



Tabled, by leave,

The Hon Mark Butts
for
Clerk of the Parliaments
23 / 10 / 24

WITNESS PROTECTION AMENDMENT BILL 2024

STATEMENT OF PUBLIC INTEREST

Need: Why is the policy needed based on factual evidence and stakeholder input?

The *Witness Protection Act 1995* (the Act) provides the legislative framework for the NSW Witness Protection Program (the Program), which is operated by the Commissioner of Police and the NSW Police Force.

The Act makes provision to protect the safety and welfare of witnesses who agree to give evidence on behalf of the Crown and are included in the Program as participants. This protection is required because such witnesses can become vulnerable to intimidation attempts so that their testimony is not provided, or retribution for testimony that has been provided.

Action that may be taken to protect Program participants includes, but is not limited to, the establishment of a new identity, relocation, accommodation, transport of property, reasonable financial assistance, and counselling. The Act also includes provisions that protect current and former participants from identification, including in court proceedings. It also includes offences that protect participants and the Program against disclosure of facts and information related to the Program.

The Act has been in operation for nearly 30 years. In this time, new threats to participants' safety have emerged. For example, in recent times the increasing collection and use of biometric data, which is unique to an individual, has increased the risk of Program participants having their new identities uncovered by criminal groups. Over the years, the NSW Police Force has also identified various legislative enhancements that would better protect witness safety and welfare and/or strengthen the operation and integrity of the Program.

The Bill therefore proposes amendments to strengthen the legislative regime by:

- protecting Program participants from modern threats, including by enabling the removal and creation of identity records for a participant;
- strengthening offences in the Act which protect the participant and the Program from disclosure;
- improving protections for current and former Program participants who become involved in court proceedings to ensure their protected identities are not accidentally revealed; and
- enhancing the Program's operation and integrity through a range of measures including recording and monitoring of participants' communications, clarifying circumstances where participants can be terminated from the Program, reuse of Supreme Court orders made to change a participant's identity, and secure keeping and handling of confidential documents.

Objectives: What is the policy's objective couched in terms of the public interest?

Witness testimony can be a crucial tool for police in investigating and prosecuting serious and organised crime, which can involve the large-scale importation of illegal drugs, money laundering, human trafficking and terrorism. Such crimes have serious and direct negative impacts on community safety. It is therefore in the public interest to ensure the Program effectively protects the safety and welfare of witnesses who agree to give evidence for the prosecution in such proceedings.

It is important not only to protect current witnesses but also give future witnesses confidence that they will be adequately protected, which may directly influence whether they agree to give evidence.

The benefit of witness protection programs to the public interest is supported by the fact that formal witness protection laws have operated in Australia since 1994. This began with the passage of the *Witness Protection Act 1994 (Cth)* and subsequent passing of similar laws in each Australian state and territory. Similar schemes also exist around the world, including in the United States, United Kingdom, Canada and New Zealand.

The Bill intends to modernise and strengthen the *Witness Protection Act 1995*. This seeks to enhance the NSW Police Force's ability to secure important witness testimony for investigations and prosecutions of serious and organised crime, which in turn keeps the community safe. The Bill seeks to achieve these public interest outcomes through:

- a) Program participants being protected from the risks of having their identities exposed due to modern threats, such as the increasing collection and use of biometric information by government and private entities.
- b) Strengthened offences in the Act that require participants and others not to record and disclose certain facts or information about the Program, protecting their own safety as well as the safety of other participants and NSW Police Force operatives.
- c) Enhanced protections for current and former participants with new identities when they become involved in court proceedings and their identity is in issue, minimising the risk of their protected identities and locations being accidentally revealed during proceedings.
- d) Enhancements to the operation of the Program to ensure its continued effectiveness and capacity to better assist police in keeping participants safe.

Options: What alternative policies and mechanisms were considered in advance of the bill?

Reforms in the Bill have been developed by the NSW Police Force based on nearly 30 years of experience operating the Program. They have also been informed by feedback from Government, non-Government, and legal stakeholders in 2023 and 2024 during targeted consultation.

This process of policy development and consultation has explored the necessity of legislative change and confirmed that all proposals contained in this Bill do require legislative reform to achieve the desired outcomes.

Some proposals originally considered for inclusion in the Bill were removed because they were more appropriately addressed through operational or other non-legislative solutions, or because legislative change would not effectively achieve the desired intent.

Progressing with the package of legislative reforms in the Bill is necessary to ensure the Act remains fit for purpose, and can support community safety by strengthening the NSWPF's ability to secure witness testimony for investigations and prosecutions.

Key items where multiple possible approaches were considered during policy development and consultation included:

1. Expanding the types of witnesses who can be included in the Program

The Bill proposes to expand the definition of a witness who can be included in the Program, to explicitly include persons giving evidence relating to applications for serious crime prevention orders. This will improve clarity and ensures that witnesses giving crucial evidence in these proceedings to prevent a person's involvement in serious and organised crime related activities can be included in the Program.

Other options considered included also expanding the definition to explicitly include witnesses who have agreed to give evidence on behalf of the Crown in other specific legislative regimes, such as in

application proceedings under the *Terrorism (High Risk Offenders) Act 2017*, *Crimes (High Risk Offenders) Act 2006*.

2. Removing and creating identity records for a Program participant

The Bill proposes to allow police to apply for a Supreme Court order authorising the removal of identity records which could link a participant's previous identity and new identity. The order may also authorise creation of an identity record in the participant's new identity. This includes biometric, educational, legal and medical records. This will apply to 'agencies' in NSW including government agencies and other persons or bodies prescribed by regulation.

Another option considered includes drawing on the approach in the *Law Enforcement and National Security (Assumed Identities) Act 2010*, which allows the NSW Police Force to compel government issuing agencies to remove 'evidence of identity', and make similar requests from non-Government issuing agencies under Part 3 of that Act.

3. Strengthen offences which protect the participant and the Program against recording and disclosure of information

The Bill proposes to strengthen existing offences to require participants and others not to disclose or record certain facts or information. This includes the fact they are or were on the Program, unless they have a reasonable excuse, and confidential information about the Program. Other options considered include exploring the creation of a new offence for the recording of confidential information.

Analysis: What were the pros/cons and benefits/costs of each option considered?

For the items identified above, discussion of why the preferred option has been progressed is set out below.

1. Expanding the types of witnesses who can be included in the Program

The approach proposed in the Bill is preferred, which is to only expand the definition of a witness to explicitly reference persons giving evidence relating to applications for serious crime prevention orders. It is critical to ensure clarity that witnesses in these proceedings can receive protection under the Program as these orders are made to prevent, restrict or disrupt a person's involvement in serious criminal activity.

Stakeholder feedback indicated most persons giving evidence in application proceedings under the *Terrorism (High Risk Offenders) Act 2017* and *Crimes (High Risk Offenders) Act 2006* are Community Corrections officers and experts, who would likely not require protection under the *Witness Protection Act 1995*.

If witnesses providing evidence under other legislative regimes require protection, these witnesses may already be eligible for inclusion in the Program under the current section 4(1)(d) of the Act as "a person who, for any other reason, may require protection or other assistance under this Act."

2. Removing and creating identity records (including biometric) for a Program participant

The Bill proposes to enable applications to the Supreme Court for an order authorising the removal of identity records held by an agency, which could link a participant's previous identity and new identity. The order may also authorise the creation of an identity record.

This approach is preferred because it enables the protection of participants through removing and creating identity records, while ensuring appropriate judicial oversight over this process. It also provides assurance to agencies holding such records that they are acting with appropriate authorisation.

This approach also provides clear thresholds for what types of records can be removed, which ensures any removal is necessary and justified. This is by providing the Supreme Court may only make an order

to authorise record removal if satisfied there is a risk of the identity record linking the participant's previous identity and new identity.

In addition, the Bill proposes the application for a record removal must specify the type of identity record to be removed. This ensures the scope of authority to remove records is clear to agencies.

3. Strengthen offences which protect the participant and the Program against recording and disclosure of information

The approach outlined in the Bill is to amend the existing offence in the *Witness Protection Act 1995* to cover recording of information. The Bill also expands the list of facts and information that must not be disclosed to include confidential information, and the fact that a person is or was a participant on the Program.

This is preferred over establishing a new offence because the information related to the Program that must not be recorded is the same information which must not be disclosed. A combined offence is also simpler for participants to understand and interpret, rather than having to consider the effect of multiple offences.

The approach proposed in the Bill is also consistent with witness protection in other jurisdictions such as Queensland, which also has a single offence covering the recording and disclosure of certain information.

Pathway: What are the timetable and steps for the policy's rollout and who will administer it?

It is proposed that most provisions in the Bill will commence upon assent to ensure improvements to the Act come into effect quickly and Program participants can have greater protections as soon as possible. Most provisions commencing on assent will be implemented by the NSWPF, with some provisions also impacting the courts.

However, the following provisions will commence on proclamation or 12 months after assent, whichever is earlier, to allow for some NSW Government agencies to update technical systems or processes and ensure smooth commencement:

- amendments to enable removal and creation of identity records for a participant
- amendments to provide for confidential documents to be kept and handled securely.

It is expected this implementation work may take up to 12 months to complete and the NSWPF has been working closely with impacted NSW Government agencies to plan for implementation of these amendments.

Consultation: Were views of affected stakeholders sought and considered in making the policy?

Yes. The NSWPF has consulted extensively with Government and non-Government stakeholders.

In December 2023, the NSWPF released a Consultation Paper containing preliminary proposals for consideration by government agencies in NSW, and other jurisdictions. This included law enforcement agencies in other jurisdictions who may administer complementary witness protection laws.

Following consideration of feedback on the Consultation Paper, a Consultation Bill was sent to stakeholders in August 2024 for review. This was sent to the same stakeholders who considered the Consultation Paper, as well as legal stakeholders because they or their members may have experience dealing with Program participants and/or matters related to the Program.

Prior to introducing the Bill, the NSW Government considered the views of all stakeholders that were expressed during consultation activities. These views were incorporated into the final Bill where appropriate.

Throughout the development of the reforms, the NSWPF sought feedback from the following stakeholders:

- **NSW Government agencies:** Department of Communities and Justice, Office of the Director of Public Prosecutions, Information and Privacy Commission, Law Enforcement Conduct Commission (LECC), Office of the Inspector of LECC, The Cabinet Office, Aboriginal Affairs NSW, Heads of Jurisdiction (NSW Local Court, NSW District Court, NSW Supreme Court), Corrective Services NSW, NSW Crime Commission, Department of Customer Service (includes Service NSW and BDM), NSW Department of Education, Transport for NSW, State Records NSW, and NSW Health.
- **Heads of jurisdiction:** Supreme Court of NSW, District Court of NSW, Local Court of NSW.
- **Commonwealth agencies and interstate policing agencies:** Attorney-General's Department, Australian Federal Police, Victoria Police, Queensland Police Service, Crime and Corruption Commission (QLD), South Australia Police, Western Australia Police Force, Tasmania Police, and NT Police, Fire and Emergency Services.
- **Legal stakeholders:** Legal Aid NSW, Law Society of NSW, NSW Bar Association, the Public Defenders, Aboriginal Legal Services NSW/ACT, and NSW Judicial Commission.