled on the Commonwealth disclosure requirements at the Tier 1 and Tier 2 levels of protection because of the possibility of transferring a participant from a Tier 2 program to the Tier 1 NWPP.

**Recommendation 3** – Inclusion of a clause in the MOU requiring the participant in a witness protection program to provide evidence in court to the best of their ability:

3(a) as determined by the Prosecutor;

3(b) failure to do so will be considered a material breach of the MOU and will lead to the termination of protection and assistance; and

3(c) termination of protection and assistance under these circumstances will require consideration by the protection provider of the restoration of the former identity of the participant.

This thesis considered the question whether the MOU should contain a clause requiring the participant to give evidence to the best of their ability. The MOU currently requires the witness to make full disclosures about certain matters and to remain of good character while included in the program or face possible exclusion from the program. Where the participant deliberately breaches an undertaking, including an undertaking to give evidence,<sup>1108</sup> protection and assistance might be terminated. It is not a significant step to include the provision requiring the participant to give evidence to the best of the participant's ability. This qualification would give some rigour to the section of the Act dealing with the MOU.

While the thesis found no international research directly on point, the empirical research supported the inclusion of sections in the MOU requiring the participant to give evidence to the best of their ability and to terminate protection and assistance where that did not occur. The proposal was supported by 73% of respondents and the same percentage agreed that where the participant fails to meet this obligation protection and assistance should cease. The Canadian witness protection legislation<sup>1109</sup> also supports the idea that the witness must fully cooperate in the investigation and the prosecution. The proposed model and legislation include this requirement and contain advice about the termination of protection and assistance including restoring the witness' former identity.

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<sup>1108</sup> *Witness Protection Act 1994* (C'th) ss 18(1)(b)(v).

<sup>1109</sup> *Witness Protection Program Act 1996* (CA) ss 14(1).

### ***Commonwealth, state and territory identity documents***

**Recommendation 4** – Identity documents to support a new identity for participants in the NWPP

4(a) Authority for an identity order by the Commissioner of the AFP – not to be delegated within the AFP

4(b) Where change of name/identity is required, an application must be made for the witness and any family accompanying the witness, for inclusion in the NWPP

This thesis concluded that the role of the Supreme Court in supervising orders for identity documents in all states and territories, except Queensland, reveals another inconsistency between the programs in Australia. It also found that this is the only aspect of the re-identification process or witness protection process that requires the supervision of the Court. As it is the only aspect of witness protection that requires supervision of a court, that begs the question, why? The commissioner is empowered for every other aspect of the program. Information gathered from Australian inquiries did not go to the level of detail on identity documents that the empirical research for this thesis did. It was considered necessary for this thesis to determine whether the supervision of the Supreme Court was essential. Respondents to the online survey did not express strong views either way, although 54% said that court supervision should not be required.

An issue that was raised in the empirical research for this thesis is that additional people become involved in the identity change process as a result of this Supreme Court supervision. This process adds to the potential loss of control by the police of the relevant documents that may contain details of the identity change. This may lead to a compromise of security and is a matter the police suggested should be addressed. Compromise is also possible in respect of access to Commonwealth identity documents. All Australian witness protection programs can and likely do access relevant departments and agencies independently. Such widespread access creates

several weaknesses through the sheer number of people who are involved from Commonwealth agencies and state and territory police. This process, it is argued, could be both streamlined and made more secure with the introduction of the three-tiered structure, recommended in this thesis, for national witness protection measures. If one agency, the NWPP, were responsible for identity change for participants included in the various programs, the opportunity for compromise and cross-contamination would be significantly reduced. This conclusion relies on risk assessment methodologies; the fewer people with access to the participant's new identity the more secure those identities will be and the less likelihood there is of accidental or deliberate release of the information.

The thesis presents a case for the adoption of the Canadian model in relation to the provision of Commonwealth identity documents to participants. Adopting the Canadian model to the Australian arrangements would mean that where a participant in a state or territory program is to be re-identified and relocated they would, subject to an assessment of their suitability, be included in the NWPP. This arrangement is included in the proposed uniform Australian legislation.

### ***Confidentiality versus secrecy***

**Recommendation 5** – Confidentiality of information relating to the identity and location of the participant or the operation and integrity of the witness protection programs:

- 5(a) mandatory suppression of the identity and location of the protected witness including likenesses, images, photographs or descriptions that may tend to identify the protected witness;
- 5(b) consideration of the court being closed to the public and the media when a participant in the NWPP is giving evidence upon application from the Prosecution; and
- 5(c) standard reporting mechanisms for all agencies providing witness protection in Tier 1, Tier 2 or Tier 3 arrangements.

The thesis demonstrated that there are significant differences in the reporting arrangements between the programs in Australia.<sup>1110</sup> Other research has been hindered when seeking to study various aspects of the programs in other countries.<sup>1111</sup> The often-stated view is that an assessment of the effectiveness and efficiency of the programs is not possible because of limited empirical data and inconsistent reporting.<sup>1112</sup>

The secrecy that surrounds the operation of witness protection programs in Australia hinders accountability and therefore good governance of the programs. Haphazard and inconsistent reporting of the operation of programs, as identified in the thesis, reduces the limited accountability that does exist. Poor annual reporting, mixed methods of reporting, the lack of a common methodology and reporting metrics, means that a clear picture of witness protection in Australia is not readily available.

Access to information about the identity and location of participants included in witness protection programs should not be possible for those not working within the witness protection function in the relevant police forces. These details should be kept secret. Information that goes to the operating methodologies of the programs, the identity of the officers working in the witness protection functions and other information that would provide the opportunity for a group or syndicate to pre-empt participants' movements, must also be kept secret.

This thesis has demonstrated that other information of an administrative nature, including the number of participants in the program, the types of crimes they are giving evidence about, the success rates of prosecutions and the cost of operating the programs could be released without any compromise to the integrity of the program or the identity and location of

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<sup>1110</sup> See Chapter 4.2 The Western Australian Reviews, 93-99; Chapter 6.3 Protection of witnesses, 150-160; Chapter 8.1 Analysis of the online survey responses, Governance and accountability, 220-221.

<sup>1111</sup> Slate, above n 51; Fyfe and Sheptycki, above n 77, iv, 27-34; See generally Chapter 9.7 Governance and accountability, 250-254; and Chapter 9.8 Effectiveness and efficiency of witness protection programs, 254-260.

<sup>1112</sup> Ibid.

the participants. That the CMC in Queensland does report more information<sup>1113</sup> to its parliamentary oversight committee than other states suggests there is scope for more robust reporting that will not compromise the program or the participant. The CMC reported that evidence provided by protected witnesses led to the conviction of offenders for crimes such as murder, drug trafficking, importation and crimes of violence and that defendants in those matters had been sentenced to terms of imprisonment. The metrics suggested in Annexure 13 coupled with a program management evaluation methodology would enable government and the public to have confidence that the programs are achieving their goals and the impact they have on crime in Australia.

As it currently stands, the community and government can have no confidence in the operation of the programs because no effective measures are in place to ensure consistent and factual reporting. It is argued that a robust annual review of witness protection in Australia could be achieved using a program evaluation model and data collection as described in Annexure 13. The analysis of that data could provide a much clearer assessment of the effectiveness and efficiency of the programs than is possible today.

### ***Expediting cases involving protected witnesses***

**Recommendation 6** – Expediting cases involving protected witnesses giving evidence:

6(a) matters involving a participant in the NWPP giving evidence must be dealt with by the courts without delay, possibly through court supervision of case preparation and abandoning committal proceedings; and

6(b) matters involving a participant of a state or territory witness protection program should be afforded high priority status.

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<sup>1113</sup> Crime and Misconduct Commission, 'Crime and Misconduct Commission Annual Report Witness Protection 2010-2011' (2010-2011) 47.

The research for this thesis included an exploration of the concept of fast tracking cases through courts. This is an area that raises concerns for a number of reasons. Firstly, because the rights of the accused are paramount<sup>1114</sup> on the basis that Australia's criminal justice system has developed around the presumption of innocence and the rights of the accused. Secondly, balancing process with expediency to reduce court lists and therefore the length of time a matter remains unresolved, may be met with scorn from legal practitioners. Finally, costs associated with the delays, and in the case of witness protection, this includes the cost to the participant, the cost to society and the cost to government, may not be considered acceptable reasons for expediting cases.

While the PJC in 1988 recommended consideration be given to expediting cases involving protected witnesses, no research has been undertaken on the issue. Early research in the United States of America considered the impact on the participant of being included in a witness protection program, but that investigation was more in the context of the social death and social rebirth of the participant. The issues involved with the participant giving up their linguistic name and everything that goes along with re-identification were examined.

In the absence of other empirical research on the issue, this thesis<sup>1115</sup> advances the proposition that expediting cases involving protected witnesses is achievable and is appropriate. A number of reasons are evident when considering expediting these cases. Firstly, relieving the stress participants are under as a result of their inclusion in witness protection is one supporting argument. Secondly, progressing these cases using an effective case management process would see the more efficient management of criminal matters in the courts. There is an argument that court case management, monitored and led by the presiding Judge, could

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<sup>1114</sup> Stewart, above n 8, 540.

<sup>1115</sup> See Chapter 8.1 Analysis of the online survey responses, Expediting cases involving protected witnesses, 225-227; Chapter 9.6 Fast tracking cases involving protected witnesses, 248-249; and Annexure 12 Uniform Witness Protection Act.

reduce delays experienced in trials involving protected witnesses without adversely affecting the rights of the accused. The results achieved in Western Australia following the refinement of processes in that state support the argument.<sup>1116</sup> Finally, a more efficient criminal justice system and a reduction of delay in hearing and determining criminal matters is likely to enhance public confidence in the criminal justice system. That 73% of survey respondents agreed there is an argument for expediting these cases and 61% said that expediting matters would not adversely affect the rights of the accused, is compelling.<sup>1117</sup> The empirical research conducted for this thesis bears out the argument that expediting matters involving protected witness could be achieved without detrimental outcomes.

The proposed UWPA caters for expediting matters involving protected witnesses through court case management processes led by the Judge, including applying milestones to be met as part of that management method.

### ***Governance and accountability; how much reporting is too much***

**Recommendation 7** – Governance and Accountability for all witness protection programs and for the three-tier structure of protection.

7(a) oversight for the NWPP by the Parliamentary Joint Committee on Law Enforcement

7(b) oversight of state and territory based witness protection arrangements by a jurisdictional parliamentary oversight committee using the same terms of reference as the Commonwealth oversight body:

7(c) Ombudsman review of complaints and own motion investigations to be limited, but mandatory where a participant or an applicant for inclusion in any witness protection program makes a complaint about a decision to either terminate protection and assistance arrangements or where a decision is made not to include a witness in a witness protection program;

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<sup>1116</sup> See Chapter 4.4 Court case management, 115-117, for discussion on this issue.

<sup>1117</sup> See Chapter 8.1 Analysis of online survey responses, Expediting cases involving protected witnesses, 225-227.

7(d) integrity commission to conduct an inquiry where a participant in a witness protection program makes a complaint of corruption in the context of the witness protection operation in which they are included; and

7(e) consistent reporting on the operation of the program identified through an annual program evaluation of witness protection nationally with the evaluation report considered by the Attorneys General.

Acknowledging the confidentiality and secrecy that is required for certain aspects of witness protection programs, the thesis demonstrated the inconsistencies in current arrangements in Australia. There is no sound argument to support the lack or quality of reporting against a clear set of metrics that do not adversely impact the integrity of the witness protection programs.

There is little direct proof that witness protection has made a significant impact on serious and organised crime in Australia. This thesis was unable to conduct a comprehensive assessment of the effectiveness and efficiency of the programs.<sup>1118</sup> That same difficulty has plagued other attempts in the United States of America, the United Kingdom, Canada and Europe, because of the obsessive attitude to security adopted by protection providers. Some examples of greater disclosure of information that facilitate assessment of witness protection programs and their impact are available, particularly in Queensland. There, in the three yearly reports to the Parliamentary Committee on the Crime and Misconduct Commission,<sup>1119</sup> the CMC states not only the cost of operating the programs and the number of operations run, it also provides some information on the number of successful prosecutions and the types of crime involved. While the disclosures in that state are by no means complete, at least insofar as the reporting metrics preferred by this thesis are concerned, they would assist a more robust assessment of the operation of the Queensland program. Nonetheless, what those examples do

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<sup>1118</sup> See Chapter 9.8 Effectiveness and efficiency of witness protection programs, 254-260.

<sup>1119</sup> Queensland Government, above n 1092, 132-133; Queensland Government, above n 1092, 93.

show is that greater disclosure does not impact the safety and security of the participant or the operating methodologies of the programs.

In relation to external oversight, the Ombudsman's role in investigating complaints by participants in or witnesses excluded from the program is different across jurisdictions. In some jurisdictions, the Ombudsman can review the process of decision-making by the Commissioner and make recommendations, whereas in others, it has been suggested that the Ombudsman should have a determinative role.<sup>1120</sup> The latter would quite obviously usurp the Commissioner's responsibility for decision-making entrusted by the parliament and enshrined in legislation. The thesis proposes that the issue be resolved by legislation confirming that the Ombudsman's role extends to reviewing process and decision-making, but stops short of empowering the Ombudsman to substitute his or her own decision for the decision originally made by the relevant commissioner. The model and uniform legislation deals with this issue at all three levels of witness protection by providing a consistent approach at the Commonwealth, state and territory jurisdictions.

The uniform legislation would be considered in conjunction with the Ombudsman's legislation in all jurisdictions because amendments may be required to the latter. Annual reporting under the model and uniform legislation also requires reporting for each tier of witness protection on the number of complaints investigated by the Ombudsman, as well as own motion investigations undertaken in relation to witness protection matters.

## **10.4 The benefits of revised methodologies and legislation**

A revised witness protection model and legislation should lead to improved efficiency and effectiveness through better coordination, more secure

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<sup>1120</sup> See Chapter 8.1 Analysis of online survey responses, Governance and accountability, 220-221.

operation and informed monitoring of the programs leading to more accurate judgments about the successes and failures of the program.

The national coordination of relocation and re-identification for participants would reduce opportunities for compromise to the participant and to the integrity of the programs. Restricting the number of people involved in the re-identification process would improve secrecy for the new identity. Clear and mandatory arrangements for the protection of the participant's new name and location during court appearances could be achieved. A reduction in the cost of operating most programs and witness protection operations by streamlining processes would be likely.

Expediting cases involving protected witnesses without adversely affecting the rights of the accused could also be achieved. This would also ensure that participants' welfare is considered in all witness protection cases, noting the severe disruption to their lives. Resolving the existing tension between the Family Court of Australia and witness protection by legislating the role of the Commissioner and the role of the Family Court of Australia in witness protection matters would improve certainty.

Developing a new witness protection model to replace existing arrangements in the Commonwealth and state and territory jurisdictions will require amendments to existing legislation and repeal of other statutes. It will also require significant changes to state and territory government's policy and changes to the attitude of the police forces that operate their witness protection programs.

## **10.5 The future of witness protection**

In its 50 plus year history, witness protection has traversed four stages, which can be described as conceptualisation, operationalisation, modification and globalisation. Witness protection is now a regular feature in law enforcement internationally. Today, witness protection has developed to a point where countries and protection providers are conducting witness protection operations in very similar ways and under legislation that shares

a range of fundamental similarities. Witness protection is not an emerging issue, but the fact that little scholarly research has been conducted into it means that in an academic sense it is quite new. The modification element is one that must continue to evolve because the world does not stand still and serious and organised crime continues to evolve and explore new ways to carry out its enterprises.

The research for this thesis identified gaps in knowledge about witness protection in Australia and circumstances where security can be and is compromised. This thesis draws attention to areas where additional research would be beneficial and applicable in most jurisdictions. Therefore, further research into a number of issues identified in this thesis is suggested. These include: (1) future threats and the implications of social media on witness protection; (2) the operational effectiveness and efficiency of the programs to establish the impact of witness protection on serious and organised crime in Australia; (3) expediting cases involving protected witnesses; (4) the unresolved issue of witness protection and the family court; and (5) plea-bargaining, immunity from prosecution and witness compellability. While most of these issues are adopted in the model and uniform legislation, additional research on the impact of the changes would be welcome.

This thesis recommends an alternative model for witness protection in Australia. It is argued that one national program, operated under a the UWPA, delivering Tier 1 arrangements, would ensure a higher level of consistency in operation and a safer and more secure environment for witnesses in serious and organised crime matters. Tier 2 arrangements, at the state and territory level, using the same legislation and similar thresholds, would build on a coordinated and effective facility for domestic witness protection arrangements. Tier 3 arrangements would see witness protection provided by the state and territory protection providers at a lower level of priority, which does not include intensive resource commitment. This third tier would complete the overall national witness protection program of arrangements.

Adoption of a UWPA, which specifies mandatory and preferred actions required of the court in these cases, would ensure the consistency provided by the model and deliver fully integrated Australian witness protection arrangements.

The proposed UWPA provides a template for regular and structured reporting on witness protection that would elicit sufficient information upon which to develop a robust analysis of the effectiveness and efficiency of the NWPP. The NWPP and each of the state and territory witness protection programs would be required to populate the template each year. The NWPP would report on all operations of the NWPP while the states and territories reports would contain information on Tier 2 and Tier 3 programs.



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# **Annexure 1 – A witness protection scenario**

Imagine a situation where whilst travelling overseas on holidays you meet a person who takes time to befriend you and gets to know you, nothing untoward to start with and nothing other than shared interests and ideas. After your holiday you keep in touch and one thing leads to another and your new friend starts to talk about business opportunities and about exploring ideas for you and he to work together on an import export business bringing furniture into Australia from South-East Asia because he has a number of outlets in Sydney and Melbourne through which the furniture will be transhipped for distribution. He tells you that the imports are arranged to meet orders placed by customers so there is no risk to you. Your part of the business arrangement is to manage the books for this venture, right up your alley, and to do some of the meet and greets with customers as well as collecting some of the shipments from the Customs bond stores, or at least arranging the collection and transport to the intended destination.

You agree and as the shipments start to arrive you are surprised at how many and how often they arrive - not to mention how lucrative the business is. You keep meticulous records, but over time you notice new additions to the business, people who seem to be influential in the business and are looking to increase the size of the furniture shipments and the number of known customers do not match the size of the shipments and there has been no discussion about altering the business model to include the storage of furniture or expanding the outlets for the furniture. As this is happening, a shipment is held up by Customs and you start to make enquiries about the delay.

At home one evening your business partner visits with a couple of rough looking individuals and he tells you the furniture shipments are not what they appear. He tells you that he owes a lot of money to people and that the increase in shipments is intended to take care of the financial problem

because the 'goods', concealed in the furniture will sell for a lot of money. He warns you that there would be repercussions for both of you if anything happened to the shipment and if anyone else found out about what was concealed in the furniture. He tells you that his associates are ruthless and will stop at nothing to make a lot of money and make it fast they are ruthless and violent.

You stop making enquiries about the furniture held up by Customs, but, unbeknown to you, the AFP has taken an interest in the shipment and there is intelligence available to the police that link the shipment to known drug distribution networks in South East Asia and in South America. The AFP has also linked you and your business partner and his associates to the shipment and has collected information on a number of your previous importations. In the next couple of days you get a phone call from one of your business partner's associates 'advising' you to watch who you talk to about the business and that day you hear, on the television news service, that a man has been killed, his name is given and you recognise the name as one of the new people seemingly involved in the business. You receive another phone call, this time from your business partner quizzing you about who you have spoken to about the importations and referring to the news report. You are, by now, extremely agitated and concerned and your stress levels are so high you can't think straight.

There is a knock at the door and you wonder whether you should answer it or whether you should pretend you are not there. The next thing there is an almighty crash as the door is knocked off its hinges, there is yelling, almost indistinguishable, and people rushing into your house, yelling, shouting, police, get down, get on the floor, don't move, get on the floor, police!

You comply and almost immediately you are handcuffed and held while your house is searched.

A police officer is talking to you, telling you who he is and what is happening, you understand and realise that the conversations you have had with your business partner and his associates in the last few days have been a warning

to you about talking to the police. You are conveyed to AFP headquarters and placed in an interview room. You wait, for what seems like an eternity, and finally the officer who spoke to you at your house comes in with another police officer. They begin interviewing you about your role in the importations, you know that there are dangers for you in talking, but you also realise that you are in deep trouble with the law. You tell the police that you have information about the operations, but that you fear for your life given what happened to the associate who was killed two days before. The conversation moves to one of witness protection and the interview is suspended.

The following day you are again interviewed again, but by different police officers and they explain about the witness protection program, but also tell you that the group you have been associating with are a well-established drug syndicate with dangerous connections in Australia and overseas. You answer all the questions the police ask you and are told they will further consider your application to be included in the witness protection program noting that you will be required to tell the investigators everything you know and that you will be required to give evidence in any subsequent trials.

You are accepted into the witness protection program and that is where your life takes the most significant change. You are taken to a 'safe' location where more interviews take place, your family is brought to you - wife and children - and you are told you will not be returning to your home, you will not be able to contact friends and extended family, your children will not be able to go back to their school and your wife will not be able to go back to her job. You will be relocated to an unknown location, you will be given a new name and new history that you will have to memorise and you will only ever be able to contact friends and family through means provided by the police. You will have police with you when you go to court and these arrangements will go on for as long as you are required to give evidence through committal proceedings, trials, appeals, re-trials and for other legal proceedings.

This goes on for 12 years and in that time you are not able to hold down a job, you and your immediate family are dependent on the police for almost everything. Your family situation has deteriorated, your children have had significant difficulties with settling into a new identity and all that brings, you and your family have been relocated a number of times because of compromises to your safety. You have not been able to return to anything that is familiar to you because of the danger you face from syndicate members for having given evidence against them and for having given information to police in the first instance. Some of those syndicate members have completed their jail terms in the time it has taken for all of the legal processes against all of the defendants and are now out of prison and looking for revenge.

So this is your lot now, a lifetime of looking over your shoulder, hoping you never come into contact with any of the syndicate members who might remember you and knowing that if they do you will have to rely on the police in the witness protection unit to relocate and possibly re-identify you and your family again.

This is not a pleasant prospect, but it could be the outcome of doing the right thing and agreeing to give information to police and evidence in court against your former friends.

## Annexure 2 – Definitions and useful terms

For the purposes of this thesis some terms are defined<sup>1121</sup> as they are used frequently in the thematic evaluation of the Australian Acts. The terms witness and informant are often used interchangeably, but for the purposes of this research, three discreet aspects of the definition of a witness are used. Firstly in the context of a ‘witness’ to a crime who is or may be called to give evidence in court, secondly, the ‘associate witness’<sup>1122</sup> and finally, the ‘Crown witness’.

**Table 2 - Definitions used in the thesis**

**Approved authority** is a Commissioner, however described, of a police force of the AFP or of a state or territory, the Integrity Commissioner,<sup>1123</sup> the Chief Executive Officer of the Australian Crime Commission; an authority or body of the Commonwealth or of a State or Territory authorised to conduct enquiries or investigations in relation to conduct that constitutes, or is alleged to constitute, criminal conduct, misconduct or corruption, and is declared by the Minister by notice in the Gazette to be an approved authority for the purposes of the Act.

An **associate witness**<sup>1124</sup> is a person who has had some involvement in the criminal activity they are now giving evidence about. Often, having agreed to cooperate with authorities they will either be granted immunity in respect of their own offences or they will have pleaded guilty to their own offences, and their cooperation will be taken into account by the court in sentencing. In describing this immunity in organised crime cases, Fyfe and Sheptycki<sup>1125</sup>

<sup>1121</sup> *Witness Protection Act 1994* (C'th) s 3.

<sup>1122</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 65-67 [5.7]-[5.12].

<sup>1123</sup> *Law Enforcement Integrity Commissioner Act 2006* (C'th) s 3.

<sup>1124</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, 65-67 [5.7]-[5.12].

<sup>1125</sup> Fyfe and Sheptycki, above n 77.

spoke of ‘accomplice testimony provided by criminal informants who become so called crown witnesses, government witnesses or co-operating witnesses.’ Where a Crown Witness is the only witness for the prosecution, special directions from the Judge to the Jury are required on the importance that can be placed on the evidence provided by the witness.

**Authorising officer** under the Witness Protection Act 2000 (QLD) means an independent member of the controlled operations committee under the *Police Powers and Responsibilities Act 2000*.

**Commonwealth identity documents** include passports, tax file numbers (within the meaning of section 202A of the *Income Tax Assessment Act 1936*) or other prescribed documents. No other documents are currently prescribed and section 24 protects the integrity of key Commonwealth documents needed in order for witnesses to establish new identities.

**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.

**Complementary witness protection law** means a law of a state or territory that makes provision for the protection of witnesses and is declared by the Minister by notice published in the Gazette to be complementary witness protection law.

**Designated position** means a position of Deputy Commissioner, an AFP employee or a special member of the AFP, the duties of which relate to the NWPP. Those duties may require the occupant to have a national security clearance because they involve access to national security information classified as secret or top secret. They may require the occupant to have a position of trust clearance at the level of highly protected because those duties involve access to sensitive information. The position must be declared by the Commissioner to be a designated position for the purposes of the Act.

An **informant** or in more contemporary language a **human source** is

distinguished from a 'witness' in this thesis on the basis that while an informant may be afforded witness protection, that informant may not ultimately be called to give evidence in court. Therefore, for the purposes of this thesis, 'informant' is used to refer to a person who gives information to police or who actively gathers information for police to support a criminal investigation. These human sources are not police officers acting in an undercover policing capacity. Where a police officer covertly collects intelligence, that police officer or methodology is referred to in the thesis as 'undercover police officer' or 'undercover policing' depending on the context.

**Organised crime** is a term used to describe the activities of the mafia, south Asian crime gangs, Middle Eastern crime gangs, Russian organised crime and others. Serious and organised crime represents a significant problem in the Asia Pacific region, Europe, South America and other parts of the world that affects Australia.<sup>1126</sup> Organised criminal activity in Australia during the past two decades has typically mirrored the patterns of development seen in Europe and North America.<sup>1127</sup> The types of activities often associated with organised crime include drugs, money laundering, identity crime, people smuggling, human trafficking, high tech crime and terrorism.<sup>1128</sup>

The term **participant** is used throughout the thesis to describe a witness or informant accepted into or included in a witness protection program. Participant is defined in the Commonwealth Act<sup>1129</sup> as '... a person who is included in the NWPP' while some of the State and Territory Acts continue to use the word 'witness' to describe a person included in the witness protection of that State or Territory. In some cases, in describing the role of a participant in court, the phrase 'protected witness' is used.

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<sup>1126</sup> Australian Institute of Criminology, above n 40.

<sup>1127</sup> Ibid 6.

<sup>1128</sup> Ibid 50.

<sup>1129</sup> *Witness Protection Act 1994* (C'th) s 3.

**State participant** is 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** is 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.

A **witness** is a person who gives, or is likely to give evidence in a prosecution. The PJC, in its 1987/88 report,<sup>1130</sup> said witnesses could be divided into four categories, someone who observes a crime; the informer; an undercover agent who may or may not be a police officer; or the accomplice in a crime or crimes, who may wish to give Queen's evidence in return for considerations. Clause 2(c) of the United Nations Drug Control Program (UNDCP) Model Witness Protection Bill refers to a witness as a person who has made a statement, or who has given or agreed to give evidence in relation to the commission or possible commission of a serious offence. Witness also includes a person who, because of his or her relationship to, or association with, a witness by those definitions, may require protection or other assistance. Australia's Witness Protection Acts define witness in almost identical terms.<sup>1131</sup>

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<sup>1130</sup> Parliamentary Joint Committee on the National Crime Authority, above n 1, citing the opinion of D. H. Peek of Counsel, published as Project Epsilon - Interim Report III (National Police Research Unit, Adelaide, 1984), 5-6.

<sup>1131</sup> *Witness Protection Act 1995* (NSW) s 4; *Witness Protection Act 1996* (ACT) s 3; *Witness Protection (Western Australia) Act 1996* s 4; *Witness Protection Act 2000* (Qld) Schedule 2; *Witness Protection Act 2000* (NT) s 3; *Witness Protection Act 2000* (Tas) s 3; *Witness Protection Act 1991* (Vic) s 4; *Witness Protection Act 1996* (SA) s 3.

## Annexure 3 – A chronology of the development of witness protection

**Table 3 - Witness protection chronology**

<b>Year</b>	<b>Country</b>	<b>Activity</b>
1963	United States of America	First instance of a witness being included in a witness protection program using administrative arrangements
1970	United States of America	The <i>Organised Crime Control Act 1970</i> created the first statutory witness protection program
1974	Australia	The Moffitt Royal Commission recognised the infiltration of organised crime into clubs in New South Wales
1978	Britain	First witness protection program developed by the Metropolitan Police
1979	Australia	The Woodward Royal Commission identified the organised and structured nature of the Calabrian mafia in Australia and the extent of the threats and intimidation used by the Australian mafia to control its operations
1980	Australia	The Williams Royal Commission recommended a national uniform Drug Trafficking Act which it said should include provisions for the Attorney-General to authorise the protection of witnesses

1982/1984	Australia	The Costigan Royal Commission into the activities of the Federated Ship Painters and Dockers confirmed organised crime on the waterfront in Australia and the lengths the facilitators would go to in order to protect their operations
1982	Australia	First indications of a witness protection program being operated by the AFP using administrative measures
1983	Australia	Stewart Royal Commission recommended the use of witness protection in organised crime cases
1983	Australia	The Australian Police Ministers Council (APMC) referred Justice Stewart's recommendation on witness protection to the National Police Research Unit for further enquiry through Project Epsilon
1984	Canada	First witness protection program was established by the RCMP using administrative measures
1984	United States of America	Witness Protection Reform Act enacted
1984	Australia	The NPRU Project Epsilon reviewed existing witness protection arrangements in Australia and provided a report to the Australian Police Ministers Council (APMC) on its findings
1985	Australia	The APMC declined to establish a national witness protection scheme saying each jurisdiction should make arrangements to protect witnesses as the circumstances require

1987	Australia	The Australasian Crime Commissioners Conference called for greater cooperation and coordination between state and territory police forces in their witness protection arrangements, but rejected a proposal for a national witness protection scheme
1987	Australia	The National Crime Authority, in its 1986/87 annual report, criticised existing witness protection arrangements in Australia
1987/88	Australia	The Parliamentary Joint Committee on the National Crime Authority conducted a review of witness protection in Australia
1991	Australia	<i>Witness Protection Act 1991</i> (Victoria) was enacted
1994	Australia	<i>Witness Protection Act 1994</i> (C'th) was enacted
1994	Canada	Member of Parliament Tom Wappel introduced a Private Member's Bill - An Act to provide for the relocation and protection of witnesses – into the House of Commons
1995	Australia	The <i>Witness Protection Act 1995</i> (NSW) was enacted
1996	Canada	The Solicitor General tabled the Witness Protection Program Act in the House of Commons. The Act came into force in June 1996
1996	Britain	The Strathclyde Police in Scotland developed its own witness protection program with initial funding from the Scottish Executive
1996	Australia	The <i>Witness Protection (Amendment) Act 1996</i> (Victoria) is made complementary legislation to the <i>Witness Protection Act 1994</i> (C'th)

1996	Australia	The <i>Witness Protection Act 1996</i> (ACT Act) is in force
1996	Australia	The <i>Witness Protection Act 1996</i> (SA Act) is in force
1996	Australia	The <i>Witness Protection (Western Australia) Act 1996</i> is in force
2000	Australia	The <i>Witness Protection Bill 2000</i> (Tasmania) receives Royal Assent on 16 June 2000
2004	Britain	British Government White Paper <i>One Step Ahead: a 21<sup>st</sup> century strategy to defeat organised crime</i> is tabled. The report recommends a national approach to witness protection in the UK
2005	Britain	<i>Serious Organised Crime and Police Act 2005</i> is enacted with specific provision for a national witness protection scheme to be managed by the Serious Organised Crime Agency

## Annexure 4 – Legislation made complementary

**Table 4 - Declared complementary legislation**

Act	In force	Complementary under section 3	Declared complementary	Section 24 arrangements
Witness Protection Act 1994 (C'th)	✓	N/A	N/A	N/A
Northern Territory— <i>The Witness Protection (Northern Territory) Act 2002</i> (NT Act)	✓	✓	✓	✗
Australian Capital Territory— <i>The Witness Protection Act 1996</i> (ACT Act)	✓	✓	✓	✗
New South Wales— <i>The Witness Protection Act 1995</i> (NSW Act)	✓	✓	✓	✓
South Australia— <i>The Witness Protection Act 1996</i> (SA Act)	✓	✓	✓	✓
Victoria— <i>The Witness Protection Act 1991</i> (Victorian Act)	✓	✓	✓	✓
Western Australia— <i>The Witness Protection (Western Australia) Act 1996</i> (WA Act)	✓	✓	✓	✓
Tasmania— <i>The Witness Protection Act 2000</i> (Tasmanian Act)	✓	✓	✓	✗
Queensland— <i>The Witness Protection Act 2000</i> (Queensland Act)	✓	✓	✓	✓

## Annexure 5 – Legislative amendments

The text describing the legislative amendments to witness protection laws in the jurisdictions identified below are predominately drawn directly from the amending legislation or the explanatory documents provided in the Australian Legal Information Institute sites.

**Table 5 - Legislative amendments - *Witness Protection Act 1994 (C'th)***

1998	<p><i>Witness Protection Act 1994 (C'th)</i> section 22(2) was amended to enable participants and former participants or persons who have been assessed for placement in the NWPP to make disclosures for the purposes of making a complaint or providing information to the Ombudsman under the <i>Ombudsman Act 1976</i> or the <i>Complaints (Australian Federal Police) Act 1981</i>.</p> <p><i>Freedom of Information Act 1982</i> was amended by the <i>Law and Justice Legislation Amendment Act 1994</i> to make documents which refer to witnesses or others afforded protection under the witness protection program exempt documents (section 37) and thus not subject to release under the FOI Act.</p> <p><i>Archives Act 1983</i> was amended by the <i>Archives Amendment Act 1995</i> to make records relating to witnesses in the <i>Witness Protection Act 1994 (C'th)</i> exempt records and thus not available for the purposes of public access.</p>
2001	<p><i>Witness Protection Act 1994 (C'th)</i> was amended by the <i>Australian Federal Police Legislation Amendment Act 2000</i> so as to affect the manner in which AFP employees are now described.</p>
2002	<p><i>Witness Protection Act 1994 (C'th)</i> section 10A was amended to provide for the inclusion of persons in the NWPP at the request of the International Criminal Court. The process for inclusion is similar to that adopted for foreign nationals or residents in the NWPP.</p>
2009	<p><i>Witness Protection Act 1994 (C'th)</i> the definition of parent was amended as a consequential result of the assent to the <i>Same Sex</i></p>

	<i>Relationship (Equal Treatment in Commonwealth Law Reform) Act 2008.</i>
2010	On 4 February 2010 the <i>Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2010</i> was amended to include significant changes to the <i>Witness Protection Act 1994 (C'th)</i> to improve the protection and security of witnesses in the NWPP. The amendments to the Act include: clarification of the application of the Act to witnesses involved in State and Territory matters; updating the concept of identity; the extension of protection to former NWPP participants and their family members; introducing protection for the identity of participants and AFP employees involved in the administration of the program during legal proceedings; and updating and extending the scope of unlawful disclosure of information offences. Section 13 of the Act was also amended to permit persons holding or occupying designated positions to utilise assumed identities pursuant to Part IAC of the <i>Crimes Act 1914</i> .

**Table 6 - Legislative Amendments - *Witness Protection Amendment Bill 2002 (NSW)***

2002	<p>The <i>Witness Protection Act 1995 (NSW)</i> was amended in 2002 in the following way:</p> <p><b>Schedule 1 [1], [18] and [20]–[23]</b> provide for certain designated authorities under complementary witness protection laws to be able to apply directly to the Supreme Court for the issue of orders to facilitate the acquisition of a new identity by a witness. Currently such orders can only be made on the application of the Commissioner of Police. <b>Schedule 1 [30]</b> makes a consequential amendment.</p> <p><b>Schedule 1 [2]</b> broadens the range of actions that can be taken under the witness protection program for the protection of protected witnesses to include the provision to protected witnesses of counselling (such as psychological counselling and drug and alcohol</p>
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counselling) and vocational training services.

**Schedule 1 [3]** repeals a provision authorising the use of false identities by persons involved in the administration of the witness protection program (on the basis that this is now authorised and regulated under the *Law Enforcement and National Security (Assumed Identities) Act 1998*).

**Schedule 1 [4]** and **[12]** extend from 72 hours to 7 days the period within which the Ombudsman is required to determine an appeal against a decision to not include a witness in the witness protection program or to terminate protection and assistance to a witness.

**Schedule 1 [5]** modifies the provision of the memorandum of understanding required to be entered into with a protected witness dealing with the grounds for termination of protection and assistance so that the provision properly reflects the grounds on which protection and assistance can be terminated.

**Schedule 1 [6]** extends the matters that the memorandum of understanding between the Commissioner and a protected witness can provide for to include the taking, provision and retention of photographs of the witness.

**Schedule 1 [7]** inserts a provision that allows the Commissioner to temporarily suspend protection and assistance to a protected witness if the Commissioner is satisfied that the witness has done or intends to do something that limits the ability of the Commissioner to provide adequate protection to the person. **Schedule 1 [8]-[11]** and **[13]-[17]** make consequential amendments and extend to suspensions existing provisions dealing with notice to witnesses of decisions to terminate protection and review of and appeals against those decisions.

**Schedule 1 [10]** shortens from 28 days to 14 days the period within which a protected witness can request a review of a decision of the Commissioner to terminate protection, and provides that a protected witness has 2 days within which to request a review of a decision of the Commissioner to suspend protection.

**Schedule 1 [17]** provides for a decision of the Ombudsman confirming a decision of the Commissioner to terminate protection of a protected witness to take effect even if the witness cannot be notified of the decision despite reasonable efforts to do so. Currently the provision prevents the decision on appeal taking effect until the witness is notified.

**Schedule 1 [19]** extends existing provisions that deal with the issue of false birth and marriage certificates to protected witnesses to provide for the issue of false death certificates in respect of protected witnesses or their relatives. **Schedule 1 [24]–[29]** make consequential amendments.

**Schedule 1 [31]** repeals a provision that will be subsumed by the provisions to be inserted by **Schedule 1 [33]**.

**Schedule 1 [32]** makes a consequential amendment.

**Schedule 1 [33]** inserts a new Part 3A dealing with the issue of non-disclosure certificates in respect of persons given new identities under the witness protection program who are then required to give evidence in proceedings (either under their former identity or their new identity). A person who is or may be required to give evidence must notify the Commissioner of Police accordingly. The Commissioner must then issue a non-disclosure certificate to the court in which the person will give evidence. The effect of such a certificate is to prevent the disclosure in the proceedings of the person's *protected identity* (which may be their new identity or their former identity, depending on the capacity in which they are giving evidence).

**Schedule 1 [34]** makes it clear that an order of the Supreme Court authorising a person to be required to give evidence in proceedings operates as an exception to the provision that makes disclosure of certain information an offence.

**Schedule 1 [35]** and **[36]** amends a provision that prevents participants and former participants in the witness protection program from disclosing certain matters to extend the provision to

	<p>persons who were refused inclusion in the witness protection program or who were only temporarily included in the program. <b>Schedule 1 [37]</b> extends a provision that prevents certain persons being required to disclose information to a court about the witness protection program to persons or bodies or their employees who provide services to or for a protected witness. <b>Schedule 1 [38]</b> is consequential on this amendment.</p> <p><b>Schedule 1 [39]</b> makes it clear that the immunity from legal proceedings conferred by the Act extends to action taken pursuant to an order of the Supreme Court under the Act.</p> <p><b>Schedule 1 [40]-[42]</b> enacts savings and transitional provisions.</p>
2006	<p>Section 15 of the <i>Witness Protection Act 1995</i> (NSW) was amended to include designated authority for a complementary witness protection law to go directly to the New South Wales Supreme Court for an order to create a new identity document. This amendment resulted in the inclusion of ss 15(1A) in the New South Wales Act on 26 October 2006.</p>

**Table 7 - Legislative Amendments - *Witness Protection Act 1996* (SA)**

2004	<p>The <i>Witness Protection Act 1996</i> (SA) was amended in the following way:</p> <p>Section 2 was omitted under <i>Legislation Revision and Publication Act 2002</i></p> <p>Section 3(1) "approved authority" means (a) the Commissioner of the Australian Federal Police; or (b) a Commissioner (however designated) of the police force of another State or a Territory; (c) the Chief Executive Officer of the Australian Crime Commission; or (d) an authority or body of this State, the Commonwealth, another State or a Territory that (i) is authorised to conduct inquiries or investigations in relation to conduct that constitutes, or is alleged to constitute, criminal conduct, misconduct or corruption; and (ii) is declared by the Minister by notice in the Gazette to be an approved</p>
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	authority for the purposes of this Act;
2009	Section 26 was deleted.
2012	<p>Section 10(3) A memorandum of understanding must contain a statement advising the witness of his or her right to complain to the Police Ombudsman about the conduct of the Commissioner or another member in relation to the matters dealt with in the memorandum.</p> <p>Section 12(2) The Commissioner must allow the Police Ombudsman to have access to all or part of the register or to all or some of the documents kept in conjunction with the register for the purposes of an investigation by the Police Ombudsman under Part 4 of the <i>Police (Complaints and Disciplinary Proceedings) Act 1985</i>.</p> <p>Section 21(3) Subsection (1) or (2) does not prevent a disclosure that— (a) has been authorised by the Commissioner or relevant approved authority (if any); or (b) is necessary for the purposes of an investigation by the Police Complaints Authority under Part 4 of the <i>Police (Complaints and Disciplinary Proceedings) Act 1985</i>; or (c) is necessary to comply with, or is authorised by, an order of the Supreme Court</p> <p>Section 21(4) (4) A person must not, either directly or indirectly, make a record of, disclose or communicate to another person any information relating to action under section 17 to establish a new identity for a person or restore a person's former identity— (a) unless authorised to do so by an order of the Supreme Court; or (b) unless it is necessary to do so— (i) for the purposes of this Act; or (ii) for the purposes of an investigation by the Police Complaints Authority under Part 4 of the <i>Police (Complaints and Disciplinary Proceedings) Act 1985</i>; or (iii) to comply with an order of the Court. Maximum penalty: Imprisonment for 10 years.</p> <p>Section 23(2) Subsection (1) or (2) does not prevent a disclosure that— (a) has been authorised by the Commissioner or relevant approved authority (if any); or (b) is necessary for the purposes of an investigation by the Police Ombudsman under Part 4 of the <i>Police</i></p>

	<i>(Complaints and Disciplinary Proceedings) Act 1985</i> ; or (c) is necessary to comply with, or is authorised by, an order of the Supreme Court.
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**Table 8 - Legislative Amendments - *Witness Protection (Western Australia) Act 1996***

2003	The <i>Corruption and Crime Commission Act 2003</i> Sch. 3 was renumbered as Sch. 4 by the <i>Corruption and Crime Commission Amendment and Repeal Act 2003</i> s. 35(12) and the reference to it in s. 62 was amended by the <i>Corruption and Crime Commission Amendment and Repeal Act 2003</i> s. 35(13).
2008	Section 22. Supreme Court may order former identity to be restored was amended on an application under section 20 the Supreme Court may make such orders as are necessary to cancel the new identity given to a person under a new identity order, to restore the person's former identity and to secure the return to the Commissioner of any document issued in respect of the person under the new identity order.  Section 23. Proceedings to be in private was also amended so that (1) All proceedings in the Supreme Court on an application under this Division must be conducted in the absence of any person not directly concerned in the proceedings. (2) Except as authorised by a judge of the Supreme Court, no person may inspect the records of proceedings in the Court on an application under this Division.

**Table 9 - Legislative Amendments - *Witness Protection Act 2000 (Tas)***

2007	Section 26A was inserted after section 26. 26A. Arrangements for Commonwealth identity was amended so that documents (1) The Minister may enter into an arrangement with the Minister responsible for the administration of the <i>Witness Protection Act 1994</i> of the Commonwealth about any matter in connection with the
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	<p>issue of Commonwealth identity documents, within the meaning of that Act, for the purposes of the Tasmanian witness protection program. (2) Without limiting the matters to which an arrangement under subsection (1) may relate, an arrangement may relate to (a) procedures to be adopted for requesting the issue of Commonwealth identity documents for the purposes of the Tasmanian witness protection program; and (b) guidelines for the issue of those documents and other documents</p>
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**Table 10 - Legislative Amendments - *Witness Protection Act 1991 (Vic)***

1996	<p><i>Witness Protection (Amendment) Bill 1996</i> ensured that matters complementary to the <i>Witness Protection Act 1994 (C'th)</i> were set out in the Victorian legislation.</p>
2000	<p><i>Witness Protection (Amendment) Bill 2000</i> amended the <i>Witness Protection Act 1991</i> to enable authorities from other jurisdictions to apply for Victorian identity documents for witnesses in their witness protection programs, to provide for the extraterritorial operation of offences regarding disclosure of information about witnesses and for other purposes.</p>
2014	<p><i>Witness Protection Amendment Bill 2014</i> will amend the <i>Witness Protection Act 1991</i> in a significant way to improve the operation of the Victorian witness protection program. It will commence operations on a day or days to be proclaimed or on 1 December 2014 if not proclaimed before that date.</p> <p>The Bill contains new definitions of Chief Commissioner, commission of inquiry and interim protection declaration into section 3(1) of the Principal Act and makes minor and technical changes to other definitions. It amends section 3B of the <i>Witness Protection Act 1991</i>, which provides for inclusion of witnesses in the Victorian witness protection program to incorporate a mechanism to allow the Chief Commissioner to delegate to a Deputy Commissioner the section 3B power to include a witness in the Victorian witness protection</p>

program. The Bill contains new subsections that provide a list of things that the Chief Commissioner must have regard to in deciding whether to include a witness in the witness protection program and allow the Chief Commissioner to consider any other relevant matters. These new provisions require witnesses to disclose certain matters before being included in program. The new section 4 strengthens the information on which witness protection decisions are made by requiring witnesses who wish to be included the Victorian witness protection program to provide the Chief Commissioner with certain information that is listed. Documents must be provided on the Chief Commissioner's request and the Chief Commissioner will be able to require a witness to undergo and make available medical, psychological or psychiatric examinations and make any other necessary inquiries and investigations for the purposes of assessing whether the witness should be included in the Victorian witness protection program. The new section 4 is consistent with section 7 of the *Witness Protection Act 1994* (Commonwealth) and section 8 of the *Witness Protection Act 1996* (South Australia). The Bill amends section 5 of the *Witness Protection Act 1991* to expressly provide that an MOU may oblige the participant to disclose the participant's criminal history in respect of current or previous identities. While it is current practice for MOUs to include a term to this effect, the provision is intended to protect the integrity of the program, manage participants' expectations and mitigate risk to the community. A transitional provision inserted by clause 36 provides that a new term to this effect may be inserted in an existing MOU by the Chief Commissioner giving written notice to the participant.

The *Victoria Police Act 2013* will repeal section 6 of the *Police Regulation Act 1958*. The amendments to the Principal Act will ensure that Deputy Commissioners may continue to enter into MOUs so long as a delegation is in place.

The Bill amends section 9 to allow police officers or officers of approved authorities, rather than the Registrar, to cancel an entry in

the register of births or register of marriages in relation to a former participant in a witness protection program if authorised by the Supreme Court.

New sections 9A and 9B require the Chief Commissioner to deal with rights and obligations of participants in the Victorian witness protection program and require participants to notify the Chief Commissioner should they become involved in a civil proceeding in which their identity is an issue. The new section 9A requires the Chief Commissioner to take action to ensure obligations incurred before the new identity was established are dealt with and complied with according to law. The Chief Commissioner may also take action to assist a participant who is seeking to enforce their rights.

New Divisions 2 and 3 of Part 2 provide for interim witness protection and temporary assumed identities. The clause also creates a new Division 4 dealing with general provisions for witness protection and assistance. Division 4 consists of sections 10 to 15 of the Principal Act. Amends section 10 relating to information disclosure offences and expands the information disclosure offences to cover disclosure of information about interim protection and assumed identities. A new section 10A protects certain witness protection information from being publicly disclosed during court proceedings by requiring courts, tribunals or commissions to hold proceedings in private and prohibit or restrict publication of evidence. The courts, tribunals or commissions are also required to make other orders considered appropriate to ensure that information that may compromise the security of a participant is not disclosed. The Bill substitutes section 13 of the *Witness Protection Act 1991* to require applications to the Supreme Court for an order under section 7 (application for authority to make an entry in the register), 9 (application to cancel entry and revert to original identity), 10 (application for authority to disclose information that would otherwise be unlawful) and new section 20A (applications to make an entry in the Victorian Register for children born to participants) to be

closed to the public.

New section 15A, allows the Chief Commissioner to suspend protection and assistance if the Chief Commissioner is satisfied that the participant has done or intends to do something that limits the ability of the Chief Commissioner to provide adequate protection (for example, enter custody or overseas travel against a warning from the Chief Commissioner).

The Bill amends section 16 which provides for termination of protection and assistance and 16(3), has the effect of expanding the list of grounds for which the Chief Commissioner (or his or her delegate) may terminate protection and assistance. It amends section 17, which provides for involuntary termination to remove the merits review function of the Independent Broad-based Anti-corruption Commission (IBAC) over a Chief Commissioner's decision to terminate protection and assistance. The affected party's right to an internal review remains and the clause introduces a time limit of 14 days for the Chief Commissioner to determine such a review. The affected party's right to judicial review to the Supreme Court also remains. IBAC's police conduct complaints function remains unchanged. The same change is made in respect of decisions to restore former identity is made. This practice is consistent with law and practice in the Commonwealth, Australian Capital Territory, South Australia and Northern Territory.

The Bill amends section 19, which refers to restoration of the former identity. The effect of the amendment is to remove IBAC's merits review function over a Chief Commissioner's decision to restore former identity. The affected party's right to an internal review remains and the clause introduces a time limit of 14 days for the Chief Commissioner to determine such a review. The affected party's right to judicial review to the Supreme Court also remains. The same change in respect of decisions to terminate protection and assistance. In practice, decisions to terminate protection and restore former identity are likely to be made by a Deputy Commissioner with internal

review to the Chief Commissioner. This practice is consistent with law and practice in the Commonwealth, Australian Capital Territory, South Australia and Northern Territory.

The Bill amends section 20, which specifies when restoration of former identity takes effect, as a consequence of clause 27's removal of IBAC's merits review function. A new section 20A allows the Supreme Court to order a new entry be made in the register of births, deaths and marriages for a child of a participant who has no former identity if the participant's protection and assistance is terminated. New section 23A to allow for delegation by the Chief Commissioner those matters specified in 23A(1) to a Deputy Commissioner, also the power to make interim protection orders and interim identity authorities may be delegated to a police officer of the rank of superintendent or above. Clause 33 amends section 24 of the *Witness Protection Act 1991* with the effect that documents containing information about interim protection declarations and assumed identities are not subject to the *Freedom of Information Act 1982*.

## **Annexure 6A – Cohort population for the online survey explanatory memorandum**

The three tables at Annexure 6B show the calculations used to identify the possible cohort population for the online survey. Chapter 7, Research Methodologies, contains discussion about the total numbers of potential respondents from each cohort group and the tables in 6B show how that figure was reached. Tables 1, 2 and 3 are read from left to right.

Table 10 describes the cohort population for the online survey, how that figure was reached and what that number is as a percentage of the Australian population by state and territory and then overall.

Column 1 is self-explanatory; it simply lists the Australian jurisdictions;

Column 2, *Overall population*, shows the total population of Australia by state and territory. The numbers were sourced from the Australian Bureau of Statistics website using the 2012 census figures.

Column 3, *State and Territory based cohort membership*, shows the number of representatives of each cohort in each state and territory. It does not include Commonwealth employees in each cohort in each state. The figures were gathered from Annual Reports for 2012 from each of the cohort representative bodies in each state and territory, for example, the Supreme Court of New South Wales, the South Australian Police Annual Report and so on.

Columns 4-8, *Distribution of Commonwealth employees*, shows the number of Commonwealth employees, by state or territory, across the cohorts. The figures are gleaned from relevant annual reports, but some estimation was required because precise figures were not listed in the annual reports in all cases.

Column 9, *Total cohort membership including Commonwealth employees*, represents the total number for each cohort taking into account

Commonwealth and state and territory figures. The total of 123,978 formed the basis of the possible respondent population because the online survey was only open to members of the five cohorts, Judges and Magistrates, Prosecutors, Defence Barristers and Police Officers, not the entire Australian population.

Column 10, *Total cohort membership as a percentage of the total population*, shows the cohort population as a percentage of the population of the state or territory. Dividing the cohort population by the total population of the state or territory and then dividing the total cohort membership by the total Australian population arrived at the percentage figure.

Table 11 shows the calculations for each cohort by jurisdiction where the cohorts are listed in the left hand column and the following columns show the number in the cohort by state or territory. Columns 1-12 are self-explanatory.

Column 13, *Possible number of respondents per cohort*, shows the possible number of respondents per cohort per state calculated by dividing the total in the cohort by 0.663%, (the total membership as a percentage of the total Australian population), to arrive at the percentage of the cohorts in the Australian population. While a figure is shown for Judges and Magistrates, that number is not relied on because for each committal proceeding and trial a Magistrate and Judge will be required respectively. The figure used in the thesis based on the number of witnesses included in programs from 1995 to 2012, is a more realistic figure.

Table 12 *The percentage of respondents who answered and partially answered the survey from the possible respondent population*, demonstrates the percentage of survey respondents per head of the overall and individual cohort populations in Australia.

## Annexure 6B – Cohort population for the online survey

**Table 11 - Possible cohort populations as a percentage of the Australian population**

	Overall population	State and Territory based cohort membership	Distribution of Commonwealth employees					Total cohort membership including Commonwealth employees	Total cohort membership as a % of the total population
			High Court Judges	Federal Court Judges	Family Court Judges	AFP officers	Legal practitioners		
NSW	7,381,100	43,869		16	13	516		44,414	0.601%
VIC	5,713,000	30,166		12	6	379		30,563	0.534%
QLD	4,638,100	21,852		6	6	316		22,180	0.478%
WA	2,497,500	11,125		4		139		11,268	0.450%
SA	1,667,500	8,356		4	2	75		8,437	0.505%
TAS	512,900	1,678		1	1	22		1,702	0.331%
ACT	381,700	@514	7		2	1832	@800	3,364	0.881%
NT	237,800	2,008				42		2,050	0.862%
<b>Population</b>	<b>23,249,658</b>	<b>119,513</b>	<b>7</b>	<b>43</b>	<b>30</b>	<b>3321</b>	<b>800</b>	<b>123,978</b>	<b>0.663%</b>

**Table 12 - The possible number of respondents by cohort**

	<b>C'TH</b>	<b>ACT</b>	<b>AFP</b>	<b>NSW</b>	<b>NT</b>	<b>QLD</b>	<b>SA</b>	<b>TAS</b>	<b>VIC</b>	<b>WA</b>	<b>TOTAL</b>	<b>Possible number of respondents per cohort</b>
<b>Judges</b>	80	4		56	9	27	12	6	46	20	<b>260</b>	<b>1.723</b>
<b>Magistrates</b>		@10		133	14	56	22	16	128	@40	<b>@419</b>	<b>2.777</b>
<b>Legal Practitioners</b>	800	@709		27,703	568	10,714	3,490	511	17,453	4,956	<b>@66,904</b>	<b>443.573</b>
<b>Police</b>			3,321	15,977	1,417	11,055	4,832	1,145	12,539	6,109	<b>56,395</b>	<b>373.898</b>
<b>TOTAL</b>	4,201	514		43,869	2,008	21,852	8,356	1,678	30,166	11,125	<b>123,978</b>	<b>821.971</b>

**Table 13 - The percentage of respondents who partially answered or answered the survey from the possible respondent population**

<b>Cohort</b>	<b>Possible survey respondents</b>	<b>Actual respondents</b>	<b>% of actual respondents</b>	
	123,759	44	0.035%	Partially answered the survey
	123,759	26	0.021%	Answered the survey
<b>Judges</b>	260	3	0.12%	Partially answered the survey
		1	0.033%	Answered the survey
<b>Magistrates</b>	@419	0		
<b>Legal Practitioners</b>	66,904	8	0.012%	Partially answered the survey
		2	0.003%	Answered the survey
<b>Police</b>	56,395	25	0.044%	Partially answered the survey
		23	0.04%	Answered the survey

# Annexure 7 – Survey Questions and Data Dictionary

Data Dictionary -PHD - Phil Kowalick, A Critical Examination of Witness Protection in Australia

Created: 26/07/2012

## Missing Values

While not displayed in the following dictionary, SurveyManager's data extraction file uses the following missing value codes which may apply to all or any R numbers in this dictionary.

-999: respondent presented a question and its question options, but did not select an option.

-888: respondent not presented a question and related question options because of questionnaire logic, so had no opportunity to respond.

Include some of the deleted discussion about the dictionary out of Chapter 8 in here.

## Consent

1. I have read the information contained in the Information Sheet for Participants and any questions I have asked have been answered to my satisfaction.

R1(1)Yes      R1(2)No

2. I agree to participate in this activity, realising that I may withdraw at any time.

R2(1)Yes      R2(2)No

3. I agree that research data gathered for the study may be published using a pseudonym.

R3(1)Yes R3(2)No

4. I agree that I can be quoted in the thesis, but that I will not be identified other than by a pseudonym.

R4(1)Yes R4(2)No

5. I agree to any subsequent interview I agreed to give being audiotape recorded and transcribed.

R5(1)Yes R5(2)No

6. Are you a...

R6(1)Judge in the Supreme Court of a State or Territory or the Family Court

R6(2)Magistrate

R6(3)Defence Lawyer

R6(4)Prosecutor

R6(5)Police Officer

7. Was the matter involving a person in witness protection giving evidence a...

R7(1)A State matter

R7(2)A Territory matter

R7(3)A Commonwealth matter

Part 1

8. As a Judge or Magistrate:

Yes No

Have you presided in a matter involving a person included in a witness protection program giving evidence?

R8\_A(1)                      R8\_A(2)

9.     Do you think...

      Yes    No

The jury, if there was one in this case, was influenced by the fact that the witness was in protection, despite instructions?

R9\_A(1)        R9\_A(2)

The Defence was reasonably able to test the credibility of the protected witness in its cross examination?

R10\_A(1)      R10\_A(2)

The fact that a protected witness was involved in giving evidence created particular judicial issues during the trial?

R11\_A(1)      R11\_A(2)

10.    Please leave any comments, you feel are relevant as to why or why not for the above

R12\_1

Part 1

11.    As a Defence Lawyer:

      Yes    No

Have you represented a defendant in a case where a person included in a witness protection program has given evidence for the Crown against your client?

R13\_A(1)      R13\_A(2)

Have you participated in a matter where a person included in a witness protection program has given evidence for the Crown in, for example a role of instructing solicitor?

R14\_A(1)      R14\_A(2)

12.    Yes    No

Was your defence strategy adversely affected by the circumstances surrounding a protected witness giving evidence for the Crown against your client?

R15\_A(1)      R15\_A(2)

Do you think your client received a fair trial?

R16\_A(1)      R16\_A(2)

Do you think the jury, if there was one in this case, was adversely affected by the evidence given by the protected witness?

R17\_A(1)      R17\_A(2)

Do you think you were reasonably able to test the credibility of the protected witness in your cross-examination?

R18\_A(1)      R18\_A(2)

Do you think the fact that a witness is included in a witness protection program influences court processes?

R19\_A(1)      R19\_A(2)

Do you think that the doctrine of the right to a fair trial is influenced in any way by the appearance of a witness included in a witness protection program in the trial?

R20\_A(1)      R20\_A(2)

Do you think the witness' credibility is in any way compromised by virtue of their inclusion in a witness protection program?

R21\_A(1) R21\_A(2)

Do you think the witnesses' credibility can be fully explored during cross-examination by the defence where the witness giving evidence in the relevant matter is included in a witness protection program?

R22\_A(1) R22\_A(2)

13. Please leave any comments, you feel are relevant as to why or why not for the above

R23\_1

Part 1

14. As a Prosecutor:

Yes No

Have you prosecuted a matter where a person included in a witness protection program has given evidence for the crown?

R24\_A(1) R24\_A(2)

Have you participated in a matter where a person included in a witness protection program has given evidence for the Crown in, for example a role of instructing solicitor?

R25\_A(1) R25\_A(2)

15. Yes No

Was your prosecution strategy adversely affected by the circumstances surrounding a protected witness giving evidence for the Crown against your client?

R26\_A(1) R26\_A(2)

Do you think the accused received a fair trial?

R27\_A(1) R27\_A(2)

Do you think the jury, if there was one in this case, was adversely affected by the evidence given by the protected witness?

R28\_A(1) R28\_A(2)

Do you think the fact that a witness is included in a witness protection program influences court processes?

R29\_A(1) R29\_A(2)

Do you think that the doctrine of the right to a fair trial is influenced in any way by the appearance of a witness included in a witness protection program in the trial?

R30\_A(1) R30\_A(2)

Do you think the witness' credibility is in any way compromised by virtue of their inclusion in a witness protection program?

R31\_A(1) R31\_A(2)

Do you think the witnesses' credibility can be fully explored during cross-examination by the defence where the witness giving evidence in the relevant matter is included in a witness protection program?

R32\_A(1) R32\_A(2)

16. Please leave any comments, you feel are relevant as to why or why not for the above

R33\_1

Part 1

17. As a police officer:

Yes No

Are you a police officer currently working in a function providing witness protection services?

R34\_A(1) R34\_A(2)

Are you a police officer who has previously worked in a function providing witness protection services?

R35\_A(1) R35\_A(2)

## Part 2

In 1989, the Parliamentary Joint Committee (PJC) on the National Crime Authority made eight recommendations about the establishment of formal witness protection arrangements in Australia. The questions below relate to specific PJC recommendations and other matters relevant to the thesis research.

18. An expanded witness protection role

The committee recommended that the Australian Federal Police should assume an expanded national witness protection role – PJC Recommendation 1

Yes No

Do you think the current arrangements for witness protection, where each state and territory as well as the AFP provide witness protection services, deliver an effective national approach to witness protection in Australia?

R36\_A(1) R36\_A(2)

Do you think one national witness protection program would provide more effective arrangements for protected witnesses?

R37\_A(1) R37\_A(2)

19. Why or why not?

R38\_1

20. The Coordination of Witness Protection in Australia

The Committee recommended that a National Witness Protection Liaison Committee be established under the auspices of the Australian Police Ministers' Council to facilitate greater coordination and cooperation between the eight police forces in the provision of witness protection – PJC

Recommendation 1 b

Yes No

Do you think that a National Witness Protection Liaison Committee would provide greater coordination and cooperation between the eight police forces in the provision of witness protection?

R39\_A(1) R39\_A(2)

Do you think that such a committee is required to ensure greater coordination and cooperation between the eight police forces in the provision of witness protection?

R40\_A(1) R40\_A(2)

Do you think such a committee would be required if a national witness protection agency was established to provide secure arrangements for protected witnesses on behalf of all jurisdictions?

R41\_A(1) R41\_A(2)

21. Why or why not?

R42\_1

22. Birth Certificates

The Committee recommended that legislation relating to the registration of births in each State and Territory be amended to provide a mechanism similar to that presently applying in cases of adoption whereby a protected witness may be issued with a birth certificate in a new name, which does not indicate that any change of name has taken place. The original birth certificate should be kept in a closed register available only to the protected witness or duly authorised person – PJC Recommendation 2

NB: This recommendation did not refer to entries to the register relating to the death of a participant or former participant, but that issue has been raised in subsequent reviews of witness protection in Australia.

Yes No

Do you think the current procedures for providing birth certificates for protected witnesses and others included in witness protection programs are satisfactory?

R43\_A(1) R43\_A(2)

Do you think the permission of the court should be required each time an entry is made into the register of births before issuing a birth certificate in the witness' new name to a participant in a witness protection program?

R44\_A(1) R44\_A(2)

Do you think the legislation should be amended to enable the police force providing witness protection to add an entry into the register in the participant's old name in the case of the death of the participant?

R45\_A(1) R45\_A(2)

23. Why or why not?

R46\_1

24. External review and oversight of witness protection programs

The Committee recommended that, where presently unavailable, appropriate mechanisms be established to handle complaints from persons who believe that they have been unjustly denied protection or who are aggrieved by decisions made by agencies in the administration of witness protection scheme – PJC Recommendation 5

Yes No

Do you think an independent external oversight responsibility should exist with respect to all witness protection programs in Australia?

R47\_A(1) R47\_A(2)

Do you think that the current oversight arrangements by a Parliamentary Joint Committee, the Ombudsman or another formal body in the relevant jurisdiction are sufficient in the case of complaints from persons aggrieved by decisions made by agencies in the administration of witness protection schemes?

R48\_A(1) R48\_A(2)

Do you think that greater external scrutiny of witness protection programs is required?

R49\_A(1) R49\_A(2)

Do you think sufficient safeguards exist in the relevant legislation to support the Commissioners decision to include or deny inclusion in a witness protection program where the applicant/witness does not make full disclosures as required by the legislation?

R50\_A(1) R50\_A(2)

25. The clash between witness protection and the Family Court

The Committee recommended that complementary State and Federal legislation relating to witness protection should set out mechanisms whereby protected witnesses may be prevented from evading their civil debts and

from avoiding obligations imposed on them by the Family Court – PJC  
Recommendation 6 (b)

NB: In *T & F [1999] FamCA 738* (30 June 1999) the Family Court asserted its authority to give directions to the Commissioner of Police to provide access to a child for a non custodial parent where either the child or the non custodial parent is a participant in a witness protection program regardless of security concerns expressed by police.

Yes No

Do you think the Family Court, acting in the “best interests of the child”, is best placed to consider the security implications in respect of access to the child where either the child or the non custodial parent is included in a witness protection program?

R51\_A(1) R51\_A(2)

Do you think the relevant legislation should be amended to provide clear instructions to the Family Court in the case of a security reason preventing access at a time and place determined by the Family Court for access?

R52\_A(1) R52\_A(2)

26. Why or why not?

R53\_1

27. Fast tracking cases involving protected witnesses

The Committee recommended that complementary State and Federal legislation relating to witness protection should establish procedures whereby the hearing of cases in which protected witnesses are to testify can be expedited – PJC Recommendation 6 (d)

Yes No

Do you think there are any circumstances in which an argument exists to fast track cases involving protected witnesses through committal proceedings and trial? R54\_A(1) R54\_A(2)

Do you think that expediting cases involving protected witness through committal and trial would affect the accused person's right to a fair trial?

R55\_A(1) R55\_A(2)

28. Why or why not?

R56\_1

29. The Memorandum of Understanding

The memorandum of understanding, entered by the participant with the programs administrators, is the underpinning agreement between the parties for the provision of protection. It sets out matters such as the basis for inclusion in the program, protection arrangements, conditions of inclusion and the termination of protection, details of identity documents, the prohibition of certain activities and certain financial arrangements. The Committee did not consider it necessary for the obligations contained in the MOU to be set out in legislation as the MOU is not a contract binding on either party.

Yes No

Do you agree that current MOU's carry sufficient legal weight to ensure the performance of rights and obligations of the respective parties? R57\_A(1)

R57\_A(2)

Do you think the MOU should include a requirement that the participant agrees to give evidence to the best of their ability?

R58\_A(1) R58\_A(2)

Do you think the MOU should contain provisions for the termination of protection where the participant fails to discharge his/her commitment to give evidence to the best of their ability?

R59\_A(1)    R59\_A(2)

30.    Why or why not?

R60\_1

Part 3

Your answers to the questions above will greatly assist the research in quantitative and qualitative way. There are likely to be further questions and clarifications arising from the analysis of the data collected and it will further assist the research if you would be willing to take part in an interview that could resolve those issues.

To that end, if you would be prepared to take part in an interview – either face to face or over the telephone please provide the following contact details.

The information you provide in this part will be stored separately from the research data.

31.

R61\_1Name:

R61\_2Contact telephone number/s:

R61\_3Email address:

R61\_4Postal address:

## Annexure 8 – Quantitative data collection – Frequency Tables

**Table 14 - An expanded witness protection role**

	No Answer		Yes		No		Total	
	Freq	%	Freq	%	Freq	%	Freq	%
<b>Question 18<sup>1132</sup> R36</b>	0	0.0	13	50.0	13	50.0	<b>26</b>	<b>100</b>
<b>Question 18<sup>1133</sup> R37</b>	0	0.0	16	61.5	10	38.5	<b>26</b>	<b>100</b>

**Table 15 - The coordination of witness protection in Australia**

	No Answer		Yes		No		Total	
	Freq	%	Freq	%	Freq	%	Freq	%
<b>Question 20<sup>1134</sup> R39</b>	1	4.0	19	73.0	6	23.0	<b>26</b>	<b>100</b>
<b>Question 20<sup>1135</sup> R40</b>	1	4.0	16	61.5	9	34.5	<b>26</b>	<b>100</b>
<b>Question 20<sup>1136</sup> R41</b>	1	4.0	16	61.5	9	34.5	<b>26</b>	<b>100</b>

<sup>1132</sup> Do you think the current arrangements for witness protection, where each state and territory as well as the AFP provide witness protection services, deliver an effective national approach to witness protection in Australia?

<sup>1133</sup> Do you think one national witness protection program would provide more effective arrangements for protected witnesses?

<sup>1134</sup> Do you think that a National Witness Protection Liaison Committee would provide greater coordination and cooperation between the eight police forces in the provision of witness protection?

<sup>1135</sup> Do you think that such a committee is required to ensure greater coordination and cooperation between the eight police forces in the provision of witness protection?

<sup>1136</sup> Do you think such a committee would be required if a national witness protection agency was established to provide secure arrangements for protected witnesses on behalf of all jurisdictions?

**Table 16 - Birth certificates**

	No Answer		Yes		No		Total	
	Freq	%	Freq	%	Freq	%	Freq	%
<b>Question 22<sup>1137</sup> R43</b>	1	4.0	18	69.0	7	27.0	<b>26</b>	<b>100</b>
<b>Question 22<sup>1138</sup> R44</b>	1	4.0	11	42.0	14	54.0	<b>26</b>	<b>100</b>
<b>Question 22<sup>1139</sup> R45</b>	1	4.0	18	69.0	7	27.0	<b>26</b>	<b>100</b>

**Table 17 - External review and oversight of witness protection programs**

	No Answer		Yes		No		Total	
	Freq	%	Freq	%	Freq	%	Freq	%
<b>Question 24<sup>1140</sup> R47</b>	0	0.0	14	54.0	12	46.0	<b>26</b>	<b>100</b>
<b>Question 24<sup>1141</sup> R48</b>	0	0.0	21	80.5	5	19.5	<b>26</b>	<b>100</b>
<b>Question 24<sup>1142</sup> R49</b>	0	0.0	19	73.0	7	27.0	<b>26</b>	<b>100</b>

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<sup>1137</sup> Do you think the current procedures for providing birth certificates for protected witnesses and others included in witness protection programs are satisfactory?

<sup>1138</sup> Do you think the permission of the court should be required each time an entry is made into the register of births before issuing a birth certificate in the witness' new name to a participant in a witness protection program?

<sup>1139</sup> Do you think the legislation should be amended to enable the police force providing witness protection to add an entry into the register in the participant's old name in the case of the death of the participant?

<sup>1140</sup> Do you think an independent external oversight responsibility should exist with respect to all witness protection programs in Australia?

<sup>1141</sup> Do you think that the current oversight arrangements by a Parliamentary Joint Committee, the Ombudsman or another formal body in the relevant jurisdiction are sufficient in the case of complaints from persons aggrieved by decisions made by agencies in the administration of witness protection schemes?

<sup>1142</sup> Do you think that greater external scrutiny of witness protection programs is required?

**Table 18 - The clash between witness protection and the Family Court of Australia**

	No Answer		Yes		No		Total	
	Freq	%	Freq	%	Freq	%	Freq	%
<b>Question 25<sup>1143</sup> R51</b>	1	4.0	6	23.0	19	73.0	<b>26</b>	<b>100</b>
<b>Question 25<sup>1144</sup> R52</b>	0	0.0	21	80.5	5	19.5	<b>26</b>	<b>100</b>

**Table 19 - Fast tracking cases involving protected witnesses**

	No Answer		Yes		No		Total	
	Freq	%	Freq	%	Freq	%	Freq	%
<b>Question 27<sup>1145</sup> R54</b>	1	4.0	19	73.0	6	23.0	<b>26</b>	<b>100</b>
<b>Question 27<sup>1146</sup> R55</b>	1	4.0	9	34.5	16	61.5	<b>26</b>	<b>100</b>

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<sup>1143</sup> Do you think the Family Court, acting in the “best interests of the child”, is best placed to consider the security implications in respect of access to the child where either the child or the non custodial parent is included in a witness protection program?

<sup>1144</sup> Do you think the relevant legislation should be amended to provide clear instructions to the Family Court in the case of a security reason preventing access at a time and place determined by the Family Court for access?

<sup>1145</sup> Do you think there are any circumstances in which an argument exists to fast track cases involving protected witnesses through committal proceedings and trial?

<sup>1146</sup> Do you think that expediting cases involving protected witness through committal and trial would affect the accused person’s right to a fair trial?

**Table 20 - Sufficient safeguards for Commissioners decisions**

	No Answer		Yes		No		Total	
	Freq	%	Freq	%	Freq	%	Freq	%
<b>Question 24<sup>1147</sup> R50</b>	0	0.0	22	84.5	4	15.5	<b>26</b>	<b>100</b>

**Table 21 - The MOU**

	No Answer		Yes		No		Total	
	Freq	%	Freq	%	Freq	%	Freq	%
<b>Question 29<sup>1148</sup> R57</b>	1	4.0	10	38.5	15	57.5	<b>26</b>	<b>100</b>
<b>Question 29<sup>1149</sup> R58</b>	1	4.0	19	73.0	6	23.0	<b>26</b>	<b>100</b>
<b>Question 29<sup>1150</sup> R59</b>	1	4.0	19	73.0	6	23.0	<b>26</b>	<b>100</b>

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<sup>1147</sup> Do you think sufficient safeguards exist in the relevant legislation to support the Commissioners decision to include or deny inclusion in a witness protection program where the applicant/witness does not make full discloses as required by the legislation?

<sup>1148</sup> Do you agree that current MOU's carry sufficient legal weight to ensure the performance of rights and obligations of the respective parties?

<sup>1149</sup> Do you think the MOU should include a requirement that the participant agrees to give evidence to the best of their ability?

<sup>1150</sup> Do you think the MOU should contain provisions for the termination of protection where the participant fails to discharge his/her commitment to give evidence to the best of their ability?

## **Annexure 9 – The Request for Information**

The number of participants included in the agencies witness protection program (WPP) at 30 June of the financial year

The number of those participants who are not witnesses, but are/were members of the witness's family and are not themselves giving evidence

The number of new participants included in the agencies WPP this financial year

The number of participants who left the WPP in this financial year following the conclusion of prosecutions they were involved in

The number of those participants who are not witnesses leaving the WPP this financial year

The number of participants who left the WPP in this financial year through reasons other than the completion of the prosecution they were involved in

The number of prosecutions protected witnesses were involved with

The number of successful prosecutions involving protected witnesses

The number of defendants in each prosecution in which the protected witness gave evidence

The number of persons incarcerated from those prosecutions

The crime types (e.g. Outlaw motor cycle gang activity, drugs, money laundering, corruption, identity crime, other) in which protected witnesses gave evidence

The financial cost of running the program not including the cost of police infrastructure and operative's wages and overtime

## Annexure 10 – Results of data collection on participation and costs

**Table 22 - National Witness Protection Program statistics**

Year ending	Total Ops	Participants	Ops Ended	Assessments conducted	Complaints to the Ombudsman	Amounts Recovered	C'th Expenditure	Total Expenditure
30/06/95								\$292,400.00
30/06/96								\$1,729,500.00
30/06/97	19	50						\$1,024,100.00
30/06/98	12	36	(13)	(6)		\$364,427.00	\$1,379,938.00	\$1,744,365.00
30/06/99	13	36	1 (1)		3	\$221,654.93	\$446,634.62	\$668,289.55
30/06/00	13	28	UK (11)		4	\$540,438.05	\$972,275.95	\$1,512,714.00
30/06/01	10	23	UK (5)	1 (2)	0	\$412,263.98	\$667,909.77	\$1,080,173.75
30/06/02	12	26	UK (12)	UK (8)	0	\$80,338.27	\$693,601.05	\$773,948.32
30/06/03	12	20	UK (4)	3 (3)	1	\$106,868.19	\$538,958.64	\$645,826.83
30/06/04	18	32	1 (2)	2 (7)	2	\$399,522.08	\$1,761,287.54	\$2,160,809.62
30/06/05	28	51	2(3)	1 (2)	0	\$978,940.98	\$688,885.72	\$1,667,826.70

30/06/06	19	39	0	1 (1)	0	\$894,598.58	\$558,013.81	\$952,612.39
30/06/07	28	75	3 (5)	1 (2)	0	\$1,166,439.88	\$74,291.44	\$1,940,731.32
30/06/08	25	66	3 (5)	3 (5)	0	\$657,349.88	\$390,398.64	\$1,047,748.52
30/06/09	34	78	2 (3)		0	\$736,263.37	\$834,357.51	\$1,570,620.88
30/06/10	14	25	6 (11)	2 (1)	2	\$426,729.15	\$818,629.57	\$1,245,358.72
30/06/11	10	14	3 (3)	1	1	\$384,644.34	\$589,672.44	\$974,316.78
30/06/12	24	43	2 (2)	3	1	\$475,764.14	\$424,178.65	\$899,942.79
<b>Totals</b>	<b>291</b>		<b>23 (80)</b>	<b>18 (38)</b>	<b>14</b>	<b>\$7,846,242.82</b>	<b>\$10,839,033.35</b>	<b>\$21,931,285.17</b>

**Table 23 - Queensland Witness Protection Program statistics**

Year	Total ops	Participants	Referrals	Operations Concluded	Operations Commenced	Participants end of reporting period	Total expenditure
30/06/88	32	96	111				
30/06/89	42	116	29				
30/06/90	56	150	53				
30/06/91	66	176	62				
30/06/92	87	228	97				
30/06/93	76	201	86				
30/06/94	74	192	123				
30/06/95	83	206	155	31 (57)	37 (76)		
30/06/96	80	198	138	33 (76)	31 (79)		
30/06/97	70	174	128	47 (114)	(62)		
30/06/98	53	112	102	31 (60)	27 (55)		
30/06/99	58	114	136	26 (59)	26 (59)		
30/06/00	72	153	165	49 (69)	50 (78)		
30/06/01	73	153	195	56 (131)	(94)		

30/06/02	63	129	199	46 (86)	(84)		
30/06/03	68	141	190	37 (74)	(94)	31 (67)	
30/06/04	55	143	143		(52)		\$3,900,000.00
30/06/05	61	115	156		(70)		\$4,100,000.00
30/06/06	70	136	89	(69)	(57)	28	\$4,300,000.00
30/06/07	44	106	130	(62)	(78)	41	\$4,300,000.00
30/06/08	42	83	96	(66)	(42)	19	\$4,400,000.00
30/06/09	-	-	-		104 (51)		\$5,000,000.00
30/06/10	-	-	-		135 (46)		\$5,200,000.00
30/06/11	-	-	-		114 (51)		\$5,900,000.00
30/06/12	-		90		(39)		\$6,300,000.00
<b>Totals</b>	<b>1325</b>		<b>2673</b>	<b>553 (726)</b>			<b>\$43,400,000.00</b>

**Table 24 - South Australian Witness Protection Program statistics**

Year	Total ops	Participants	Out	Assessments	New in	Total expenditure
30/06/95						
30/06/96						
30/06/97		15		10	0	
30/06/98						
30/06/99			3			
30/06/00		35	2			
30/06/01						
30/06/02						
30/06/03						
30/06/04						
30/06/05						
30/06/06			2			
30/06/07			5		7	
30/06/08	107		1			
30/06/09	111		2			

30/06/10	112		3			
30/06/11						
30/06/12						
30/06/13						
<b>Totals</b>	<b>330</b>	<b>50</b>	<b>18</b>	<b>10</b>	<b>7</b>	<b>\$0.00</b>

**Table 25 - Western Australian Witness Protection Program statistics**

Year	Total ops	Participants	Out	Assessments	New in	Total expenditure
30/06/97		13	2	9	6	\$100,000.00
30/06/98		8	12	11	7	\$93,000.00
30/06/99		7	8	8	8	\$93,000.00
30/06/00		15	7	11	11	\$138,000.00
30/06/01		19	6	14	8	\$196,043.00
30/06/02		13	9	4	1	\$245,000.00
30/06/03						Not available
30/06/04	7	15	0	5	1	\$306,000.00
30/06/05	9	21	4	8	2	\$321,294.00

30/06/06	10	20	3	7	1	\$360,000.00
30/06/07	8	15	3	5 (13)	1	\$319,000.00
30/06/08	9	21	0	38	1	\$173,469.82
30/06/09	8	14	5	32		\$169,602.00
30/06/10	12	26	3	35		\$310,631.00
30/06/11	10	27	2	35		\$317,629.00
30/06/12	10	23	2	34		\$473,468.00
30/06/13	8	20	2	28		\$340,899.00
<b>Totals</b>						<b>\$3,957,062.82</b>

# **Annexure 11 – An alternative witness protection model**

The three-tiered model for national witness protection arrangements is a viable option. In such a model, Tier 1, the NWPP, is responsible for protecting witnesses in serious and organised crime matters; Tier 2, WPPs, provide protection and assistance in relation to serious crime matters; and Tier 3 assistance arrangements are provided in the case of other crime. Each tier is described briefly below to provide an overview of differences and the nuances between them:

## **Tier 1 – National Witness Protection Program**

The NWPP will provide protection and assistance to witnesses and informants in serious and organised crime matters and the evidence to be provided by the witness or informant is important to the case. In these Tier 1 matters, the witness or informant will be the subject of a threat or threats and those making the threat/s have the intent and capability to carry it out. Other methods of providing protection and assistance to the witness or informant will have been explored by the NWPP and inclusion in the program will be seen as the last resort.

The criteria for including a witness or informant in the NWPP are currently set out in the Commonwealth Act and would require only minimal revision to support the three-tiered model. A written threat assessment, conducted by a competent intelligence analyst, would have to include an assessment of the intent and capability of those making the threat to carry it out.

Any instance of the re-identification and relocation of the participant outside of the original jurisdiction must be undertaken by the NWPP. Therefore, where a decision is made that a participant in a state or territory witness protection program requires a new identity and relocation to another jurisdiction, that participant should be included in the NWPP. The participant would have to be assessed as suitable for inclusion in the NWPP against the

criteria set out in the Act. The application must be supported by the referring police force setting out the importance of the matter, the threat to the participant and the reasons for referring the participant to the NWPP.

## **Tier 2 – State or Territory witness protection program**

A WPP will provide protection and assistance to witnesses and informants in serious criminal matters and the evidence to be provided by the witness or informant is important to the case. In these Tier 2 matters, the witness or informant will be the subject of a threat or threats and those making the threat/s will likely have the intent and/or capability to carry it out. Other methods of providing protection and assistance to the witness or informant will have been explored and inclusion in the program will be seen as the last resort.

The criteria for including a witness or informant in the WPP should be the same as those for inclusion in the NWPP so as to facilitate the transfer of participants from a WPP to the NWPP where that becomes necessary. A threat assessment and a separate and comprehensive risk assessment should be conducted for all Tier 2 matters.

In Tier 2 cases, where the participant is to be relocated interstate, the protection provider should be obliged to consult the NWPP before the relocation. In the case of relocation interstate, an option could exist for the original police force to transfer a witness to a host police force in the new location. This model has been adopted in Britain and while there is no data about the use made of the option or its success, there are obvious benefits. The host is in a better position to provide rapid response in the case of emergency, the problems associated with the original police force operating in another jurisdiction without legal powers and the potentially reduced costs of managing the operation are three clear benefits.

This transfer option would not be required in Tier 1 operations because the AFP has national jurisdiction and has offices in each state and territory. In the

case of relocation overseas, the NWPP must facilitate the necessary arrangements.

A participant in a Tier 2 program might choose to take a new identity and in such cases the arrangements should be facilitated through deed poll in the state or territory.

### **Tier 3 – State and Territory police witness assistance**

The criteria for inclusion in a Tier 3 program would include that the criminality involved relates to a lower order state or territory offence, but that the witness faces a threat to their safety or security of a sufficient magnitude and those making the threats were capable of carrying them out. The decision to include a witness in a Tier 3 program should rest with the commissioner in the relevant jurisdiction.

A participant in a Tier 3 program would not require relocation nor would they require a new identity. Police operating witness protection programs would, in these cases, alert the local area command (LAC) in the area in which the witness resides requesting the LAC provide additional attention and/or response for the participant. A witness protection officer from the relevant WPP might attend court when the witness is giving evidence so as to provide support for the witness during his or her evidence in court.

### **General issues**

Costs associated with a state or territory having a witness included in the NWPP should be borne by the relevant state or territory police force managed on a cost recovery basis. Likewise, the cost associated with transferring a participant from one Tier 2 program to another should be recovered from the referring police force. Arrangements between the NWPP and the states and territories and between the states and territories should be entrenched in the UWPA and described in interagency MOUs.

Options for the secondment of state and territory police to the NWPP should be explored. State or territory police would require appropriate security clearances prior to the secondment.

# **Annexure 12 – A Uniform Witness Protection Act**

Supporting the three-tiered structure for witness protection programs is critical and the current legislative arrangements, it is argued, do not deliver an effective national approach. A Uniform Witness Protection Act (UWPA) would apply to all witness protection programs in Australia and would repeal all existing legislation at the Commonwealth and state and territory levels. Where necessary, subsections relating to relevant issues should be framed to relate to the NWPP with the following subsection referring to the state or territory WPP:

## **Preamble**

This part should contain sections 1 Short title, 2 Commencement, 3 Interpretations, 3AB *State offence that has a federal aspect* and 3A Application of the *Criminal Code* of the existing Commonwealth Act. Sections dealing with the application of state and or territory laws should be included in the preamble.

Section 3AA Declaration of *complementary witness protection law* would not be required in the UWPA.

## **Part 1 – Establishment and maintenance of the NWPP and another WPP**

The part should establish the National Witness Protection Program (NWPP) and state and territory witness protection programs hereinafter referred to as WPPs under the UWPA. Sections 4, Establishment of the National Witness Protection Program; 11, Register of participants; 12, Access to Register; 21, Officers protected from suit in respect of decisions under Act; 23, Payments under NWPP not able to be confiscated; and 25, Delegations, of the existing Commonwealth Act, should be included in this part.

This part should also clearly articulate the revised cross-jurisdictional coordination arrangements including that where a decision is made to re-identify and relocate a participant in a Tier 2 program, outside of the original jurisdiction, that participant must be included in the NWPP. Other arrangements for the relocation of participants in Tier 2 programs should be dealt with in Part 3 of the UWPA as part of the section dealing with actions where a participant is included in the NWPP or a WPP.

The Register of participants must be maintained. The register must contain all records relating to the participant and be held on a stand-alone computer facility with no Internet or other outside access.

### **Approved authorities and commercial arrangements**

Arrangements with approved authorities should be described in the UWPA. Protection for officers, either Commonwealth or state or territory, and for private sector employees, who produce identity and other documents to support the new identity of the participant in good faith, should be identified in this section. Sections 6, Arrangements with approved authorities; 7, Special commercial arrangements by Commissioner; and 20, Provision of information to approved authorities, of the existing Commonwealth Act, should be included in the UWPA.

### **Part 2 – Inclusion in the NWPP or another WPP**

The inclusion of a witness in the NWPP or another WPP requires attention to be given to a range of aspects which should be included in this part. Sections 5, Inclusion in NWPP not to be done as a reward for giving evidence etc.; 7, Witness to disclose certain matters before being included in the NWPP; 8, Selection for inclusion in the NWPP; 10, Inclusion of foreign nationals or residents in NWPP at the request of foreign law enforcement agencies; 10A, Inclusion of persons in NWPP at the request of International Criminal Court, of the existing Commonwealth Act should be included in the UWPA.

Sections should be included in the UWPA. Additionally, a clause should recognise that inclusion in the NWPP or another WPP is voluntary. A witness will not be included in any witness protection program unless the witness, or a person legally responsible for the witness, agrees in writing to be included in the program. This acknowledgement should be required in the Act and the details should be specified in the MOU. This part should include a section noting that leaving the program before the completion of court is voluntary.

Common entry requirements should apply to Tier 1 and Tier 2 programs so as to facilitate the movement of participants from a WPP to the NWPP where re-identification and relocation are needed.

The transfer of a participant in a WPP to the NWPP should be recognised in the Act. Provisions to facilitate the transfer of participants from one state or territory program to another, should also be included in this part. Such a relocation must be discussed with the NWPP to ensure any opportunity for compromise to an existing NWPP operation is minimised. Cost recovery for services rendered by the NWPP or a WPP are dealt with in Part 5 of the UWPA.

An applicant for inclusion in the NWPP or a WPP should complete the application personally unless the witness is incapacitated. In that case the witness could instruct another person to complete the application and what words to use. In such cases a declaration would be required to ensure the witness was making the application and the other person was simply assisting to fill out the application form. This will help to prove voluntariness on the part of the applicant.

The decision to include a witness in Tier 3 arrangements should be at the discretion of the commissioner of the relevant jurisdiction or his/her delegate.

A threat assessment should accompany the application for inclusion in the witness protection program. This assessment should clearly set out the intent

and capability of the source of the threat to inflict harm on the witness or informant or their family.

A risk assessment should be conducted to identify and quantify the risks to the community prior to the relocation of the participant to a new location. The risk assessment would consider the likelihood and consequences of the participant reoffending in the new location and the risks to community of the participant's relocation.

Only the NWPP is empowered under the UWPA to facilitate applications for foreign nationals to be relocated to Australia or for Australian participants to be relocated to a foreign country.

The MOU, signed by the witness on inclusion in a witness protection program, should describe the protection and assistance to be provided, the rights and obligations of the participant including that the participant agrees to give evidence to the best of their ability. Provisions for the termination of protection and assistance are described in the section dealing with termination or cessation.

Provision should be made in the legislation for temporary protection arrangements at the Tier 1 and Tier 2 level while the witness is undergoing assessment for inclusion in the NWPP or a WPP.

### **Part 3 – Actions where a witness is included in the NWPP or another WPP**

The UWPA should replicate sections 9, Memorandum of Understanding; 13, Action to protect witnesses, participants and former participants etc.; and 15, Dealing with rights and obligations of participant, currently contained in the Commonwealth Act.

This part should include sections enabling cases including participants to be expedited. It remains a priority that the accused's right to a fair trial is not adversely affected, but that the trial is not delayed unnecessarily. The judiciary is to ensure the management of such cases in the most effective and

efficient manner possible. This may be through more rigorous, Judge Managed Case Management methodologies, similar to those described in the Martin report however, the same arrangements should be described in the legislation and should apply in all state and territory jurisdictions and the Commonwealth in the same way.

Where a participant in a Tier 2 program is to be re-identified using facilities available under the UWPA (or the current legislation) the participant must be referred to the NWPP. The NWPP will conduct an assessment of the suitability of the participant to be included in that program, using the criteria set out in the Act, and where appropriate, will include the participant in the NWPP.

The UWPA should recognise that relocation is the preferred method of protecting participants included in the NWPP. Those included in Tier 2 programs can be relocated within the original jurisdiction or to another jurisdiction, but the relocation must be discussed with the NWPP to avoid any accidental relocation that would compromise the identity or location of the NWPP participant.

Obligations the participant has in respect of family law matters – access and visitation and contact orders – should be honoured except where the threat to the participant is such that to expose the children to the threat would represent unacceptable danger or would be likely to create a situation where protection and assistance could not be effective. In such cases, the Commissioner should provide the threat assessment to the FCA Judge in chambers with no other persons present, so as to support the Commissioner’s reasons for opposing contact orders that would render access and visitation too dangerous in the opinion of the Commissioner.

The Family Court of Australia should be prevented from constructively arranging contact orders in any matter involving witness protection in such a way that would require the cessation of protection and assistance. The threat to the participant and the children should be considered the highest priority

with contact with the non-custodial parent subordinate to the safety and security of the participant and the children.

### **Exclusion and termination from the NWPP or another WPP**

Three reasons protection and assistance may be withdrawn from a participant should be dealt with in this part. Sections 18 Termination of inclusion in NWPP and other protection and assistance; and 19 Restoration of former identity of the Commonwealth Act should be included in the UWPA.

A section should be included in the UWPA to the effect that where a participant leaves the program voluntarily the Commissioner may continue to provide protection and assistance to the family of the participant who elect to remain in the program. The Commissioner may consider allowing the participant to retain their new identity or to restore the participant's former identity; the decision should be made on a case-by-case basis and at the Commissioner's discretion.

Protection and assistance may be terminated where the participant breaches a term or condition in the MOU including one requiring the participant to give evidence to the best of their ability.

Commission of offences by the participant while included in the NWPP or another WPP will lead to termination of protection and assistance and the restoration of the participant's former identity.

### **Identity documents**

Sections 14 Special provision in case of marriage of participant and 24 Restriction on issue of Commonwealth identity documents of the existing Commonwealth Act should be included in the UWPA.

This part should clearly spell out that an order for an entry to be made in the register of births so that a birth certificate can be provided to a participant in the NWPP will be made by the Commissioner of the AFP as custodian of the

NWPP. This will remove the current requirement for the Supreme Court to supervise that process.

This part should also contain a section dealing with an entry in the register of deaths so that the participant's death can be recorded in the original name at the actual time of death.

### **Confidentiality**

This part refers to the release of information about the programs or participants included in the programs. Consequently, sections 16 Non-disclosure of former identity of participant; 22C Disclosures to courts, etc.; 26 Commissioner and members not to be required to disclose information; 27 Requirement where participant becomes a witness in criminal proceedings; 27A Requirement where participant involved in civil proceedings; and 28 Identity of participant not to be disclosed in court proceedings etc. should be included.

This part should also contain sections mandating the suppression of the identity and location of a participant in the NWPP or a WPP. The section should also require the suppression of drawings, images, likenesses and descriptions of the protected witness. Where the participant is particularly vulnerable or intimidated, the Prosecution may request other in court protections and this eventuality should be described in the UWPA.

### **Part 4 – Offences**

Offences relating to the release of information about the participants and the programs are dealt with in this section. Exceptions should also be covered in this part. Sections 22 Offences relating to Commonwealth or Territory participants; 22A Offences relating to State participants; 22B Offences relating to disclosure of information about the NWPP; 28A Offence of contravening an order under section 28 should be included in the UWPA.

## **Governance and Accountability**

The existing Commonwealth Act requires the AFP and the Minister to report to the Parliament on the operation of the NWPP. Section 30 requires the AFP to provide reports and information for the Minister. Annual reporting is required for accountability and good governance purposes and the Act should set out the nature and extent of the reporting requirements. The metrics recorded in the table at Annexure 13 should be incorporated into the Act so that protection providers are clear on the level of reporting and the content required in their annual reports. All Tier 1, 2 and 3 programs should be required to prepare and submit annual reports using the same metrics.

The UWPA should contain sections setting out the annual review of the operation of the NWPP or each WPP by an appropriately constituted parliamentary joint committee (PJC) in each jurisdiction. Witness protection annual reports are to be tabled at the review and be made available to the public.

The Ombudsman can undertake a review of decisions made by the Commissioner including through 'own motion' investigations; however, such a review can only be of process. The Ombudsman should not be empowered to remake the Commissioner's decision or to substitute the Commissioner's decision for the Ombudsman's own decision; there should be no determinative power for the Ombudsman in relation to the NWPP or a WPP.

The section should specify that a Witness Protection Committee (WPC) within a police force, acting as a decision maker delegated by the Commissioner to make decisions in relation to the NWPP or a WPP is appropriate. The duties and responsibilities of the WPC should be set out in formal terms of reference and should be notified to the appropriate PJC in the first annual report to occur once the terms are finalised.

## **Part 5 – Miscellaneous**

Transitional arrangements, Regulations and Amendments to other Acts should be set out in the UWPA.

This part should also mandate that all officers deployed to a witness protection function in the NWPP or in another WPP and performing protection roles at any of the Tier levels have attended and been found competent in all aspects of the training necessary for officers engaged in witness protection operations.

Sections should describe the cost recovery arrangements that apply when a participant is transitioned to the NWPP or transferred from one WPP to another in the case of Tier 2 protection.

## **Annexure 13 – Reporting requirements**

*No. of operations conducted by the witness protection program in the financial year.*

*No. of participants in the program at the end of the financial year*

*No. of participants in the program who are not witnesses giving evidence*

*No. of assessments for inclusion in the program undertaken in the financial year.*

*No. of new participants into the program in the financial year*

*No. of participants leaving the program in the financial year*

*No. of participants who are not witnesses leaving the program in the financial year*

*No. of participants for whom protection and assistance was terminated in the financial year.*

*No. of participants who voluntarily withdrew from the program in the financial year.*

*No. of Prosecutions in which a participant gave evidence in the financial year.*

*No. of successful prosecutions.*

*No. of defendants involved in those prosecutions.*

*No. of defendants imprisoned as a result of those successful prosecutions.*

*Length of sentences imposed.*

*Type of crime*

*Financial cost of operating the program.*

*No. of complaints to the Ombudsman or Integrity Commissioner.*

# **Annexure 14A – Australian Witness Protection Legislation Comparison Chart, Explanatory Memorandum**

The table at Annexure 3B is a ready reckoner of similarities and differences across Australian witness protection legislation. It contains the legislation from each Australian jurisdiction in columns running across the page and the main headings for each section in rows running down the page. The columns start with the Commonwealth legislation at the far left column, followed by the state and territory acts in alphabetical order in the remaining columns moving from left to right of the page.

The table adopts the *Witness Protection Act 1994 (C'th)* as the primary statute. The reasons for that selection is that while it was not the first Australian statute it is the statute the other Australian Acts are required to be complementary to. It was also chosen because the Commonwealth Act is the foundation for the UWPA recommended by this thesis.

The table is read from left to right and shows the alignment of the various Acts so that the topics appear across the page. For example, where the Commonwealth Act refers to section 3 Interpretations, the corresponding provisions in the other Acts appear in the same row. In this example, the Western Australian Act contains three sections 3, 4 and 33 that deal with the same matters as section 3 in the Commonwealth Act. Another example is section 9 of the Commonwealth Act dealing with the MOU and the Queensland Act contains six separate sections, 7, 8, 10, 11, 12 and 47, dealing with the MOU. Other similarities and differences are clearly read by scrolling through the table.

The table provides a tool for quick referencing where the Acts are referred to in the thesis, primarily in Chapter 5, but also in other places.

## Annexure 14B – Australian Witness Protection Legislation comparison chart

**Table 26 - Witness protection legislation comparison table**

NWPP	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
1 – Short Title	1 – Name of the Act	1 – Name of the Act	1 – Short title	1 – Short title	1 – Short title	1 – Short title	1 – Purpose	1 – Short title
2 – Commencement		2 – Commencement	2 – Commencement	2 – Commencement		2 – Commencement	2 – Commencement	2 – Commencement
3 – Interpretations	2 – Dictionary at the end of the Act	3 – Definitions 4 – Who is a witness?	3 – Interpretation	3 – Dictionary	3 – Interpretation	3 – Interpretation	3 – Definitions	3 – Terms and abbreviations used in this Act 4 – Meaning of witness 33 – Terms used
3AA – Declaration of complementary witness protection law								
3AB – State offence that has a federal aspect								
3A – Application of the Criminal Code				4 – Act binds State, Commonwealth and other States				
4 – Establishment of the NWPP	4 – Witness Protection Program	5 – Witness Protection Program	5 – Commissioner to establish Territory witness protection program	5 – Witness protection program	4 – Establishment of Witness Protection Program	4 – Tasmanian witness protection program	3A – Victorian witness protection program	5 – Commissioner to establish SWPP
5 – Inclusion in NWPP not reward					5 – Inclusion in Program not to be reward for giving evidence	5 – Inclusion in Tasmanian witness protection program	3B – Inclusion in the Victorian witness protection program	9 – Inclusion not to be a reward for giving evidence

<b>NWPP</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>QLD</b>	<b>SA</b>	<b>TAS</b>	<b>VIC</b>	<b>WA</b>
6 – Arrangements with approved authorities	25 – Arrangements with approved authorities 26 – Authorisation of approved authorities	36 – Arrangements with approved authorities	4 – Declaration of approved authorities and complementary witness protection laws etc. 30 – Arrangements with approved authorities 31 – Exercise of powers etc. under this Act by approved authorities	40 – Arrangements with approved authorities 41 – Approved authorities	6 – Arrangements with approved authorities 7 – Authorisation of approved authorities	24 – Arrangements with approved authorities 25 – Authorisation of approved authorities 26A – Arrangements for Commonwealth identity documents	21 – Arrangements with approved authorities 21A – Approved authorities can only act under this Act if arrangements are in place with Chief Commissioner are in place 22 – Authorisation of approved authorities	6 – Arrangements with approved authorities 7 – Authorisation of approved authorities
7 – Witness to disclose certain things	5 – Assessing witnesses for inclusion	6 – Inclusion in the witness protection program	7 – Conditions on which witness or family member included in TWPP 9 – Commissioner to receive information before making decision to include witness or family member		8 – Witness to disclose certain matters before inclusion in the Program			10 – Witness to provide Commissioner with information before inclusion
8 – Selection for inclusion		7 – Assessing witness for inclusion in witness protection program	8 – Decision of Commissioner whether to include witness or family member	6 – Person may be included in program	9 – Selection for inclusion in Program			8 – Commissioner to decide who is included
9 – MOU		8 – MOU	10 – MOU – content	7 – Protection	10 - MOU	8 – MOU	5 - MOU	11 – MOU

NWPP	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
		9 - Variations of MOU	11 - MOU - signing 12 - MOU - amending	Agreement 8 - Content of protection agreement 10 - Variation of protection agreement by agreement 11 - Variation by Chairperson of protection agreement 12 - Suspension of Protection agreement 47 - Special provisions about minors and adults with impaired capacity				12 - Amending a MOU
10 - Inclusion of foreign nationals								
10A - Inclusion at the request of the ICC								
11 - Register of Participants			17 - Commissioner to maintain records of original entries in Register		11 - Register of participants			13 - Commissioner to keep a register
12 - Access to register				45 - Access to	12 - Access to the			14 - Access to the

NWPP	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
				registers	register			register
13 – Action where a witness is included	17 – Documentary restrictions	10 – Temporary protection pending full assessment 27 – Documentary restrictions	13 – Commissioner must take action to protect etc.	9 – Interim protection 14A – Application of part 2A 14B – Arrangements for short-term protection 14C – Variation of short-term protection arrangements 14D – Suspension of short-term protection arrangements 14E – Voluntary ending of short-term protection arrangements 14F – When chairperson may end short-term protection arrangements 20A – New identity for witness protection officer 28 – Documentary	13 – Action where a witness is included in Program			15 – Commissioner must take action to protect etc.

NWPP	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
				restrictions				
14 – Special provisions in the case of marriage		20 – Special provisions in case of marriage of participant	18 – Marriage of participant who has been given new identity			18 – Special provisions in the case of marriage	15 – Special provisions in case of marriage	
15 – Dealing with rights and obligations	19 – Dealing with rights and obligations of participant 20 – Avoidance of obligations by participant	29 – Dealing with the rights and obligations of participant 30 – Avoidance of obligations by participant		30 – Dealing with rights, obligations and restrictions of protected witnesses 31 – Avoidance of obligations by protected witness	14 – Dealing with rights and obligations of participant			16 – Actions as to obligations etc. of a participant
16 – Non disclosure of former identity of participant	14 – Non disclosure of former identity of participant	24 – Non disclosure of former identity of participant			18 – Non disclosure of former identity of participant			32 – Certain disclosures to court to be in private
17 – Special commercial arrangements	18 – Special commercial arrangements by chief police officer	28 – Special commercial arrangements by the Commissioner	6 – Commercial arrangements for benefit of participant	29 – Special commercial arrangements by chairperson	19 – Special commercial arrangement by Commissioner	6 – Special commercial arrangements by Commissioner	3C – Special commercial arrangements by Chief Commissioner	17 – Commercial arrangements for benefit of participant
18 – Cessation of protection		11 – Cessation of protection and assistance 11A – Suspension of protection and assistance 12 – Notice of involuntary termination or suspension and	19 – Termination of protection etc. by Commissioner or Deputy Commissioners 20 – Procedures for involuntary termination of protection etc. 21 – When	13 – Voluntary withdrawal from program 14 – When the Chairperson may end protection under program	15 – Cessation of protection and assistance	19 – Termination of protection and assistance 20 – Notice of involuntary termination, review and appeal 21 – When does voluntary termination take	16 – Cessation of protection and assistance 20 – Notice of involuntary termination, review and appeal 18 – When does involuntary termination take	25 – Commissioner may terminate protection

NWPP	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
		application for review 13 – Date on which involuntary termination or suspension takes effect	involuntary termination takes effect 22 – Effect of termination or protection and assistance			effect	effect?	
19 – Restoration of former identity		21 – Restoration of former identity	23 – Restoration of former identity 24 – When Commissioner or Deputy Commissioner may take action to restore former identity 25 – Commissioner or Deputy Commissioner must apply to Supreme Court to restore former identity 26 – Approved authority may apply to Court to restore former identity 27 – Power of Supreme Court to make order	21 – Restoration of former identity 22 – Particular documents to be destroyed	16 – Restoration of former identity	22 – Restoration of former identity 23 – When does a decision to restore a person’s former identity take effect?	19 – Restoration of former identity 20 – When does a decision to restore a person’s former identity take effect?	22 – Supreme Court may order former identity to be restored 26 – Restoring former identity

NWPP	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
			28 – Registrar to cancel new identity 29 – Effect of cancellation of new identity					
20 – Provision of information to approved authorities		38 – Provision of information to approved authorities	36 – Provision of information about participant or former participant to approved authorities	43 – Providing information to approved authorities	22 – Provision of information to approved authorities	27 – Provision of information to approved authority	22 – Provision of information to approved authorities	29 – Disclosing information to approved authorities
21 – Officers protected from suit	27 – Protection from liability	40 – Immunity from legal proceedings for exercise of functions under Act	39 – Immunity from proceedings	20 – Special provisions about concealing identities 44 – Immunity from legal proceedings for exercise of functions under Act		15 – Immunity from proceedings		38 – Protection from liability for wrongdoing
22 – Offences	12 – Offences in relation to documents 21 – Offence – disclosures about participants 22 – Offence – disclosures by participants 28 – Proceeding of offences	31 – Offences – disclosures concerning participants 32 – Offences – disclosure by participant and others 41 – Proceedings for offences	33 – Offences relating to disclosure of information about participants 34 – Offences relation to disclosure of information by participants 35 – Person who has	23 – Offences in relation to documents 36 – Offence of disclosure about particular persons or the program 37 – Offence of disclosure by prescribed persons	21 – Offences	13 – Information not to be disclosed 14 – Offences in relation to documents 29 – Double jeopardy	10 – Information not to be disclosed 11 – Offences in relation to documents	34D – Disclosure of protected person’s identity despite certificate 34K – same but in relation to parliamentary enquiries 35 – Offences

NWPP	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
			new identity not to use documents relating to former identity 40 – Double jeopardy					
22A – Offences relating to State participants								
22B – Offences relating to disclosures of information about the NWPP								
22C – Disclosures to courts, etc.								
23 – Payments under the NWPP not to be confiscated		31 – Payments under witness protection program		32 – Payments under witness protection program	20 – Payments under the Program not able to be confiscated			
24 – Restrictions on issue of C'th identity documents	24 – Restrictions on the issue of Territory identity documents	35 – Restrictions on issue of New South Wales identity documents		39 – Restriction on the issue of Queensland identity documents		See s 26A – Arrangements for Commonwealth identity documents		
	6 – Identifying documents 7 – Application for court order 8 – Power of Supreme Court to	14 – Identity documents 15 – Application for a court order 16 – Court proceedings under		15 – Identifying documents 16 – Application for new identity authority 17 – Power of	17 – Authorisation for establishment of new identity or restoration of former identity	7 – Authority to make new entry in register of births or register of marriages 9 – Application for a	4 – Authority to make new entry in the register of births or register of marriages 6 – Application for a	18 – Identity documents in urgent cases 19 – New identity orders 20 – Application to

NWPP	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
	make order 9 – Court proceedings under Pt 3 to be closed to the public 10 – Effect of witness protection order 11 – Effect of entries made in the register 13 – Information not to be disclosed	this part to be closed to the public 17 Power of the Supreme Court to make an order 18 – Effect of witness protection order 19 – Effect of entries made under this Act 22 – Offences in relation to documents		authorising officer to issue new identity authority 18 – Giving effect to new identity authority 19 – Effect of creation of birth certificate under new identity authority 33 – Application of s 16 to approved authorities 34 – Effect of issuing of birth certificate under complementary witness protection law 42 – Arrangements for Commonwealth identity documents		court order 10 – Power of the Supreme Court to make order 11 – Effect of authorising court order 12 – Effect of entries made under this Act 16 – Court proceedings under this Act to be closed 17 – Certain provisions of Registration of Births and Deaths Act 1895 and Marriages Registration Act 1962 excluded	court order 7 – Power of Supreme Court to make order 8 – Effect of authorising court order 9 – Effect of entries made un this Act 13 – Court proceedings under this Act to be closed 14 – Certain provisions of <i>Births, Deaths and Marriages Registration Act 1996</i> excluded	Supreme Court 21 – Supreme Court to make order 22A – Effect of new identity order 23 – Proceedings to be in private 24 – Effect of actions done under order
25 – Delegations		39 - Delegations	37 – Commissioner may delegate powers and functions under this Act	48 - Delegations	27 - Delegations			36 - Delegations
26 – Commissioner	23 – Certain people	34 – Certain persons		38 – Certain persons	23 – Commissioner	28 – <i>Right to</i>		27 – Duty not to

NWPP	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
and members not to be required to disclose information	not to be required to disclose information	not to be required to disclose information		not to be required to disclose information	and members not to be required to disclose information	<i>Information Act 2009</i> not to apply		disclose 29 – Disclosure of information cannot be compelled
27 – Requirement where a participant becomes a witness in criminal proceedings	15 – Requirement if participant becomes a witness in criminal proceeding	31B – Requirement if a person given a new identity becomes a witness in relevant proceedings 31C – What a non disclosure certificate must state 31D – Effect of a non disclosure certificate 31E – Court may grant leave to disclose relevant information 43 – Exclusion of provisions of Births, Deaths and Marriages Registration Act 1995		24A – Application to div 2 to lawyer or party to proceedings 25 – Requirement if protected witness becomes a witness in a proceeding 26 – What non disclosure certificate must state 27 – Effect of non disclosure certificate	24 – Disclosure of information where participant becomes a witness in criminal proceedings			Division 2 Evidence by participants 33 – Terms used 34A – Non disclosure certificates 34B – What non disclosure certificate must state Provisions applicable to court proceedings 34CA – Application of the subdivision 34C – Effect of non disclosure certificate 34E – Directions to jury 34F – Adjournment for appeal decisions 34G – Jurisdiction to hear and determine appeals

NWPP	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
								<p>34H – Recognition of non disclosure certificate under corresponding laws</p> <p>Subdivision 4 – Provisions applicable to Parliamentary proceedings</p> <p>34I – Application of Subdivision</p> <p>34J – Effect of non disclosure certificate</p> <p>34K – Disclosure of protected person’s identity despite certificate</p> <p>34L – Restrictions on content of report to Parliament</p>
27A – Requirement where participant involved in civil proceedings								
28 – Identity of the participant not to be disclosed in court	16 – Identity of participant not to be disclosed in legal proceedings	26 – Identity of the participant not to be disclosed in legal proceedings	38 – Proceedings in Supreme Court to be closed to public	27A – Disclosure of protected witness’s identity despite certificate	25 – Identity of participant not to be disclosed in court proceedings etc.			

NWPP	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
				27B – Recognition of corresponding non disclosure certificate				
28A – Offences for contravening an order under section 28								
29 – Transitional		45 – Special provisions for former participants in NSW Police Witness Protection Plan 46 – Savings, transition and other provisions 47 – Review of the Act	42 - Transitional	Part 5 – Transitional provisions 53 – Existing witness protection program 54 – Existing MOU 56 – Existing non disclosure certificates 57 – Provision about notice under pre-amended Act	Schedule – Transitional provisions	31 – Administration of the Act 31A – Transitional provisions	26 – Transitional provisions	Part – Transitional and saving provisions
30 – Reports and information to the Minister					28 – Annual report			34 – Disclosures by Auditor General, Parliamentary Commission or Corruption and Crime Commission 37 – Reporting on the SWPP
31 – Amendments to other Acts								

NWPP	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
32 - Regulations	30 – Regulation-making power	42 – Regulations	41 – Regulations	51 – Regulation-making power	29 - Regulations	30 - Regulations		39 - Regulations
		44 – Relationship with other witness protection arrangements	31 – Exercise of powers etc. by Commissioner etc. under complementary witness protection law				24 – <i>Freedom of Information Act 1982</i> 25 – Supreme Court – limitations of jurisdiction	