Review of the *Witness Protection Act 1991*

The Hon. Frank Vincent AO QC

Certain material in the report has been redacted or summarised for operational and/or legal reasons

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1 Terms of Reference

The reviewer is asked to make recommendations about ways in which the *Witness Protection Act 1991* may be changed to improve witness protection.

Consideration should be given to:

- the nature of witness protection and its role in the broader legal framework relating to the investigation and prosecution of crimes;
- the level of witness intimidation in Victoria;
- the provision of protection and assistance to witnesses where a person is unsuitable or unwilling to have their name changed and/or be relocated;
- appropriate liability arrangements for police officers and others who operate in accordance with the Act;
- the protection measures available should different categories of protection be available under the Act;
- an appropriate mechanism to monitor the operation of the Act;
- any issues that are specific to the provision of protection to children;
- any issues that are specific to witnesses who fall within the ambit of protected disclosures legislation;
- a national witness protection program and legislative arrangements to support such a program; and
- any administrative arrangements flowing from recommendations for legislative reform or to facilitate a national witness protection program.

Regard should be had to:

- witness protection schemes in other jurisdictions;
- literature and reviews from Victoria or other jurisdictions; and
- stakeholder views.

The integrity of the current witness protection program should not be compromised by the conduct of the review.

2 Recommendations

This Report makes eight recommendations to:

- clarify the purpose of the *Witness Protection Act 1991*;
- improve the governance and administration of the witness protection program;
- promote community confidence in the witness protection program; and
- deter witness intimidation.

Recommendation 1 – purpose and principles

The purpose and principles underpinning the Act should be made clear on the face of the legislation.

The provision of witness protection must be to give practical effect to the rule of the law by, as far as reasonably possible, protecting those who are exposed to risk of injury or death by reason of their participation in or co-operation with the criminal justice system.

The Act should be based on and contain the following witness protection principles to guide decision making and implementation:

- the central objective of witness protection is to advance the public interest in the efficacy and integrity of the criminal justice system through the provision of protective support to those who are at risk by reason of their co-operation in its functioning;
- witness protection and support is intended to remove or reduce a barrier to co-operation and is not to be provided as a reward or inducement;
- there must be a clear separation of the investigative and the protective functions in order to ensure the integrity of the process;
- the decision to protect a witness cannot be solely or even principally dependent upon the value of the investigation being pursued or whether or not it arises in the context of any particular category of offences. It should be determined by reference to the risk incurred by the individual as a consequence of co-operation;
- protection arrangements need to be tailored to the individual circumstances and risk faced by the witness and the community;
- the safety of the witness must take priority over the successful conduct of a prosecution;
- the interests of children involved in or affected by witness protection arrangements must be separately considered and their welfare a powerful factor in decision making; and
- consistent with the need for operational security, there should be public accountability for the operation of the witness protection system.

Recommendation 2 – extension of the Act's scope

The persons encompassed by the legislation should include:

- people (including human sources) who have reported crimes or otherwise co-operated with authorities in relation to criminal investigations but may never give or be expected to give evidence in a criminal proceeding;
- witnesses (including victims) in criminal proceedings as well as other proceedings of a related or broadly similar kind (such as IBAC investigations, Royal Commissions, Parliamentary Inquiries);
- those who seek to secure their safety through the justice system (for example, through the taking out of intervention orders);
- other participants in the justice system, such as police officers, jury members and judicial officers; or
- family members of the above.

The scope of the Act should be extended to those entering into what are currently categorised within Victoria Police processes as 'Category B' arrangements. This will have the effect that the Act's witness protection principles, external monitoring, reporting and confidentiality provisions apply to the alternative arrangements provided to high-risk witnesses who have been considered for but either declined to enter the program or have been considered unsuitable.

Recommendation 3 – principle based discretion

The Chief Commissioner should maintain responsibility for the implementation of the Act and a broad discretion based on the purposes and principles of the Act.

Recommendation 4 – obligations and protection

The Act be amended to remove the unjustifiably wide immunity presently available for police conduct in relation to witness protection arrangements. The general indemnity provisions for police conduct and the conduct of IBAC and other relevant officers should be substituted with the following exceptions:

- no liability should flow from a decision under the Act to enter or not to enter a person into the program; and
- the present provisions with respect to the making, alteration or cancelling of entries or records in the Register of Births, Deaths and Marriages in accordance with an order of the Supreme Court should remain.

Recommendation 5 – rights of protected people

The Act should be amended to ensure that the terms of memoranda of understanding entered into at both Category A and Category B levels should be legally enforceable by persons entering into them.

Recommendation 6 – mandatory case review

To ensure a basic level of active case management, the legislation should require all persons protected under the Act be reviewed at least every two years.

Recommendation 7 – public accountability, monitoring and reporting

To ensure appropriate public accountability:

- an independent body should monitor the operation of the Act to provide assurance that the witness protection principles recommended are given practical effect; and
- subject to necessary safety and operational caveats, there should be public reporting on the operation of the Act.

Recommendation 8 – deterring witness intimidation

There should be a new indictable offence triable summarily that would cover the range of witness intimidation behaviours addressed in the various interstate provisions.

The offence should have a maximum penalty of 5 years.

3 Introduction

In the investigation and prosecution of crime… it is essential that witnesses, the cornerstones for successful investigation and prosecution, have trust in criminal justice systems.

Witnesses need to have the confidence to come forward to assist law enforcement and prosecutorial authorities. They need to be assured that they will receive support and protection from intimidation and the harm that criminal groups may seek to inflict upon them in attempts to discourage or punish them from cooperating.[1]

The purpose for the institution of the present Review of the *Witness Protection Act 1991* was described by the then Minister for Police and Emergency Services in his second reading speech when introducing amendments to the Act in March 2014:

When enacted in 1991, Victoria's Witness Protection Act led the way. While these reforms improve the existing framework, we need to ask is there anything more we can do.[2]

To answer this question, attention had to be given to a number of matters including:

- consideration of the proper role of witness protection in the criminal justice system;
- who is and who should be encompassed within Victoria's legislatively supported protection framework;
- what should be the level of responsibility, if any, of the community towards persons who come within that framework;
- whether there are particular groups such as victims of family violence or children for whom the current arrangements can be seen to be inadequate;
- whether the rights of persons who have been provided with or assured of protection are adequately safeguarded;
- whether there are other legislative changes outside the framework of the Witness Protection Act that could be effected that would be of value in the protection of those who may be endangered as a consequence of cooperation with, or reliance upon, the criminal justice system; and
- whether there is sufficient public transparency and accountability within the present structure.

[1] United Nations Office of Drugs and Crime, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*, 2008.
[2] Second Reading Speech Witness Protection Amendment Bill 2014, Legislative Assembly, 12 March 2014.

The Terms of Reference governing the scope of the Review are expressed to encompass *witness* protection. However, the classes of persons covered by the Act are very broadly defined and accordingly consideration has been give to the position of informants and others who might never be expected to give evidence but whose situations can be seen to be, for all relevant purposes, virtually indistinguishable from that of a potential witness in a formal proceeding and those who may face a risk of reprisal as a consequence of evidence already given.

The common feature linking the individuals in all of these groups is their relationship with the criminal justice system. All may be exposed to the risk of death or personal injury by reason of the assistance they have or may contemplate providing to the authorities in the investigation or prosecution of those engaged in serious criminal behaviour. Or they may be exposed to this risk because they have relied upon the system of justice to protect them against violence in a family or other social context and have in consequence increased the danger to which they may already have been exposed.

The basic propositions on which the Review has been conducted can be simply stated:

- it is of fundamental importance that the rule of law is not only accepted in our social rhetoric but has full practical application in our community;
- this cannot be achieved if, by reason of intimidation or justifiable fear of risk of physical violence or harassment, victims, witnesses or informants are not prepared to report matters to the police or other relevant authorities and, if necessary, provide evidence of wrongdoing in court proceedings;
- in its own interests and in order to vindicate the rights of the individuals who may be exposed to such risks, it is therefore incumbent upon the community to take such steps that, as a practical proposition, are reasonably available to protect them;
- not to accept this responsibility empowers those who are prepared to employ violence or intimidation to avoid responsibility for their criminal conduct or to engage in acts of reprisal at the expense of our societal values and the rights and safety of those who cooperate in our law enforcement processes;
- there are very substantial legal and practical limitations upon the measures and resources available in this area. These must be taken into account in endeavouring to honour this responsibility. It must be recognised that only so much can be done; and
- to maintain confidence in our system of justice, there needs to be an appropriate level of public accountability for our witness protection measures consistent with the maintenance of necessary operational security.

The protection of its members from destructive criminal depredations and the vindication of the human rights values upon which it rests are of fundamental importance to the functioning of any properly ordered society. Those objectives are difficult enough to attain in the most favourable of circumstances but clearly this will be much harder if victims, witnesses or information sources can be deterred from cooperation by external threats against which the community is perceived to be unable adequately to safeguard them.

If a victim, witness or informant cannot possess sufficient confidence that justifiable concerns for their personal security will be addressed and reasonable measures taken to protect them, they cannot be expected to place themselves at additional risk through resort to or cooperation with the authorities. It must also be borne in mind that from the individual's perspective, cooperation might not only create or result in an increased personal risk but a threat to family members or others associated with them and could result in fundamental changes being required to their entire life situation.

Correlatively, if such a person does place himself or herself in potential jeopardy and accepts the many social and economic consequences that may follow, it is incumbent upon the community, which seeks and needs their cooperation, to endeavour to do what it sensibly can in the particular circumstances to support them. This requires a clear commitment to honour any undertakings or assurances given to them with respect to the measures to be taken and upon which they have relied.

This is not simply a matter of ethical conduct, nor is it affected by the motivation of the individual who may well be acting out of blatant self-interest. Rather, it is crucial to the maintenance of the integrity and effectiveness of the criminal justice system upon which we all depend for the maintenance of our collective and individual safety. For its part, the community must be prepared to provide the financial and other resources necessary for this work.

At one level, the position with respect to witness protection is relatively straightforward: the more powerful is the perceived threat to a cooperating individual, the greater will be the challenge to the credibility and operational effectiveness of our law enforcement agencies and legal processes.

I have considered a number of individual cases in the course of this Review and the Recommendations have been informed by the knowledge and understandings gained. In accordance with its Terms of Reference, however, the Review has not been concerned with the attribution of responsibility for inappropriate decisions, mistakes or misjudgements that may have been made in the past. Similarly, I have directed attention to the internal management systems with respect to witness protection employed within Victoria Police. Both of these lines of inquiry have been undertaken to identify the kinds of issues that can and have arisen and to enable an assessment to be made of the adequacy of the formal structures presently in place to deal with them.

The Terms of Reference for the Review were approved by the former Minister for Police and Emergency Services, Hon Kim Wells MP and in March 2014 the Review was publicly announced during the Second Reading Speech for the Witness Protection Amendment Bill 2014. The current Minister for Police, Hon Wade Noonan MP agreed to its continuation in December 2014 on the same terms.

The process followed in the conduct of the Review involved extensive consultation with Victoria Police personnel, a range of other justice system stakeholders and representatives of interstate jurisdictions.

Written responses to queries raised in the course of the Review were obtained from Victoria Police in addition to copies of a number of relevant Reports and other documents. The Review also examined relevant public and departmental records within Victoria and literature and studies relating to processes in other Australian jurisdictions and internationally. Details of these activities are contained at **Appendix A**.

4 Police responsibilities for witness protection

The primary responsibility with respect to the protection of witnesses in Australian jurisdictions currently and for the foreseeable future can be expected to rest with our law enforcement agencies. The questions which then must be considered are – *what should be their proper functions and duties and what can reasonably be expected of police in this area?*

4.1 A public duty – police powers and the office of constable

Police perform a range of statutory and common law functions to "serve the Victorian community and uphold the law so as to promote a safe, secure and orderly society".[3] To give practical effect to these functions, the Chief Commissioner may issue binding instructions to police officers such as those contained in the Victoria Police Manual.[4] In order to perform these duties and functions, police also have both statutory and common law powers. For example, statute alone now governs the power to arrest,[5] detain and interrogate,[6] and search premises and persons,[7] while residual common law powers remain to prevent breaches of the peace and protect life and property.[8]

Importantly, while these police powers, functions and duties are vested in individual police officers, they exist for the benefit and protection of the general public and are owed to the public at large. A police officer's public responsibilities do not ordinarily translate into a private duty giving rise to an aggrieved citizen's private cause of action. Rather, if a police officer is negligent or careless in the discharge of his or her duty, he or she commits a breach of discipline.[9] Wilful failure to perform his or her public duty may constitute an offence (misconduct in public office).[10]

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[3] *Victoria Police Act 2013* section 8. *Victoria Police Act 2013* section 9(1) lists the functions as preserving the peace, protecting life and property, preventing the commission of offences, detecting and apprehending offenders; and helping those in need of assistance. See also *Victoria Police Blue Paper – A vision for Victoria Police in 2025* May 2014 for discussion of the broader principles underpinning the practical implementation of police functions.

[4] *Victoria Police Act 2013* section 60.

[5] *Crimes Act 1958* section 458 and 459.

[6] *Crimes Act 1958* section 464 and 464A.

[7] For example, see Part III Crimes Act 1958.

[8] *R v Commissioner of Police of the Metropolis: ex parte* Blackburn [1968] 2 QB 118; *Hill v Chief Constable of West* Yorkshire [1989] AC 53; *Glasbrook Brothers Ltd v Glamorgan County Council* [1925] AC 270; *Nicholson v Avon* [1991] 1 VR 212.

[9] Section 125 of the *Victoria Police Act 2013*.

[10] Unless its performance would cause him or her greater danger than a person of ordinary firmness may be expected to face *R v Dytham* [1979] 1 QB 722; *AG's Reference (No 3 of 2003)* [2004] 3 WLR 451.

4.2 Other considerations

The concept of the rule of law in a modern democratic community is not confined to adherence and enforcement of a set of formally enacted legislative provisions or administrative processes. Rather, it has an ethical basis in the long established human rights principles and values upon which our community has been constructed. Our criminal justice system and police duties and responsibilities within it must operate in accordance with those principles and values.

4.2.1 Rights of the witness

The right to life and the right not to be arbitrarily deprived of life is recognised in Victoria's *Charter of Human Rights and Responsibilities Act 2006*, as well as in other international human rights instruments.[11] British[12] and European,[13] courts have held that this right imposes a positive obligation on states to do what is reasonable to safeguard life, subject to resourcing considerations.[14] In the context of policing in the UK, the positive obligation has been held to arise when police know or ought to know of the existence of a real and immediate risk to a person's life from the criminal act of a third party and failed to take reasonable measures within their powers to avoid that risk.[15] A real and immediate risk is one that is 'objectively verified, present and continuing', a test that the House of Lords has described as a high threshold to meet.[16] An individual's belief or fear should be treated only as one factor to be taken into account in assessing the risk.[17]

While *witnesses* do not have fair trial rights under international human rights law, they may have other rights that may be violated as a result of their participation in legal proceedings. For example, the United Nations Human Rights Committee found that failing to offer protection to a witness experiencing threats to their personal security could constitute a violation of a person's right to liberty and security of the person under Article 9(1) of the ICCPR.[18]

Other rights may also be a consideration in imposing or agreeing to particular protection measures. For example, the right to be free from inhuman and degrading treatment may be relevant to measures used to protect custodial witnesses.

4.2.2 Rights of the accused

The rights of a person charged with a criminal offence are recognised in both the common law and human rights instruments.[19] The use of any measure to protect or conceal the identity of a witness needs to be balanced with the presumption in favour of open court proceedings and accused's right to a fair trial.[20] In practice, this means that the accused has the right to know the identity of the person who is giving evidence against them and to be able to test that evidence, including the credibility and the reliability of its source.

4.2.3 A duty to the court

In the area of witness protection and witness intimidation, police have duties to provide full and open disclosure of all material facts to the court in proceedings such as:

- applications for authority under the *Witness Protection Act 1991* to make an entry in the register of Births, Deaths and Marriages;
- bail matters – for example, in assisting the court to understand the risk of an offender interfering with a witness;

[11] See Article 2 of the *Human Rights Act 1998* (UK), Article 6 of the International Covenant on Civil and Political Rights. It should be noted that while Australia has signed the treaty, it is yet to ratify it in domestic law. See also Article 2 of the European Convention on Human Rights.
[12] *Hill v Chief Constable of West Yorkshire Police* [1988] 2 WLR 1049.
[13] *Osman v United Kingdom* [1998] EHRR 101.
[14] *Osman v United Kingdom* [1998] EHRR 101 at 85 and 116 and *Re: Officer L* [2007] UKHL 36 at 21.
[15] *Osman v United Kingdom* [1998] EHRR 101.
[16] *Re: Officer L* [2007] UKHL 36 at 20.
[17] *Re: Officer L* [2007] UKHL 36 at 20.
[18] *Rajapakse v Sri Lanka*, HRC Communication 1250/2004, UN Doc CCPR/C/87/D/1250/2004 (2006) at 9.7, (unofficial version: www1.umn.edu/humanrts/undocs/1250-2004.html)
[19] See sections 24 and 25 of the *Charter of Human Rights and Responsibilities Act 2006*. See Article 6 of the *Human Rights Act 1998* (UK), Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights.
[20] See section 25 of the *Charter of Human Rights and Responsibilities Act 2005* and the *Open Courts Act 2013*.

- intervention orders;
- applications for use of court procedural measures to protect a witness – for example suppression orders, closed court proceedings and applications to give evidence via closed circuit television (CCTV); and
- other matters where the person is at risk because of their co-operation with or participation in the justice system.

Police also have a responsibility to use the *Witness Protection Act 1991* for the bona fide purpose of protecting a person. Entry of a person into the witness protection program for the purpose of obtaining suppression orders, for example, would not only undermine the fundamental purpose of the witness protection scheme, but would, in my opinion, constitute a breach of duties to the court.

4.3 Private duties – a special relationship

While the responsibilities of police officers are owed to the public at large, police may be individually liable for tortious conduct in the course of their activities for example, assault, battery, false imprisonment or malicious prosecution. At common law, the State is not vicariously liable for the individual actions of police officers.[21]

Only in some quite limited circumstances – usually where a "special relationship" with a specific individual has been identified – have the courts accepted that a failure of a police officer to perform satisfactorily their functions has given rise to civil liability.

The High Court of Australia has not finally determined the question of when and in what circumstances a police officer owes an enforceable duty of care to a witness or potential witness (including informers). This is not an appropriate context in which to embark upon a discussion of the multiple issues that can arise in this area. I do, however, have a number of observations that in my view are relevant for the purposes of this Review.

The question involves consideration of the tension between some fundamental public interests and values. On the one hand, the factors outlined in the UK case of *Hill* can be seen to militate against the attribution of civil liability upon those engaged in the investigation and suppression of crime.[22] The *Hill* policy considerations can be summarised as the following:[23]

- imposing a duty of care would lead police officers to operate with a defensive frame of mind contrary to the public interest in officers performing their duties with skill and speed;
- police officers are charged with the primary responsibility of detecting and preventing crime so as to improve the general welfare of all members of society. To impose a private duty on these functions will require police officers to devote additional resources in providing advice relating to matters, which in essence, are unrelated or not connected to their police functions; and
- the manner in which police investigations proceed necessarily involves a variety of decisions to be made on matters of policy and discretion, for example, as to which particular line of inquiry is best pursued and what is the most advantageous way to deploy the available

[21] This is because some police powers, duties and functions are given to police officers *personally* by the common law or statute. These powers, duties and functions (for example the power to arrest, search, detain and interrogate) are conferred by law on the individual police officer. More senior police officers, the Chief Commissioner or the State cannot direct the police officer in the exercise of these duties in individual instances. A police officer performs these public duties and exercises these powers on his or her own authority and in his or her own independent discretion. *Enever v The King* (1906) 3 CLR 969; *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237.

[22] *Hill v Chief Constable of West Yorkshire* [1989] AC 53 per Lord Keith at 59. The plaintiff's case was for negligence in the conduct of investigations into the Yorkshire Ripper's preceding crimes and for failing to apprehend the murderer and so prevent the murder of her daughter. The Chief Constable applied successfully to have the writ struck out on the basis of there being no duty of care. The *Hill* case has been cited with approval by Australia's High Court: *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [132] per McHugh J and at [221] and [231]-[232] per Kirby J; *Sullivan v Moody* (2001) 207 CLR 562 ("*Sullivan v Moody*") at [57]. *Hill* has also been applied in several cases in Australia's State courts to deny a duty of care. For example, see *Batchelor v State of Tasmania* [2005] TASSC 11.

[23] In Australia, there has been inconsistency about whether the *Hill* doctrines create an immunity from which possible exemptions apply, or whether the approach is to consider it as one of the 'salient features' tending against a finding of duty care.[23] The 'trend', however, is that over time, Australian courts have been less likely to consider *Hill* as creating a blanket immunity and more likely to consider the policy considerations as part of a broader 'salient features' analysis. *cf Tyszyk*, *Cran v State of New South Wales* (2004) 62 NSWLR 95*, ACT v Crowley and Ors* [2013] ACTCA 52 and *Tame v New South Wales* (2002) 211 CLR 317.

resources. Courts analysing the actions of police officers in performing these functions could result in a significant diversion of police resources into responding to and defending negligence actions and away from the performance of core police functions.[24]

On the other hand, it is essential for the proper functioning of our system of justice that people co-operate with police by providing information and assistance. Police rely on information given by members of the public and, from time to time, make appeals for such assistance in the investigation of crimes.[25] This flow of information is vital. If a victim, witness or informant cannot possess sufficient confidence that justifiable concerns for their safety will be addressed and reasonable measures taken to protect them, they cannot be expected to place themselves at risk by their provision of such co-operation.[26]

Courts in the UK have set a very high threshold before the public interest would outweigh the *Hill* policy considerations and impose a duty of care on police agencies.[27] A wide range of considerations are relevant to this question.[28] Again, it is not necessary for present purposes to embark upon an analysis of the various situations in which the issue has arisen.

Despite the uncertainties, it seems to me likely that the courts would hold police officers liable in the witness protection context to honour specific representations and undertakings given by them and upon which the witness has relied to their detriment. This scenario could give rise to a duty of care to do what was promised,[29] or may give rise to a claim in contract or equity.[30] In my opinion, there is no good reason why police should not be required to honour undertakings and assurances given in such circumstances.

Victoria Police is well aware of the potential for the creation of duties of care in witness protection scenarios as a consequence of the undertakings given concerning protection measures. The almost absolute protection provided by the immunity in the Act has, I consider been directed to limiting this potential liability in the interests of Victoria Police rather than those of the broader public or individuals affected. This aspect will be addressed later in the report.

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[24] Some argue that, rather than detract from policing duties, the threat of litigation will improve police decision making and practices. See Laura Hoyano 'Policing Flawed Police Investigations: Unravelling the Blanket' (1999) 62 *The Modern Law Review* 912. The Victorian Supreme Court in *Tache v Abboud (No 1)* [2002] VSC 36 agreed. The case involved a negligent failure of police to advise a person convicted of a crime that the conviction may have been unsafe. Arguments about defensive policing were held not to apply once an investigation is complete and imposing a duty in these circumstances would enhance, rather than detract from performance. Some academics have gone further in their criticism of the *Hill* police considerations and argued that the premise that police always act ethically and do their best should also be questioned, particularly in the context of widening of police powers since the 9/11 attacks in New York in 2001. Mandy Shircore, 'Police Liability for Negligent Investigations', *Deakin Law Review,* Volume 1 No 1 2006. In Victoria, community legal centres have used civil litigation over police complaints processes to advocate for greater 'police accountability'. At the same time, surveys of overall community satisfaction with policing services remains high.

[25] For example, on 3 May 2014 *The Age* reported Detective Inspector John Potter's call for witnesses to come forward with information about murders. He was quoted as saying "While I understand some people might be fearful about coming forward, we will protect you and can put measures in place for anyone concerned about their safety".

[26] The common law already recognises the need to protect people who provide information to police. For example, in a criminal prosecution, witnesses may not be asked to disclose the name of an informer.

[27] For example, despite "a litany of derelictions of duty and failure in police investigation", the Court found that police owed no duty to the witness or victim/witness respectively: *Van Colle v Chief Constable of the Hertfordshire Police* (decided with *Smith v Chief Constable of Sussex*) [2009] 1 AC. See also *Brooks v Commissioner of Police of the Metropolis* (2005) 1 WLR 1495, and *Michael and others (FC) v The Chief Constable of South Wales Police and* another [2015] UKSC 2. The tension between these two fundamental public interests, however, has been resolved in favour of at least the *possibility* of a duty being found in the UK case of *Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464. This case involved threats to a witness following alleged negligent handling of police files that were stolen from a police vehicle. At trial, the court found that in fact, the duty had not been breached. In the UK it is accepted that the relationship between police and Covert Human Intelligence Sources (CHIS) is such that police assume a duty of care to protect the CHIS from risks to physical safety and wellbeing to which they are potentially exposed as a result of their activities as a CHIS in providing information about others. *An informer v A Chief Constable* [2012] EWCA Civ 197.

[28] For example, control, vulnerability, indeterminacy of liability ('floodgates'), conflicting or incompatible duties, the nature and consequence of action to avoid the harm, coherence in the law and nature of the alleged harm.

[29] See *Cran v State of NSW* [2004] NSWCA 92 per Santow JA at 52 and 64; See *ACT v Crowley* [2012] ACTCA 52; *Crowley State of New South Wales v Klein* [2006] NSWCA 295 *Rush v Commissioner of Police* [2006] FCA 12 for examples where the argument was not successful. See *NSW v Spearpoint* [2009] NSWCA 233 (a victim witness came forward seeking protection and specific undertakings were communicated) and *State of Victoria and Ors v Richards* (2010) 27 VR 343 (involving an innocent bystander being affected by OC spray) where courts have held that it is arguable.

[30] For example, a claim based on the concept of promissory estoppel.

5 Victoria's current Witness Protection Act

5.1 The Act's history

Prior to the introduction of Victoria's *Witness Protection Act 1991*, the protection of witnesses at risk fell to police to manage in the absence of any formal programs. A handful of examples of protection arrangements in this state prior to the commencement of the Act were within the collective memory of those interviewed in the course of the Review. Where protection was perceived to be in the interests of the investigating police (and those police were able to access resources), limited physical protection was on occasion arranged. In the words of one of the participants, it was basically about "farms and guns". In those of another, it involved being "handed a pump action shot gun and told to sit in the witness' lounge room" with the purpose of ensuring that the person was still alive to give evidence in an anticipated trial.

A number of significant events provided the catalyst for the passage of Australia's first witness protection legislation, the *Witness Protection Act 1991* (Victoria). Internationally, the United States passed legislation in 1970 authorising the Attorney-General to assist and protect witnesses who are in a position to give evidence against participants in organised crime.[31]

In Australia, a number of Royal Commissions in the 1970s and 1980s demonstrated the complex nature of organised crime across the Australian jurisdictions. The Commissions found that law enforcement agencies faced significant barriers in procuring information to prosecute organised criminals[32] and converting any such information into admissible evidence to secure convictions.[33] The importance of witness protection programs in removing barriers for police informers to give evidence was recognised.[34] Both the Williams and Stewart Royal Commissions supported the establishment of a national program.[35]

In Australia, two high profile criminal investigations – one successful, one not – impacted heavily on Victoria Police's approach. In 1983, as part of the Mr Asia trials, Operation Aries provided 24 hour security for two witnesses and their dependents. It is understood to have cost the state some $4.5 million, a very substantial amount at that time and almost double the 2013/14 overall budget for the Witness Protection Unit. In 1991, those tried for the 1988 murder of Constables Steven Tynan and Damien Eyre in Walsh Street was considerably weakened after a key witness Wendy Peirce, the wife of one of the accused, refused to give evidence in accordance with previous statements made by her. Ms Peirce had been provided protection for a substantial period prior to the trial.

…

In 1986, Victoria Police established the Witness Security Unit (WitSec) to perform witness protection functions in the absence of supporting legislation.

In 1988, the Commonwealth Parliamentary Joint Committee on the National Crime Authority published a report on witness protection in Australia.[36] The Committee recognised the need to protect witnesses against reprisal for their co-operation. As this could create a long-term commitment, it was considered sufficient to justify the use of formal name changes to relocate and re-identify co-operating individuals permanently. This technique was seen as the most effective way of keeping the person safe in the longer term and ensuring that they had access to services … that require identity documents. It was seen as reducing or removing the need for resource intensive long term personal protection. While the Commonwealth Committee's recommendations were driven largely by consideration of witness protection as a tool in the context of organised crime, it recognised that there was a wider cohort of people who could be considered appropriate for inclusion in such a scheme. This group included innocent witnesses to a crime, victims, accomplices who were prepared to give evidence against an accused and importantly, informers who might never be expected to give evidence but whose co-operation with authorities rendered them at risk of reprisal.

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[31] 18 U.S. Code § 3521 - Witness relocation and protection.
[32] Mr F.X. Costigan, QC, *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union: Final Report*, Australian Government Publishing Service, Canberra 1984, vol. 2, p.6
[33] The Hon D.G. Stewart, *Royal Commission of Inquiry into Drug Trafficking*, Australian Government Publishing Service, Canberra, 1983, p504.
[34] The Hon E.S. Williams, *Australian Royal Commission of Inquiry into Drugs*, Australian Government Publishing Service, Canberra, 1980, pB197, p F38.
[35] *Ibid*, p 540.
[36] *Witness Protection* Report by the Parliamentary Joint Committee on the National Crime Authority, Australian Government Publishing Service, 1988.

To secure assistance from organisations responsible for record keeping and the production of identity documents and to avoid potential liability for those engaged in the process, the Committee recommended an immunity for officials who alter records to create new identities under the proposed scheme. To ensure the integrity of the program the Committee also recommended mechanisms to avoid the misuse of these new identities and appropriate complaints mechanisms for persons who were denied protection or aggrieved by witness protection decisions.

In 1991, Victoria passed the first legislation flowing from this report. In his second reading speech for the *Witness Protection Bill 1991,* the then Minister for Police stated that the Act was "designed to help the police combat organised crime and to solve major crimes of violence" and to "encourage witnesses to come forward, *safe in the knowledge that they will be fully protected*" (emphasis added).[37]

The original Act was a relatively short seven pages in length and focused primarily on the creation of new identities for witnesses by empowering the Supreme Court to authorise new entries to be made in the Register of Births, Deaths and Marriages.[38] It contained a significantly wider immunity provision than that recommended by the Commonwealth Committee. It covered both police officers and registry staff in respect of all conduct under the Act. I will return to this aspect in detail below. The Act also provided that, in order to be included in the witness protection program, a witness must enter into a Memorandum of Understanding (MoU) with the Chief Commissioner.

The operation of all aspects of the program were within the discretion of the Chief Commissioner, including entry into the program, the protection measures provided, termination from the program, resolution of any disputes arising from participation in the program and the resourcing of the implementation of witness protection decisions.

In 1994, the Commonwealth passed witness protection legislation establishing the National Witness Protection Program operated by the Commissioner of the Australian Federal Police. The Commonwealth Act included more detail and guidance than its Victorian counterpart. It included the considerations for entry into the program, the matters that a witness was required to disclose prior to admission, examples of assistance and protection that could be offered, special provisions dealing with witnesses who wished to marry while in the program and provisions designed to ensure witnesses did not use their new identities to avoid prior obligations. It also dealt with the termination of protection and assistance, providing a right of review of such decisions by the Commissioner and facilitating witness protection arrangements between the Commissioner and police commissioners in the States and Territories.

Within seven years of the Commonwealth Act coming into operation, all other Australian States and Territories had introduced similar witness protection legislation. The various Acts allowed for mutual recognition and interstate co-operation, although technical differences in the Acts remained.

The New South Wales witness protection legislation was modelled on the Commonwealth Act and provided an equivalent right of internal review by the Commissioner in respect of decisions to terminate protection and assistance or restore a person's identity. When the Witness Protection Bill was introduced in the NSW Parliament, the then Leader of the Opposition raised concerns about the Commissioner having "absolute power to deal with people who are to be brought onto or taken off the witness protection scheme"[39] and argued that a mechanism for review of the Commissioner's decisions by the Ombudsman was required. The opposition introduced amendments to that effect, which were supported by the government of the day and included in the Bill.

Victoria would later adopt a similar approach with the Office of Police Integrity (OPI) and then the IBAC performing a merits review function over decisions to terminate a person from the program. Victoria has never had a review function over decisions to enter the program. On 1 July 2014, the merits review function with respect to termination was removed from the Victorian Act to "streamline the review mechanisms under the Act".

…

At the time of the introduction of this amendment, it was understood that the broader issue of a mechanism to monitor the operation of the Act was to be considered as part of this Review.[40]

[37] Hansard, Parliament of Victoria, Legislative Assembly, 15 November 1990, p 2060.
[38] It is now 60 pages.
[39] Hansard, Parliament of New South Wales, Legislative Council, 7 December 1995, Item 51.
[40] Second Reading Speech Witness Protection Amendment Bill 2014, Legislative Assembly, 12 March 2014.

In 1992, the Legal and Constitutional Committee of the Victorian Parliament reviewed Victoria's Act. The Committee recommended that an appropriate mechanism be put in place to monitor its operation, including Ministerial and public reporting about the use and effectiveness of the powers under the Act. The Committee also recommended that Victoria Police maintain records of information collected in the administration of the program and that consideration be given a potential role for the Ombudsman to independently check those records. It is unfortunate that these recommendations were not implemented as they might have avoided an embarrassing legacy that is still being remediated today.

The Legal and Constitutional Committee also recommended a number of other measures, some of which were subsequently implemented:

- a definition of the term 'witness' be included in the Act (implemented);
- the provision of a right to complain to the Deputy Ombudsman including for breaches or non-fulfilment of police obligations under memoranda of understanding, and a requirement that advice of this right be included in all memoranda (implemented);
- a requirement that every application for a Supreme Court order include supporting evidence from the witness (not implemented);
- the provision of an automatic expiry date of the effect of any court authorising order within one month of such order being issued under the Act (not implemented); and
- the provision that the Chief Commissioner obtain a signed record of receipt from each person who receives a new birth certificate under the Act, to be signed in such person's former (old) name and dated (not implemented).[41]

Parliament amended the Act in 1996. This facilitated the mutual recognition of witness protection legislation in other Australian jurisdictions first contemplated by the 1988 Commonwealth Parliamentary Inquiry, and implemented some of the measures recommended in the Victorian Parliamentary Committee Report (as indicated above). In addition, the 1996 Amendment Act:

- listed examples of assistance and protection that may be offered;
- included provisions to deal with witnesses who wish to marry while in the program;
- clarified the processes for terminating protection and assistance and restoration of a person's former identity and included a right to an internal review by the Chief Commissioner and an external appeal to the Deputy Ombudsman; and
- required memoranda signed under the Act to advise witnesses of their right to appeal to the Deputy Ombudsman. While this appeal right remained in the Victorian Act until 2014 (discussed below), the person who determined such appeals changed several times in this period from the Deputy Ombudsman to the Director, OPI in 2004 and again to the IBAC in 2013.

Following the 2004 killing of Christine and Terence Hodson and the subsequent collapse of a serious criminal case involving alleged corrupt police and links to organised crime, the OPI in 2005 conducted an "own motion" inquiry into the Victorian witness protection program. By their own choice, the Hodsons had not entered the formal witness protection program. The OPI inquiry made thirty recommendations including some for legislative reform and changes in Victoria Police practice.

Recommendations from the OPI review included that:

- planning and further development of witness protection be based on three levels of threat and witness fears (not supported by Victoria Police);
- a framework be introduced to provide protection to witnesses who face a degree of risk but who do not meet the criteria for, or who refuse to be included in, the program including documenting such an agreement (not supported by Victoria Police);
- the second level of protection generally exclude relocation, sustained financial support or provision of a new identity (not supported by Victoria Police);

[41] Legal and Constitutional Committee of the Parliament of Victoria, *Report upon A Mechanism for Monitoring the Operation of the Witness Protection Act 1991*, Victorian Government Printer, 1992.

- measures be introduced to ensure that witnesses are appropriately prepared for and supported during their adjustment to life on the program, including psychological assessments prior to entry (supported subject to legislative amendment which in fact, was not requested until 2012);
- measures be introduced to ensure police are appropriately trained to identify witness intimidation and perform the witness protection function (supported subject to verifiable data on witness intimidation being available. As no attempt appears to have been made to collect it, and as earlier pointed out, this kind of data was never likely to become available. It is, I consider, reasonable to infer that Victoria Police were well aware that this was the case);
- an Assistant Commissioner chair the committee that makes decisions about entry and termination from the program (not supported by Victoria Police, but subsequently implemented in 2010);
- a further inquiry into the nature and extent of witness intimidation and of measures which could limit its effectiveness in the criminal justice system (this recommendation was not acted on until the conduct of this Review);
- information about being a witness and protection offered by the program be made publicly available (not supported by Victoria Police);
- consideration be given to the risks imposed on the community when deciding whether or not to relocate a witness and that these risks be assessed by both the investigator and the WitSec (not supported by Victoria Police); and
- information about the program be included in the Victoria Police annual report (not supported by Victoria Police).[42]

…

Following the 2010 murder in prison of prospective Crown witness Carl Williams, the OPI conducted an inquiry into the circumstances surrounding his death. It is not necessary for present purposes to attempt to state the circumstances leading to Mr Williams' death as reported in that inquiry.

…

Other matters that came to my attention, the details of which need not be addressed in this report, point strongly to the need for external independent oversight. This would not be directed to "second guessing" activities that were truly operational in character but designed to ensure that there were proper structures, guidelines and protocols in place and that the internal controls were operating effectively and in accordance with principles of witness protection.

The Chief Commissioner conducted a further review of Victoria Police's witness protection program. This was undertaken … in 2012. The 2012 Review recommended both legislative and administrative reform.

Parliament subsequently enacted a number of reforms that became operative on 1 July 2014. These changes:

- empowered the Chief Commissioner to provide interim protection and temporary assumed identities for witnesses who are being considered for inclusion in the program;
- empowered the Chief Commissioner to suspend protection and assistance (for example, while a person is imprisoned or overseas);
- removed the avenue of external appeal to IBAC for decisions to terminate a person from the program (IBAC, however, retains jurisdiction to investigate police conduct complaints in respect of the Act and affected parties retain the right to judicial review); and
- added some more detail to the legislation without fundamentally changing its scope or key tools, including:
    - listing some of the considerations for admission into the program;
    - strengthening the Chief Commissioner's ability to obtain information to assist in making the decisions; and

[42] Office of Police Integrity, *Review of the Victorian Witness Protection Program*, Victorian Government Printer, Melbourne, 2005

- clarifying that the Chief Commissioner could disclose protected information about a protected witness without it being an offence under the Act.

Victoria Police concurrently implemented a number of administrative arrangements flowing from the 2012 Review including:

- transferring responsibility for the newly re-branded 'Witness Protection Unit' (WPU, formerly known as WitSec) from the Protective Security Command of Victoria Police to the Intelligence and Covert Support Command, under the Deputy Commissioner for Crime and implementing a number of human resource changes to the Unit (April 2014);
- the introduction for the first time of policies in the Victoria Police Manual for the governance and administration of witness protection functions under the Act and high risk matters falling outside the Act (July 2014);
- the introduction of a custom developed risk assessment tool (July 2014);
- the auditing and remediation of all protection files held by the WPU – including identifying dormant files that have not been formally terminated or withdrawn, re-engaging with the participant, conducting a new threat risk assessment and responding accordingly (April – December 2014); and
- internal human resources changes to improve the attraction of suitable candidates to the WPU.

Before describing the use of the Witness Protection Act in practice, it is important to mention two further reviews. The first was commissioned by the Chief Commissioner and conducted …in 2012. It considered Victoria Police's informer management practices and the transition from human source to witness.

The second is an own motion inquiry under the *Independent Broad-based Anti-corruption Commission Act 2011* into the conduct of Victoria Police in relation to the management of human sources. This inquiry, led by former Supreme Court Judge the Honourable Murray Kellam AO QC, has now been finalised. It was directed to the issue of whether or not informer management has complied with appropriate ethical and legal obligations. Mr Kellam's review found negligence of a high order in this area that had the potential of adversely affecting the administration of justice in Victoria.

There are different emphases underpinning the structures and operational processes involved in witness protection and human source management. Witness protection is focussed on the safety of the individuals concerned and at the same time maintaining the integrity of evidence. Human source management, although clearly involving consideration of safety of informers, is directed more to the gaining of intelligence in a way that cannot be seen to compromise the integrity of the system and the maintenance of proper ethical standards by law enforcement agencies. Human source management in a given case may not involve issues of witness protection at all. However, there may be overlap in some cases. Both persons categorised as human sources and witnesses may come within the definition of 'witness' in the Witness Protection Act. This is because informers may be subject to reprisal for their co-operation with police whether or not they give evidence in court. Both areas are subject to high levels of police discretion and secrecy in order to maintain the safety of individuals and the effectiveness of the respective programs in solving crime and bringing offenders to account.

In contrast to Victorian arrangements, in the UK, a legislative scheme regulates the use of covert human sources.[43] It has not been necessary to examine this aspect as it falls outside the ambit of the Review. However, I am of the view that consideration should be given to where there are benefits to the possible introduction of a similar scheme in this jurisdiction to complement the Witness Protection Act provisions.

5.2 The Witness Protection Act in practice

…

Note: This section has been summarised by the Department of Justice & Regulation so as to guard against disclosure of covert police methodologies

[43] See *Regulation of Investigatory Powers Act 2000* and the Covert Human Intelligence Sources Code of Practice made pursuant to section 71 of that Act.

While the Act is now more than 60 pages in length, its key elements remain the same as the 'bare bones' seven page version of 1991. It facilitates an untraceable name change to allow a person to re-identify. This, combined with relocation and the severance of all ties with a person's previous life, allows the person to 'disappear', removing them from the source of the risk while enabling them to access services that require identity documentation. To support this practice, the Act:

- provides for the use of temporary assumed identity documents.[44]
- guards against disclosure of sensitive witness protection information;[45]
- promotes informed decision making under the Act;[46]
- promotes the integrity of the program;[47]
- sets out the rights and obligations of the parties;[48]
- facilitates national co-operation and mutual recognition with other jurisdictions;[49] and
- allows for suspension of protection and assistance for example, when the person is in custody or travels overseas.[50]

Since July 2014, the Act has empowered the Chief Commissioner (or his delegate) to provide interim protection. This:

- allows access to temporary assumed identity documents;
- means that the person's identity is protected by the non-disclosure offences under the Act; and
- allows police time to obtain the information required to sufficiently assess an application for protection under the Act.

Entering the program involves serious decisions for both the witness and the police. The witness must be prepared to make significant changes to their lifestyle, their circle of friends and family. Such extreme protection measures cannot be *imposed* on a person and will only work by mutual agreement, the terms of which should be set out clearly in a MoU. That agreement must identify the obligations and entitlements of the parties and thereby reduce the perception that the protective measures undertaken are intended to constitute any kind of inducement.

The task may be rendered more difficult due to the personal and other issues presented by those to whom protection is provided in this way. It is reasonable to assume, and consistent with the observations of those engaged in this work, that a substantial proportion of protected individuals will have criminal involvements and dysfunctional lives. Those concerned with their protection may have to deal with issues relating to almost any aspect of the individual's situation, including substance abuse, housing, health, employment, education, family law problems or child welfare concerns.

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[44] *Witness Protection Act 1991* section 9F-9M. Temporary assumed identity documents may be authorised for those requiring urgent protection while an application for formal entry into the program is considered, or for those already on the program whose identity is compromised. They may allow, for example, police to book travel and accommodation for the person under an assumed identity. The Act contains strict controls on the use of these assumed identities, including time limitations on their use, requirements for supervision and record keeping. The Chief Commissioner may only make one delegation (to a person of the rank of Superintendent or above) to issue temporary assumed identities. Those using temporary assumed identities are immune from prosecution for offences related to their authorised use (for example, fraud-related offences).

[45] *Witness Protection Act 1991* includes offences for disclosure at section 10 and a presumption in favour of closed court proceedings at section 10A and ousts FOI laws for witness protection documents at section 24.

[46] A prospective participant is required to disclose information and take psychological examinations for the purposes of making decisions about entry into the program and the kinds of protection measures required, see section 4 and section 9B. Certain things must be considered before entering a person into the program, see section 3B.

[47] If insufficient information is available to make an informed decision, the program must not be used: see section 3B(4). Documents cannot be obtained that represent that a witness has a qualification that he or she does not have, or a benefit to which he or she is not entitled: see section 3A; the program is not a way to 'wipe the slate clean' and avoid obligations associated with a previous identity: see section 9A that requires the Chief Commissioner to take necessary action to ensure ongoing obligations are dealt with according to law.

[48] Protection must be by mutual consent facilitated through the entering into of an MOU: see section 3B. No legal action may be commenced to enforce the terms of an MOU or enforce civil liability generally: see section 12. Processes for termination of protection assistance and restoration of former identity are prescribed: see sections 16-20.

[49] Sections 21, 21A and 23.

[50] Section 15A.

[51] *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organised Crime,* UN Office on Drugs and Crime, Vienna, 2008 p48.

[52] *Witness Protection Act 1991* section 3.

Unsurprisingly, there have been protected individuals who have sought to exploit to the fullest extent their importance as witnesses and others, who for one reason or another, could not comply with measures designed to protect them. There is an ever-present potential that some people with criminal propensities or drug or alcohol addiction will relapse and engage in offending.

I have referred to these possibilities to emphasise not only the kinds of issues that can arise in decision making with respect to such questions as whether an individual will be accepted into or removed from the program, but also the complex case management difficulties that are encountered in the daily operation of the Unit. The need for skilled personnel and adequate training for this work is apparent. As a 2008 United Nations report commented:

> *protection is a complex task requiring experience in a variety of fields, ranging from close personal protection and handling of weapons to law and psychology*.[51]

The definition of *witness* under the Act is very broad and includes a person who, for any other reason, may require protection or other assistance under the Act.[52] The legislation recognises the need for flexibility in order to accommodate the wide range of circumstances and individuals that may be involved and does not act as a limit on people who may be considered appropriate for inclusion in the program.

It appears that at the time that the Act was passed, it was contemplated that its principal area of operation would be to protect witnesses from reprisal in the context of organised criminal activity. Witnesses were only provided with protection by way of new identities *after* they had given evidence. As explained in the second reading speech for the Witness Protection Bill in 1991:

> *Before a trial, protection is provided by around-the-clock physical police presence at a safe house – an expensive operation. After giving evidence, witnesses are offered the chance to change their identities and to start new lives in other locations.*
>
> *A change of identity involves the witness adopting a new name and the provision of a range of fresh documents in that new name - drivers licence, educational and trade qualifications, tax file number, to name a few. But the most important is a new birth certificate which will enable the witness and his or her family to lead an independent new life.*
>
> *All new documents must be backstopped so they will stand up to checking. In the case of a birth certificate, this requires the creation of an entry of the new name in the register of births which will be accessible by the public in the normal way. That is the purpose of the Bill.*

By the time the OPI conducted its 2005 Review, practices had changed. Police had used the Act to relocate the person and their family out of harm's way *before* they gave evidence. This practice had the benefits of requiring less direct contact with police (providing reduced opportunity for and perception of possible contamination of evidence). It also required fewer resources in the long term. From the time that WitSec became aware of a witness at risk, it could take less than 24 hours to agree to enter the person onto the program under a 'fast tracked' process. While the need to act quickly is understandable, given the absence of any adequate formal arrangements for interim protection, such a fast process brings into question the possible robustness of the decision-making.

Internal Victoria Police practice and policy changes were implemented in July 2014 alongside amendments to the Act. Persons classified as being in 'Category A', may be provided protective measures under the Act that fall short of relocation and formal name change. This provides greater flexibility enabling a tailoring of the protective measures to the individual circumstances of the witness concerned. However, the legislative arrangements do not extend to persons classified as being in 'Category B'.

The decision-making process became more robust through a combination of:

- information request powers in the Act;
- requirements to consider certain matters prior to entering a person into the program;
- a prohibition on entering a person onto the program if insufficient information is available to consider those matters; and
- a temporary protection regime to allow for urgent protection measures to be put in place at the same time as appropriate inquiries are made in order to make a robust decision about entry into the program.

5.2.1 Protection outside the Act

…

Note: This section has been summarised by the Department of Justice & Regulation so as to guard against disclosure of covert police methodologies

The introduction of the Act in 1991 did not replace the ad hoc arrangements existing prior to that time. Rather, it appears that WitSec continued to provide witness protection outside the Act on a discretionary basis. This so-called 'level 2' assistance (now named 'Category B' assistance) was provided in addition to other ad hoc arrangements organised by investigators. These activities have been conducted in the absence of policies and guidelines, and without consistent internal governance or controls, documentation requirements or accountability.

In 2005, the OPI criticised the existence of what it viewed as an 'all in' or 'all out' scheme and recommended the adoption of a structure for witnesses at risk who were not on the program. In 2005, neither the OPI nor police command identified the number of people who were, in fact, being provided protective support outside the provisions of the Act. The then Chief Commissioner's official response at the time was not to support the OPI recommendation that some form of protection outside the Act should be available. In fact, such arrangements were already being made. By the time that the Review reported in 2012, these 'level 2' cases dominated the work of the WitSec (now Witness Protection Unit).

Anecdotally, the situation of persons in now named 'Categories B and C' emerged in the course of the Review as a source of considerable frustration. Investigators claimed to have experienced difficulty in being able to secure approvals and funds for the practical assistance required in the past. Some investigators perceived organising protection arrangements themselves for witnesses at risk to be inappropriate, bearing in mind their role and responsibilities as an investigator. Some were also disturbed at the withdrawal of support as soon as the witness had given evidence in the criminal proceeding. This touches upon one of the major deficiencies in these kinds of arrangements, namely, support may be discontinued once the case is finalised. The witness may be left to his or her own devices and whether or not they are subject to reprisal may never be known. In any event they may be left in a state of reasonable anxiety in consequence of their co-operation and a sense of abandonment.

WPU members, in their day-to-day operations, were far more concerned with the actual circumstances and protection of the witnesses rather than their categorisation. The major differences from the WPU members' perspective in related to the tools available to them to assist the individual at risk, rather than their categorisation.

There is certainly no reason to suppose that investigating police officers or personnel involved in witness protection have ever been indifferent to the fate of those considered to be endangered as a consequence of their cooperation. Rather, what has been done to assist them has generally been left to the discretion and judgement and, of course, the resources available to the individual investigators or teams involved.

5.2.2 Verifying practices under and outside the Act

Quite surprisingly, Victoria Police was able to provide remarkably little data to confirm the use of the Act or protection outside its provisions. The type of detail sought included the:

- number of applications received to enter the program;
- number of MoUs entered into under the Act;
- general 'category of witness' applicants fall into, for example:
    - witness in criminal proceeding;
    - informer;

    - family violence victim;
    - other participant in the justice system;
- number of voluntary terminations from the program;
- number of involuntary terminations from the program;
- number of 'active' cases per year;
- number of 'inactive' cases per year;
- average length of time that protection arrangements existed; and
- number of females, males and children under the program.

Similar information in relation to the cohort of people with arrangements for protection outside the Act was also sought but not available. Victoria Police informed the Review that they were not able to provide basic data of this kind in relation to people protected under and outside the Act over the last 12 months. The fact that even 12 months' data is unavailable on the basic work practices of a unit comprising only 12 people is of particular concern. The reason given was that the administrative arrangements and time required to collect such information was "prohibitively onerous". In explanation, the unsatisfactory response was given that there was not an adequate IT system in place. The lack of a customised computerised data base does not justify the absence of even a rudimentary manual 'register' to identify and adequately manage cases. Indeed, the fate of some persons admitted to the program over the years was at the time unknown and has subsequently been the subject of a remediation process. Similarly, no information was available on protective assistance that had been provided by investigating members.

Given this sorry state of affairs, it is certainly not surprising that no data is available on the effectiveness of the program or of individual measures ancillary to supporting the Act such as the effectiveness of the information disclosure offences. Victoria Police informed the Review that no qualitative data on the actual experience of those people protected is kept. A soundly managed and properly administered program could reasonably be expected to give attention to all of these aspects.

In April 2014, after the commencement of the Review, a Victoria Police team undertook a comprehensive audit and remediation of all files to determine the actual extent of the protection work that had been performed both under and outside the Act. Put simply, the team's mandate was to identify what had been done by the unit since its inception in 1986, find the people on the program whose cases were not being actively managed, identify any ongoing responsibilities, update risk assessments, close files as appropriate (for example, where the person had died), remove people from the program as appropriate (for example, where the person was voluntarily prepared to be removed) or transition people being protected under ad hoc arrangements to more formal arrangements.

Within the limitations created by inadequate file maintenance, case management and record keeping, the remediation team's work has largely now been completed. It provides some information and a point in time baseline for future management. However, it is important that continuing attention be given to this area if the lessons learned from this process are not to be lost.

5.3 Current policy and practice – who is responsible for what?

5.3.1 The Minister

The Minister:

- is responsible to Parliament for Victoria Police's performance – the Minister is supported in this function by express powers to issue formal directions to the Chief Commissioner on matters of policing policy and legislative authority to require information from the Chief Commissioner, with a corresponding duty of the Chief Commissioner to oblige such a request;[53]
- is responsible for the administration of the *Witness Protection Act 1991*; and

[53] *Victoria Police Act 2014*, section 10-11

- has specific responsibility under the *Financial Management Act 1989* to approve financial payments in excess of $1 million.

Observations

I had the opportunity throughout the review to examine a number of documents relating to information Victoria Police provided to the Minister or the Department in respect of the Minister's functions and responsibilities. These include:

- all the departmental files about Victoria Police requests for financial conferrals to make payments over $1 million in purported witness protection matters;
- a copy of the redacted version of the 2012 Review …;
- a copy of the complete and redacted versions of the 2012 Review; and
- copies of Cabinet papers and other papers supporting the *Witness Protection Amendment Act 2014*.

I have also attempted to verify information contained in these files through further requests to Victoria Police and examination of relevant reviews. Some of these documents contain troubling features that contributed to my decision to recommend the establishment of some form of external monitoring to ensure that there is an appropriate level of accountability and performance.

…

5.3.2 The Chief Commissioner

The Chief Commissioner has specific statutory responsibilities under the *Witness Protection Act 1991* including responsibility for:

- entry to the program;
- the content and scope of the protection arrangements;
- suspension from the program; and
- termination from the program and reversion back to original name.

From July 2014, this authority may be delegated to a Deputy Commissioner. The only powers that may be delegated other than to a Deputy Commissioner are the ability to make interim protection declarations and authorise the use of temporary assumed identities. The reasons for allowing this further delegation are practical – such measures are usually required for urgent protection. To ensure a separation between investigative and protection interests and promote accountability for the use of the powers, only one such delegation to a police officer of the rank of Superintendent or above may be made.

The Chief Commissioner is also broadly responsible for the implementation of witness protection decisions. In practice, the protection arrangements are the responsibility of the Witness Protection Unit.

Observations

The Chief Commissioner is entrusted with a complex responsibility. He or she is responsible for administering the witness protection program in the context of:

- competing perspectives within Victoria Police – there are inherent tensions between the objectives and priorities of investigators and those engaged in witness protection;
- competing broader interests – depending on the circumstances, there can be tension between the protection of the individual and that of the public. There may also be tension between Victoria Police's interests and duties and the broader public interest;
- a necessarily covert program that, of its nature, must be exempt from the usual transparency and accountability mechanisms for discretionary executive decision making – for example, FOI, open court measures and other detailed public reporting;
- a high risk and dynamic operational environment; and
- substantial practical and legal limitations within which witness protection can be provided.

These matters will be discussed further below.

5.3.3 Victoria Police – internal governance

On 1 July 2014, Victoria Police implemented internal governance measures for the administration of witness protection arrangements both under and outside the Act. These are based on the following principles:[54]

- *the safety and well-being of a witness and their dependants that are under threat is of paramount importance;*
- *the community needs to have confidence in the ability of police to protect a witness, essential to the operation of the criminal justice system;*
- *a witness needs assurance that they will receive support and protection from the intimidation or harm criminals may seek to inflict upon them in an attempt to discourage or punish them from co-operating with authorities;*
- *witness protection is not an inducement or a reward for cooperation with police and it is not to be to the benefit or detriment of the protected witness. Its sole purpose is to remove witnesses from the threat of intimidation and serious harm to enable the provision of witness testimony;*
- *the program is voluntary requiring the participants to be fully cooperative with their security arrangements; and*
- *a person remains on the program only until such time as the threat-risk has significantly reduced to permit either voluntary or involuntary termination.*

The Policy Rules (enforceable by way of disciplinary action) establish two committees, the Witness Protection Evaluation Committee (WPEC) and the Witness Protection Oversight Committee (WPOC).

The purpose of the WPEC is to:[55]

- *examine all cases where a witness is assessed at a higher level risk of death, serious injury or serious intimidation;*
- *consider all applications for admission, suspension or termination from the Victorian Witness Protection Program;*
- *recommend approval or other action concerning program inclusion;*
- *provide advice or direction, as deemed necessary, in regard to higher risk cases not deemed suitable for the Witness Protection Program (Category B); and*
- *consider biannual reports from the Witness Protection Oversight Committee regarding the integrity and activity status of the program.*

Membership of the WPEC consists of Deputy Commissioner – Specialist Operations (Chairperson), Assistant Commissioner – Intelligence & Covert Support Command and another Assistant Commissioner (as nominated by the Chairperson).

The purpose of the WPOC is to:[56]

- *undertake a periodic review of all active high risk witness protection cases (Interim, Category A & B);*
- *facilitate any priority requests on a case by case basis for additional human or physical resources for witness protection to State Tasking & Coordination;*
- *facilitate interagency cooperation, particularly via the Interdepartmental Custodial Witness Protection Committee, High Risk Management Advisory Panel and the THASM Review Panel;*[57]

[54] Victoria Police Manual – Policy Rules – Witness Protection.
[55] Victoria Police Manual – Policy Rules – Witness Protection.
[56] Victoria Police Manual – Policy Rules – Witness Protection.
[57] A panel responsible for considering threats against serving members.

- *provide a biannual report to the Witness Protection Evaluation Committee on the integrity and active status of the Victorian Witness Protection Program; and*
- *identify and recommend any amendment to witness protection practice or procedure in the Victoria Police Manual or approve amendments to WPU local operating procedures.*

The Assistant Commissioner – Intelligence & Covert Support Command, the Superintendent – State Intelligence Division, the Superintendent – Security Services Division, and the Superintendent – Crime Command constitute the membership of this body.

Where a sufficient threat-risk exists, the following options are available to WPEC:[58]

- Interim protection – the issue of an Interim Protection Declaration with the consent of the witness (not to exceed 3 months);
- Category A protection – the admission of the persons to the Witness Protection Program subject to full compliance with a signed agreement (MoU); or
- Category B protection – this enables the provision of some limited assistance by the WPU to persons considered unsuitable for the Witness Protection Program or who are unprepared to sign a MoU.

Where the threat-risk is assessed at a lower level, the following additional option is available:

- Category C – reasonable level of assistance provided by operational police.

The Policy Rules set out responsibilities within Victoria Police as follows.

The Deputy Commissioner – Specialist Operations is:[59]

- *accountable for the efficiency and effectiveness of the relevant policies, implementation delivery and strategic engagement with Government;*
- *the Chief Commissioner's delegate to approve admission, suspension or termination from the Victorian Witness Protection Program; and*
- *the Chairperson of the Witness Protection Evaluation Committee (WPEC).*

The Assistant Commissioner – Intelligence and Covert Support Command is:[60]

- *owner of the relevant policies and accountable for the administration of the Witness Protection Program;*
- *the Chairperson of the WPOC; and*
- *a member of WPEC.*

Superintendent – State Intelligence Division:[61]

- *is the Chief Commissioner's delegate to issue, cancel or extend an Interim Protection Declaration or temporary assumed identity in writing for a witness in accordance with the Act;*
- *has line management responsibility over the WPU and is responsible for ensuring the integrity of the interim process that precedes consideration of whether to accept a person in the witness protection program; and*
- *is a member of the:*
    - *WPOC;*
    - *Interdepartmental Custodial Witness Committee; and*
    - *High Risk Management Advisory Panel.*

The WPU is responsible for the administration of witness protection arrangements. The Officer in Charge must:[62]

[58] Victoria Police Manual – Policy Rules – Witness Protection.
[59] Victoria Police Manual – Policy Rules – Witness Protection.
[60] Victoria Police Manual – Policy Rules – Witness Protection.
[61] Victoria Police Manual – Policy Rules – Witness Protection.
[62] Victoria Police Manual – Policy Rules – Witness Protection.

- *allocate cases for assessment to a WPU Case Officer for preparation of a threat-risk assessment;*
- *maintain a Register of Protected Witnesses under Interim Protection Declarations, and Category A & B;*
- *coordinate the operation of the Victorian Witness Protection Program;*
- *respond to requests for assistance from police members and other police jurisdictions;*
- *ensure offences against the Act are investigated; and*
- *provide secretariat support to the witness protection committees.*

The Officer in Charge, WPU is to ensure that:[63]

- *requests for police assistance are responded to in a timely manner;*
- *threat-risk assessments rated at a higher level are provided to the WPEC for assessment in a timely manner;*
- *all witness protection policies and guidelines (VPM and WPU local operating procedures) are complied with;*
- *information shared between agencies is appropriate and authorised in accordance with Victoria Police policy and the Commissioner for Law Enforcement Data Security (CLEDS) standards;*[64]
- *the integrity and privacy of that information is protected; and*
- *information is used correctly and for the purposes for which it was intended.*

…

Note: This section has been summarised by the Department of Justice & Regulation so as to guard against disclosure of covert police methodologies

The policies require operational members to take certain actions where a threat of death, serious injury or serious intimidation has been made toward a person who has given or agreed to give evidence in court proceedings, and provide reasonable assistance where threat-risk is assessed at lower levels. Guidelines also require operational members not to make undertakings to a witness in consideration of their providing witness testimony as well as not making commitments about witness assistance or protection until a WPU assessment has been conducted and a response strategy authorised. The policies also place obligations on Detective Inspectors and I&R Inspectors to take appropriate action in these circumstances.

Observations

These new policies will improve the program's internal governance structures significantly. They will, however, improve the situation in practice only if they are vigorously pursued and the WPEC and WPOC take an active rather than a passive role. It is important to ensure that the reform process continues and that the changes are properly evaluated and monitored. Three matters, however, warrant particular mention as they have contributed to my decision to recommend external monitoring.

…

Second, it is also apparent that WPOC has interpreted its role narrowly and as largely confined to the reviewing of current active cases.

The consequences of categorisation in Categories A and B on the one hand, and category C on the other, can be immense. In my view, WPOC's proper function should extend beyond the management of active cases to oversight of the processes and timeliness of the system under which the matters are referred to WPU, interim measures put in place, risk assessments conducted and finally decisions made and implemented.

[63] Victoria Police Manual – Policy Rules – Witness Protection.
[64] Note that CLEDS standards are now called the Standards for Law Enforcement Data Security (SLEDS).

WPOC should also be concerned to ensure that the public value and effectiveness of the program are maintained and to monitor the effectiveness of the particular mechanisms available under the Act and administratively. At the moment, there is little indication that this is happening. Victoria Police has advised that it does not consistently keep information on:

- whether people on the program have been harmed;
- how often the program achieves its aim to facilitate a person giving evidence; or
- the effectiveness of particular mechanisms in the Act, such as information disclosure offences, temporary assistance and the temporary assumed identities scheme.

Third, while the remediation project provides a point-in-time picture of the work of the WPU, the fact that data on the previous 12 months' activity is not available is of concern and suggests that there is still much to be done in implementing even a basic system of case management and record keeping. The reason proffered for this absence is the lack of a purpose built computer case management system. I appreciate that an IT solution may improve the situation. As I have earlier mentioned, however, this provides no excuse for the absence of basic manual systems including a register of protected witnesses (Category A and B) and witnesses under Interim Protection Declarations.

5.3.4 The participants

To enter the program, a prospective participant needs to be prepared to enter into a MoU with the Chief Commissioner outlining their respective obligations. In practice, a standard form of agreement is used, with free text areas able to be filled with the details of the protection arrangements specific to the person or persons encompassed.

Under new arrangements, participants who are provided protection outside the Act will be required to sign an 'Acknowledgement of Alternative Witness Assistance'. The form requires the person to:

- acknowledge that they are *not* part of the witness protection program under the Witness Protection Act;
- 'sign away' any prior rights (for example those arising from the presence of special relationships that may create a duty of care, contract or relationship in equity); and
- 'sign away' any rights to actually enforce the protection arrangements being provided.

Observation

In my view, to leverage an individual's safety and wellbeing against an organisation's potential financial liabilities in respect of that individual's prior, current and future rights is inherently offensive and contrary to fundamental notions of justice.

5.3.5 External parties

A number of parties external to Victoria Police currently have a legislated role in respect of the program. The review consulted representatives of each of these organisations.

Courts

The Supreme Court has three principal roles broadly connected with witness protection matters. First, untraceable name change by way of new entry in the Register of Births, Deaths and Marriages may only be made after obtaining an order from the Court.[65] The Court may only make an order of this kind if it is satisfied that:

- the person named in the application as a witness is part of the program;
- the life or safety of the person or of a member of his or her family may be endangered as a result of the person being a witness; and
- the person is likely to comply with the MoU.[66]

Second, the Supreme Court may hear applications for judicial review of decisions under the Act. However, this is a very limited right in practice due to the broad discretion available under the Act and the extent of the immunity enjoyed by Victoria Police.

[65] Section 7 *Witness Protection Act 1991*.
[66] Section 13 *Witness Protection Act 1991*.

Third, the Supreme Court (along with other Courts) may hear matters in which a protected witness gives evidence or is a party. The Act creates a presumption in favour of closed court proceedings for these matters.[67]

Registrar of Births, Deaths and Marriages

The Registrar of Births, Deaths and Marriages facilitates police access to the Register for the purpose of making or removing entries as authorised by the Supreme Court. Neither the Registrar or Registry staff have access to information that might link a person's previous and new identities.

Independent Broad-based Anti-corruption Commission

IBAC has broad powers to investigate police conduct following a complaint or on its own motion, including any matter relating to witness protection. IBAC no longer has the broader own motion 'systems review' functions under which OPI conducted its 2005 Report into Victoria Police's Witness Protection Program.[68] On 1 July 2014, its merits review function over decisions to terminate a person from the program and restore the person's original identity was removed.

Observations

We are now in a situation where, for the first time in over 10 years, no form of either an external merits review or holistic systems review is available for witness protection matters.

5.3.6 'Partners' in the protection function

…

Note: This section has been summarised by the Department of Justice & Regulation so as to guard against disclosure of covert police methodologies

Depending on the individual circumstances of a protected person, other parties may also be involved in varying capacities. The practicalities of implementing witness protection arrangements means that the Witness Protection Unit might need to work with a range of other agencies across the justice system and the broader public sector.

As organised crime investigations become more sophisticated and law enforcement bodies place greater reliance on witnesses from a professional services background (accountants, tax experts, IT professionals, lawyers etc), a wider array of 'relationships' to facilitate protection arrangements might be required.

6 Strengthening witness protection legislation

There are a number of areas in which the Witness Protection Act and related legislation need to be strengthened.

First, because the fundamental purpose of the Witness Protection Act is not clearly stated, its implementation has been dependent upon the policy approach adopted within Victoria Police from time to time. The Act should contain a clear framework of principle within which decisions should be made and implemented and upon which a structural framework should be firmly based.

Second, some protection arrangements for high-risk witnesses occur outside the scope of the current Act. While every effort should be made to bring them under the Act, this will not always be possible. A witness may refuse to enter the program, or be considered unsuitable. Arrangements made for persons in this situation should be regularised in legislation to ensure that the witness protection principles, governance, accountability and transparency mechanisms apply to this activity.

Third, to set the expectation that police actively case manage those protected under the Act, there should be a statutory requirement for the Chief Commissioner to review each case at least every two years.

Fourth, there is no good reason why undertakings and assurances given to persons who place themselves at risk through co-operation with the criminal justice system should not be honoured and

[67] Section 10A *Witness Protection Act 1991*.
[68] This broad systems review power was introduced in 2004 largely in response to police corruption concerns. The OPI's review of Victoria Police's witness protection program was the first review conducted under the power.

enforceable. The current broad immunity under the Act is not justified and should apply only to such decisions and conduct that can be reasonably excluded as a matter of public policy.

Fifth, although significant improvement is currently being made with respect to governance arrangements, the need for the introduction of some external monitoring and reporting to ensure the integrity and transparency of the system of witness protection is clearly required.

Sixth, Victoria's criminal law should be strengthened to deter witness intimidation. This should be recognised as a serious crime affecting individual victims and not only a crime against the justice system.

6.1 Purpose and principles of witness protection

Within the constraints posed by the need to ensure operational and personal security, measures should be in place to ensure accountability, transparency and effectiveness of what is being done in the public interest. In particular, there should be:

- accountability for the use of powers provided by Parliament;
- accountability for the use of public funds;
- the demonstration of value through evaluation and monitoring of program effectiveness; and
- mechanisms to continually improve the program.

6.1.1 Fundamental purpose of the Act

I have formed the strong impression that the approach to witness protection within Victoria Police has been based throughout on the view that, although not part of the ordinary policing functions, the provision of protective assistance is an unfortunate necessity if investigations are to be successfully pursued, but it was not highly valued. This, I consider, is evidenced by the absence of appropriate governance structures throughout the entire period, the failure over decades to develop even the simplest form of record keeping system to record what has been done, the low status of the witness protection unit in terms of staffing levels and little apparent interest in training for those engaged in this work. It is noteworthy that, despite the increased attention given to the area in recent years and Victoria Police informing the Inquiry that the National Witness Protection training course was available to Witness Protection Unit members, only three people had undertaken the course and none were currently enrolled. This is an important aspect, given many of the issues with which WPU members have to deal clearly fall well outside the scope of the normal range of police functions.

I am strongly of the view that even in the absence of appropriate governance structures, if the proper role and significance of witness protection had been appreciated at the higher level of police command, many of the problems encountered to date would not have emerged. In other words, the failures in this area were as much cultural as they were structural in nature. Although there has been a great deal of attention given to this aspect over recent times, it is not clearly evident yet that the situation has sufficiently changed.

In his second reading speech for the Witness Protection Bill in 1991, the Minister of the day explained that the purposes of its introduction were "to help the police combat organised crime and to solve major crimes of violence" and "encourage witnesses to come forward, *safe in the knowledge that they will be fully protected*" (emphasis added).[69]

The definition of *witness* under the Act is broad and includes:[70]

- *a person who has given, or agreed to give, evidence on behalf of the Crown in a proceeding for an offence or proceeding before another body Gazetted by the Minister;*[71]
- *a person who has given, or agreed to give evidence in relation to the commission or possible commission of an offence against a law of Victoria, the Commonwealth or another State;*
- *a person who has made a statement to the Chief Commissioner, another police officer, a member of the police force or service of the Commonwealth or another State or Territory, or*

[69] Second Reading Speech, Witness Protection Bill 1991.
[70] *Witness Protection Act 1991* section 3.
[71] No such bodies have been Gazetted and given the fourth limb of the definition, such a procedure is likely to be unnecessary.

an approved authority in relation to an offence against a law of Victoria, the Commonwealth or another State; or

- *a person who, for any other reason, may require protection or other assistance under this Act.*

While Victoria Police's new Policy Rules are consistent with the Act's framework, they still do not address the fundamental objectives of the Act. In particular, they do not direct attention to whether the Act is primarily concerned with the fight against organised crime or should operate as a protection tool for those in need of assistance by virtue of their co-operation with the criminal justice system generally.

What happens in other jurisdictions?

Under their respective Acts, a similarly wide discretion to that entrusted to the Chief Commissioner in Victoria exists in all other Australian jurisdictions with the exception of Queensland. In Queensland, the Chairman of the Crime and Corruption Commission may admit a person if the Chairman considers that:

- the person needs protection from a danger arising:
    - because the person has helped, or is helping, a law enforcement agency in the performance of its functions; or
    - because of the person's relationship or association with a person who has helped, or is helping, a law enforcement agency in the performance of its functions; and
- it is appropriate to include the person in the program.

Internationally, witness protection programs have more restrictive entry criteria. Programs are limited to:[72]

- people who have agreed to be a witness in a criminal trial and are at risk because of that agreement (for example, Canadian Federal Program);
- witnesses in criminal trials for certain specified serious offences and/or offences in specified courts (for example, see Ireland, Italy and United States of America Federal Witness Security Program);
- witnesses or people in a position to give evidence about specified criminal offences or structures of criminal organisations (for example, Germany's Program); and
- witnesses where the evidence is sufficiently independently supported (for example, in Philippines, the witness' evidence must be 'substantially corroborated').

Observations

It is in the public interest that members of the community come forward and assist authorities even if they face risks in doing so. It is also in the public interest that they should be able to rely upon the police to undertake reasonable endeavours to protect them. Not to accept and act on this responsibility empowers those who are prepared to employ violence or intimidation to avoid being held to account for their criminal conduct.

A number of things flow from this position. The Witness Protection Act should be available to people when:

- they co-operate with or participate in the justice system;
- are at serious risk to their safety and wellbeing; and
- that risk is *a consequence of* or *increased* by reason of their co-operation or participation.

The categories of people who may potentially fall within this category include:

- people who have reported crimes or otherwise co-operated with authorities but may never actually give evidence;
- witnesses (including victims) in criminal proceedings as well as other investigative processes (such as IBAC proceedings, Royal Commissions or in regulatory matters);

[72] List collated from Y. Dandurand *A Review of Selected Witness Protection Programs*, Report to the Canadian Government, 2010.

- victim witnesses who seek to vindicate their rights through the justice system (for example, through the taking out of intervention orders);
- other participants in the justice system, such as police officers, jury members and judicial officers; and
- family members of the above.

In order to come within the possible ambit of witness protection arrangements, there should be a direct nexus between the threat faced by the person and their participation in the justice system. A family violence victim, for example, whose risk arises from or is exacerbated because that person seeks to vindicate their rights through the justice system, will meet these basic criteria. The broader issues of violence would continue to be addressed, as they always have been, through general law enforcement.

6.1.2 Decision making under the Act

As mentioned, the very notion of witness protection involves issues of principle related to the integrity of the criminal justice system, and accountability as well as open and transparent trial processes. It also raises issues of public confidence in the reliability of our public records, for example, the Registry of Births, Deaths and Marriages as Victoria's key identity system. Within that context, any individual witness protection case involves other tensions between a range of public and individual interests. These may arise at a number of different levels and include:

- securing the safety of the witness and broader public safety or national security considerations;
- the particular interests of the witness and those of their family or children;
- the need to address both the witnesses' protection from physical harm and the psychological and personal consequences that may result from the protection measures considered necessary; and
- the need to maintain strict security and secrecy over information on the one hand and the disclosure of information to relevant organisations on the other.

While the function remains with police, which as a practical proposition is likely to remain the case for the foreseeable future, there will inevitably be tension between what is in the public interest and the institutional interests of the organisation. These will need to be approached with greater care than has been evident in the past.

The tensions can be demonstrated by reference to a number of cases and anecdotes.

Tension between witness security and public safety

…

Note: This section has been summarised by the Department of Justice & Regulation so as to guard against disclosure of covert police methodologies

This theme has recurred throughout a number of other jurisdictions. For example, a New Zealand review concluded that:[73]

> *if police wish to run a witness protection program for individuals who have significant criminal backgrounds they must accept those witnesses pose a potential serious risk to public safety.*

Similarly, concerns about participants in the US Witness protection program who commit crimes under their new identities resulted in the following amendment to US legislation:[74]

> *the Attorney General shall not provide protection to any person under this chapter if the risk of danger to the public, including the potential harm to innocent victims, outweighs the need for that person's testimony.*

Measures are in place in Victoria to address these concerns.

[73] See www.beehive.govt.nz/sites/all/files/07-09%20Ministerial%20Inquiry%20Report.pdf for a copy of the publicly released Report. See Joint Corrections Police media release 9 July 2008 www.police.govt.nz/news/release/4106 . All accessed 18 February 2014.
[74] 8 U.S. Code § 3521 (c).

Tension between witness security and national security

In 2013, a US Department of Justice audit revealed that the US Federal Witness Security program embarrassingly could not identify how many known or suspected terror suspects had been admitted to the program and that two terror suspects had been 'lost'. Both were likely to have used the program to relocate themselves overseas despite being on national security watch lists and the 'no-fly' list.[75] The audit summary revealed significant deficiencies in the handling of known or suspected terrorists who were admitted into the federal program. National security considerations were not identified when assessing participants or monitoring or removing known or suspected individuals. During and following the audit, protocols were improved to ensure appropriate consultation with national security agencies.

It is possible that in the future, the Victorian witness protection program will need to grapple with the issues of having a terrorist offender participate in the program and the unique issues that such an individual or family will pose. Dependent upon the nature of the offences involved and jurisdictional limitations, terrorist offences may be investigated by the Federal Police or through a joint State/Federal taskforce. Some situations, however, may well involve only State law. Witness protection in these cases can be predicted to present even greater difficulties than those normally encountered arising from the existence of terrorist networks operating within different communities and the heightened risk posed to protected persons' extended family members who may or may not be within Australia.

Interests of children

…

Note: This section has been summarised by the Department of Justice & Regulation so as to guard against disclosure of covert police methodologies

The position of children in protection presents a variety of particularly difficult problems with the long-term consequences as yet unknown. As far as I am aware, there has been no research conducted into this area in Australia.

It is possible only to speculate about the impact that an early life lived in subterfuge, possibly hidden from their extended family relationships, may have upon children in this situation. The Review was made aware of the potential for children to exhibit mental health issues that may have been influenced by their situation.

I am aware of a very tragic case of a 15 month old boy who died in Townsville while on a witness protection program.[76] The family had been relocated from their usual family support structures and relied principally on government agencies for support in their new location. The circumstances under which the family was admitted to the program were quite complex and it is easy to understand why the Commissioner considered that other arrangements should have be made instead. This case provides a powerful example of the practical limitations to the provision of protective assistance in the absence of an integrated national system or adequate cooperation between the various agencies involved.

The Review was informed of the potential for unaccompanied minors to enter the program.

The Family Court has held that it maintains the power to make residence and contact orders in relation to children who are on witness protection programs even where the Commissioner considers this would represent an unacceptable risk to the child or some other relevant person in doing so. The crux of the decision is that the Court considered that where there is a conflict between the welfare and interests of children and the public interest in bringing criminals to justice, the interests of the child prevail.[77] This raises practical, operational and resourcing issues requiring police agencies to facilitate safe visitation and contact between participant children and non-participant parents. It also raises the possibility of needing to remove a person from the program or separate a person from the prosecution for the benefit of the child, which leads into the next tension.

WPU members advised that they were conscious of such potential impacts and endeavoured to

[75] US Department of Justice *Interim Report on the Department of Justice's Handling of Known or Suspected Terrorists Admitted into the Federal Witness Security Program* Public Summary Report 13-23. www.justice.gov/oig/reports/2013/a1323.pdf accessed 8 December 2014.
[76] Findings of Inquest, Inquest into the death of C, a 15 month old child, Magistrate John Lock, 24 June 2011.
[77] *T and F; The Commissioner of the Australian Federal Police and the Children's Representative* (1999) FLC 92-855.

ensure the availability of counselling for all involved, sometimes incurring the resentment of dysfunctional parents who objected to what they saw as unwarranted intrusions. The management of issues of this kind which can require high level inter-agency cooperation, would be quite demanding and also points to the possibility of intergenerational implications in some cases. Active case management is also required as children on the program come of age and are required to make decisions of their own.

Tension between witness security and securing a conviction

As abhorrent as it is, there may be some situations where it is just not possible to keep a person safe and the only available option is for a witness' evidence to be withdrawn, resulting potentially in a failed prosecution. In some instances this may still not be sufficient to mitigate the risk and despite the prosecution failing, a need for continuing protection may exist. This problem can arise in a particularly acute fashion in situations where it is decided to call as a witness in a criminal proceeding a person who has been operating as a police informer. The risk to that person, who may well have provided information on unrelated matters, could be substantially magnified because the information that that informer has may be perceived as threatening to a far wider group. Learnings from such cases might inform processes further upstream and are not just issues for witness protection itself.

Tension between a witness' physical safety and psychological wellbeing

The decision by a person to co-operate with the authorities and expose themselves to such risks that it is felt necessary to enter into witness protection arrangements is likely to be both difficult and distressing. This was recognised as a prominent theme in the 2005 OPI Review. It is understood that Victoria Police now has processes in place to ensure prospective entrants undertake psychiatric and psychological assessments which are taken into consideration when making the decision whether the person should be admitted to the program. Amendments that commenced on 1 July 2014 to the Act support these arrangements. The longer term psychological impacts of the program, however, are not known. In discussions with other jurisdictions, I was informed of a number of occasions on which people on the program experienced mental difficulties. In one instance, the witness protection unit of the jurisdiction found it necessary to intervene and connect a family with psychological services in respect of a child on the program as behaviour associated with the child's mental illness risked undermining the safety of the family.

6.1.3 The case for a broad principle-based discretion

The Act authorises the Chief Commissioner, through the establishment and maintenance of a Victorian witness protection program, to "take such action as he or she thinks necessary and reasonable to protect the safety and welfare of a witness or a member of the family of a witness".[78] The Act lists such action as including:[79]

- applying for any document necessary:
    - to allow the witness or family member to establish a new identity; or
    - otherwise to protect the witness or family member;
- relocating the witness or family member;
- providing accommodation for the witness or family member;
- providing transport for the property of the witness or family member; and
- doing any other things that the Chief Commissioner considers necessary to ensure the safety of the witness or family member.

It therefore allows for the provision of a broad range of protective measures.

Changes introduced on 1 July 2014 provide a non-exclusive list of considerations for entry into the program. The Chief Commissioner must have regard to:[80]

- whether the witness has a criminal record, particularly in respect of crimes of violence, and whether that record indicates a risk to the public if the witness is included in the program;

[78] *Witness Protection Act 1991* section 3A.
[79] *Witness Protection Act 1991* section 3A.
[80] *Witness Protection Act 1991* section 3B.

- any psychological or psychiatric examination or evaluation of the witness conducted to determine the witness' suitability for inclusion in the program;
- the seriousness of the offence to which any relevant evidence or statement relates;
- the nature and importance of any relevant evidence or statement;
- whether there are viable alternative methods of protecting the witness;
- the nature of the perceived danger to the witness; and
- the nature of the witness' relationship to other witnesses being assessed for inclusion in the program.

The Chief Commissioner may also have regard to any other matters that are considered relevant.

Similarly, decisions to suspend a participant's protection and assistance measures are at the broad discretion of the Chief Commissioner, as are decisions to terminate a person from the program.[81] The involuntary termination power was significantly amended on 1 July 2014, when the following listed grounds for termination were introduced. The Chief Commissioner may terminate a person from the program against the person's wishes if:

- the person commits an offence;
- the person deliberately breaches a term of the MoU or a requirement or undertaking relating to the program including an undertaking to give evidence;
- the Chief Commissioner discovers that the person has knowingly given false or misleading information;
- the person's conduct or threatened conduct is likely to threaten the security or compromise the integrity of the program;
- the circumstances that gave rise for the need for protection and assistance cease to exist;
- the person refuses or fails to sign the MoU when required to do so; and
- there is, in the Chief Commissioners opinion, no reasonable justification for the person to remain in the program.

The Chief Commissioner also has the power to suspend the provision of protection and assistance to the participant or a member the participant's family if satisfied that the participant has done or intends to do something that limits the ability of the Chief Commissioner to provide adequate protection for the participant or family member. The suspension power was introduced on 1 July 2014. Parliament intended the function to be used in scenarios such as the person entering prison, or going overseas against advice. Under current practice, termination decisions will be made by a Deputy Commissioner under delegation and internally reviewed by the Chief Commissioner. This produced the recent curiosity of a participant whose "protection and assistance" was initially suspended because he was in prison. However, it transpired that the individual had been accepted into the program while already in custody and had done nothing to compromise his position further. I have been advised that this matter is still under consideration.

Victoria Police's Policy Rules introduced on 1 July 2014 focus on procedure, internal governance and accountability. Significantly, they do not otherwise seek to guide the administration of the wide discretion under the Act. The consequences of categorisation can be very significant and indeed affect whether or not any effective protection will be provided at all. The Review requested Victoria Police to provide de-identified examples of witness protection matters under each of the new categories A, B and C and in particular, 'real life' case scenarios indicating how cases which fell on the cusp of the boundaries between the categories would be handled. Their response that it was too early at this stage to provide an answer indicates that they directed attention primarily to formal structural matters rather than the principles upon which the decision would be made.

What happens in other jurisdictions?

All other Australian witness protection Acts provide the respective Commissioners with a similarly broad discretion over the kind and nature of protective assistance able to be provided, the

[81] *Witness Protection Act 1991,* sections 15A, 16 and 17.

considerations to apply to decision making, and suspension and termination from the program. There are differences, however, in policy and practice. Some jurisdictions *only* use the Act for those witnesses requiring re-identity and re-location and allow their dedicated witness protection units to undertake only this work. Reasons given for this relate to the maintenance of the integrity of the program, risk management and specialist skills. These jurisdictions argue that the practice:

- protects the integrity of the program; and
- ensures only controllable risks come under program, reducing the potential that institutional reputation and record may be tarnished through harm being suffered by a witness;

These jurisdictions also argue that other police officers can provide a variety of other forms of protective assistance that do not require 'covert' techniques.

Some jurisdictions have systems in place to provide support and funding for witnesses who are not protected under their Act. Some supplement these arrangements with protection measures being provided outside the legislative scheme by police investigators, while others do not. In one jurisdiction, a dedicated pool of funds exists from which investigators (with the witness protection unit's assistance) may apply for funding for measures to provide assistance to a witness, such as locks, surveillance equipment, short term relocation etc. The governance around applying for and acquitting against the funding provides a level of internal accountability. Other jurisdictions provide a wider range of protection measures under their Acts, including measures falling short of complete re-identity and re-location. It should be noted that all of these different practices are provided under legislation drafted in largely the same form.

Queensland's Act provides a third category of protection. In addition to protection under the program and interim protection, it allows for a more "streamlined process" for short term protection.[82] The scheme was introduced in 2006 following a recommendation from the Parliamentary Crime and Misconduct Committee Report.[83] While the Committee agreed that a streamlined process for provision of protection for *in-court assistance* was justified, the Government was initially reluctant to allow short-term protection for anything other than in-court assistance as it was thought to weaken the strict existing legislative scheme.[84] Despite these concerns, in 2006, amendments were passed to allow short-term assistance that was not so limited.

Finding

For a number of reasons, including their public significance, it is important that the most significant decisions relating to witness protection be made at the level of Chief Commissioner or Deputy Commissioner and within a flexible framework of legislatively identified principles.

Each application for witness protection should, by reason of the multitude of circumstances in which the risk may arise, be individually assessed and the measures adopted tailored to the individual situation, threat and risk. It may be that some serious threats can *only* be managed through re-identity and re-location. However, other serious threats may be handled through other measures, such as re-location without re-identity. If the protective assistance measures undertaken are to be appropriately tailored to the individual circumstances of each person or family involved and the risks that they face, then the Act needs to support the existence of a wide discretion for decisions of that kind, such as:

- whether or not to enter someone onto the program;
- the protection measures provided;
- the period of protection;
- the frequency of review periods;
- suspension from the program; and
- termination from the program.

However, as I have emphasised, this discretion must be exercised in accordance with a number of fundamentally important principles.

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[82] *Witness Protection Act 2000* (Qld) Part 2A.

[83] Recommendations 36 and 37; Report - No. 64 - Three Year Review of the Crime and Misconduct Commission 2004. https://www.parliament.qld.gov.au/documents/committees/PCCC/2004/three-year-review-04/Report64-3yrReview.pdf

[84] Government Response to Recommendation 37 Report - No. 64 - Three Year Review of the Crime and Misconduct Commission 2004.

6.1.4 Witness protection principles

The broad approach and rationale that I consider should underpin witness protection schemes are relatively straightforward:

- the central objective of witness protection is to advance the public interest in the efficacy and integrity of the criminal justice system through the provision of protective support to those who are at risk by reason of their co-operation in its functioning;
- witness protection and support is intended to remove or reduce a barrier to co-operation and is not to be provided as a reward or inducement;
- there must be a clear separation of the investigative and the protective functions in order to ensure the integrity of the process;
- the decision to protect a witness cannot be solely or even principally dependent upon the value of the investigation being pursued or whether or not it arises in the context of any particular category of offences. It should be determined by reference to the risk incurred by the individual as a consequence of co-operation;
- protection arrangements need to be tailored to the individual circumstances and risk faced by the witness and the community;
- the safety of the witness must take priority over the successful conduct of a prosecution;
- the interests of children involved in or affected by witness protection arrangements must be separately considered and their welfare a powerful factor in decision making; and
- consistent with the need for operational security there should be public accountability for the operation of the witness protection system.

I recognise that the application of these principles in any given case may present substantial difficulty including the assessment and reality of risk, the adequacy of the methods available to address it and the priorities to be accorded to different considerations and interests. However, I consider that it is fundamentally important that the principles be given practical effect in the decision making processes and in the administration of the structures.

Public interest decision making

Of necessity, decisions with respect to the provision, form and withdrawal of witness protection will involve matters of judgement and discretion and result in a high degree of responsibility being placed on the decision maker.[85] A large number of public and individual interests bear on witness protection decisions. Depending on the individual circumstances of each case, some of the relevant interests in witness protection matters include:

- the maintenance of public confidence in the criminal justice system generally and the effectiveness of Victoria Police;
- the public interest in encouraging informers, witnesses and victims to come forward to assist police;
- consideration of issues of public safety and national security;
- the particular situation of the primary witness and their physical and psychological wellbeing;
- the interests of each member of the witness' family unit including children; and
- the interests of others who may be affected by witness protection decisions.

Witness protection and support is intended to remove or reduce a barrier to co-operation and is not to be provided as a reward or inducement

Lying at the very heart of our approach to witness protection issues must be the importance of witness protection in removing what can be a significant barrier to cooperation with authorities and therefore the operation of our criminal justice system. Protective assistance must not be provided as a reward for such cooperation.

[85] See *O'Sullivan v Farrer (1989) 168 CLR 210* (referring to the judgement of Dixon J in *Water Conservation and Irrigation Commission (NSW) v Browning)* for discussion of public interest decision making.

Witness protection is not an investigative tool. While this statement would appear to be trite, adherence to the principle could have avoided a number of unfortunate situations that have arisen in the past.

There must be a clear separation of the investigative and the protective functions

The manner in which witness protection decisions are made and implemented may well create the potential for contamination of the witness' evidence. If the protection measures can be seen as affecting the weight of that person's evidence, the fundamental objectives of the program will be defeated. In practice, addressing this requires the creation of a sterile corridor separating the investigative and protective functions. Consultation conducted in the course of the Review with representatives of witness protection units of a number of jurisdictions indicated general agreement concerning the adoption of the following:

- police conduct a recorded interview with the witness to explain what can and will be provided and generally *after* signed statements have been taken;
- the development of a 'standard package' of protection measures on the basis of which an individual plan can then be tailored;
- entry into the program should not be a way for a witness to 'wipe the slate clean'. Measures are required to deal with the rights and obligations of the person's previous identity, including continuation of public safety measures such as prior criminal records, parole obligations, sex offender register requirements and civil obligations such as debts;
- the witness must be informed that entry into arrangements is voluntary and subject to their continued co-operation in relation to the agreed safety measures. The potential participant must be empowered to make informed decisions, be made aware of known threats, risks and the potential consequences of their choices;
- it is not appropriate for a person in the custody of prison or other authorities to remain actively in a witness protection program for the practical reason that the Chief Commissioner is not able to adequately protect a person in this situation. Where the person has been on a witness protection program prior to incarceration, the prison authority becomes responsible for their protection during the period of incarceration and protective measures under the program should usually be suspended during this time. This allows the information disclosure offences in the Act to continue to apply and does not prevent the person's family members from entering or remaining in the program; and
- if a registered human source enters a witness protection program, the person cannot thereafter be used as an active informant.

Protection arrangements need to be tailored to the individual circumstances and risk faced by the witness and safety must take priority over the prosecution

While the use of the presently employed categories of A, B and C are useful for general administrative purposes, an 'all in' or 'all out' approach to witness protection will inevitably leave some witnesses exposed and protection must be viewed more flexibly and arrangements structured upon a continuum of risk.

As abhorrent as it may be, in very rare circumstances, the only way to address a threat or risk may be to separate the witness from the prosecution. This may mean that prosecutions fail.[86]

Decision-making to be based on the risk incurred by the individual as a consequence of co-operation

While the program commenced in response to organised crime and is still usually spoken about in that context, the issues can arise in a wide range of circumstances including family violence. The decision to protect a witness cannot be solely or even principally dependent upon the value of the investigation being pursued. An innocent bystander witness, an accomplice turned witness with evidence going towards a high profile organised crime matter or a victim of family violence whose risk has escalated due to that person's decision to vindicate their rights via the court system are not more

[86] The current Secretary of the Police Association, Ron Iddles, recently remarked that while the securing of a conviction of an offender in a given case could be anticipated to be a matter of high priority, there can be occasions where the safety of a witness or informer becomes more important: *The Age* 'Top cops call for reforms to witness protection process' 2 February 2015.

or less worthy of protection. The key determinant should be the risk arising from their co-operation with the authorities and the protective measures available to manage that risk.

It is increasingly being recognised that while violence in the context of organised crime is a very serious issue for our community, overall there is a much higher risk of violence within the context of family relationships. Across Australia, from 1 July 2010 to 30 June 2012, there were a total of 479 recorded homicide incidents. The most common relationship between homicide offender and victim throughout this period was domestic (39%; n=187).[87] It is important to recognise that each such death contributes to the creation of fear in the community in general and victims subject to abuse, in particular women and children. These people should be able to resort to the justice system confident that their position will be regarded very seriously and that reasonable endeavours will be taken to ensure that the risk to them would not be aggravated in consequence.

Considerations specific to children

Children in this situation are innocent victims of the conduct of others and subject to decision making and processes beyond their control or influence. In all decision making and implementation at all levels, their interests must always constitute a powerful consideration. This should be made clear in the governing principles in the Act.

Public accountability

The integrity and value of the program must be demonstrated, or if necessary their deficiencies exposed and measures put in place to correct the situation. This means that:

- the program must be well managed and governance policies implemented consistent with the witness protection principles;
- threats should be referred for assessment and robust and timely threat/risk assessments conducted;
- decisions must be made in the public interest and all decisions and undertakings should be appropriately documented;
- subject to appropriate security safeguards, there should be public reporting; and
- there should be external monitoring.

[87] Australian Institute of Criminology, Homicide in Australia: 2010–11 to 2011–12: National Homicide Monitoring Program report number 23 www.aic.gov.au/publications/current%20series/mr/21-40/mr23.html accessed 12 February 2015.

6.1.5 Recommendations

Recommendation 1 – purpose and principles

The purpose and principles underpinning the Act should be made clear on the face of the legislation.

The provision of witness protection must be to give practical effect to the rule of the law by, as far as reasonably possible, protecting those who are exposed to risk of injury or death by reason of their participation in or co-operation with the criminal justice system.

The Act should be based on and contain the following witness protection principles to guide decision making and implementation:

- the central objective of witness protection is to advance the public interest in the efficacy and integrity of the criminal justice system through the provision of protective support to those who are at risk by reason of their co-operation in its functioning;
- witness protection and support is intended to remove or reduce a barrier to co-operation and is not to be provided as a reward or inducement;
- there must be a clear separation of the investigative and the protective functions in order to ensure the integrity of the process;
- the decision to protect a witness cannot be solely or even principally dependent upon the value of the investigation being pursued or whether or not it arises in the context of any particular category of offences. It should be determined by reference to the risk incurred by the individual as a consequence of co-operation;
- protection arrangements need to be tailored to the individual circumstances and risk faced by the witness and the community;
- the safety of the witness must take priority over the successful conduct of a prosecution;
- the interests of children involved in or affected by witness protection arrangements must be separately considered and their welfare a powerful factor in decision making; and
- consistent with the need for operational security there should be public accountability for the operation of the witness protection system.

6.2 Scope of the Act

6.2.1 Current definition of witness

The current definition of witness in the Act is sufficiently broad and should be retained. It includes:

- people who have reported crimes or otherwise co-operated with authorities but who may never actually give evidence;
- witnesses (including victims) in criminal proceedings as well as other proceedings (such as IBAC proceedings, Royal Commissions or in regulatory matters);
- victim witnesses who seek to vindicate their rights through the justice system (for example, through taking out intervention orders);
- other participants in the justice system, such as police officers, jury members and judicial officers; and
- family members of the above.

6.2.2 Protection outside the current scope of the Act

While the general classification of witnesses into the three categories (Category A, B and C) is useful for administrative purposes, it should not be determinative of the steps taken to protect them. The adoption of an "all in" or "all out" approach to protection leaves many people exposed to an unacceptable extent.

Witness protection is more appropriately viewed on the basis of a continuum of risk and with respective obligations and responsibilities under which the relative positions of the community and the witness may vary substantially from time to time.

Of course, any arrangements entered into must be both practical and clear and will, of necessity, involve mutual obligations. However, for the reasons outlined earlier, the proper functioning of the rule of law requires that such endeavours are undertaken. For its part, the community must be prepared to provide the financial and other resources necessary for this work.

It is one thing for the police to assume responsibility to address the risk faced by a cooperating person through a process designed to remove them to a safe location and with a new identity and quite another to assume any obligation for their safety as they continue to live in their own homes and move about in their normal environments. Not only have there been understandable doubts expressed by Victoria Police about the effectiveness of the protective measures that could reasonably be taken in such circumstances, but concern with respect to the consequent reputational and financial risks for the organisation in the event of apparent failures.

The decision to enter into an arrangement at the Category A level can be expected to be taken as a last resort for most individuals and one which, by its nature, is likely to be confined to a relatively small number of cases. Some, who make this choice, will almost certainly experience great difficulty in making the fundamental changes required, however fearful and well-motivated they may be at the outset and, in consequence, jeopardize their own safety.

As a practical proposition, some areas of risk may not be able to be managed in the case of a person who is not within a program, or, at least, not without an unsustainable diversion and allocation of limited resources for what might be a lengthy period of time. Others might be addressed only with a very high level of co-operation from the individual that it cannot be assumed will necessarily be forthcoming or, sometimes, within their ability to maintain.

Conscious of the range of problems that could arise, those engaged in the witness protection units across the country expressed considerable reluctance to expand their scope beyond dealing with Category A matters or to engage with a broader range of individuals. They have serious doubt, given the size of the units and the resources available to them, that they could perform the added duties satisfactorily. Whilst this is understandable, it means that there will inevitably some who are in need of protection as a consequence of their cooperation but whose vulnerability cannot be addressed through this means.

The central and clearly most difficult question that has arisen in the course of the Review is what, if anything, can and should be done for those people who are not within a Category A program.

By the time of the 2005 OPI Report, concern was developing about the position of a wider group of individuals who were considered to be at risk in consequence of their cooperation with the law enforcement authorities but who, for one reason or another, were not in such a program. It was recognised that the information and evidence that they could provide may be just as valuable, the threat to which they may be exposed just as serious and the community interest in the outcome just as powerful, but the capacity to protect them could be significantly more limited.

The potential practical difficulties and resource implications arising from the assumption of an increased role in such situations, together with the reputational risks involved, can be seen to have powerfully influenced the approach of Victoria Police to witness protection generally.

A central question that must be faced in this area is – to what extent, if at all, should the organisation and indeed the community be reasonably expected to assume responsibility and be accountable for the physical security of witnesses and informants who are not in a program principally directed to securing their safety by concealing their identity and whereabouts?

The starting point for consideration of this issue must be the powerful societal interest in ensuring that, as far as reasonably possible, our law enforcement processes cannot be thwarted by the intimidation of persons who cooperate in them or by the employment of violence.

Where it is established that attempts have been made to intimidate witnesses or informants, the maintenance of the integrity of the system would ordinarily seem to require the imposition of substantial penalties. This is discussed below and an obvious gap in the legislative regime governing criminal responsibility for such intimidation requires attention. However, by itself, the risk of prosecution as a deterrent can only provide a partial answer.

There can be a substantial compounding of the complex task of witness protection when dealing with persons in the Category B group by reason of their increased vulnerability and the practical limitations on what can be done. However, it does not follow that there should be no responsibility to take reasonable steps to protect them, if for no other reason than that it is very much in the community's interest to do so. Any offer of Category B assistance should only be made *after* consideration has been given to Category A assistance. The protection measures subsequently available will almost certainly be more limited than those under Category A. This should be clearly documented as should the protective measures proposed. This process is incorporated within Victoria Police's new policies and procedures.

In the case of witnesses where entry into the program has been considered and refused in the exercise of discretion by the Chief Commissioner, but the presence of a genuine risk was identified, the Chief Commissioner should be required to consider what other steps can be reasonably undertaken to provide protective assistance.

The proposed witness protection principles, monitoring and the Act's confidentiality scheme (such as the offences, exemption from FOI and presumption in favour of closed court proceedings) should also apply to all such arrangements.

6.3 Recommendation

Recommendation 2 – extension of the Act's scope

The persons encompassed by the legislation should include:

- people (including human sources) who have reported crimes or otherwise co-operated with authorities in relation to criminal investigations but may never give or be expected to give evidence in a criminal proceeding;
- witnesses (including victims) in criminal proceedings as well as other proceedings of a related or broadly similar kind (such as IBAC investigations, Royal Commissions, Parliamentary Inquiries);
- those who seek to secure their safety through the justice system through the justice system (for example, through the taking out of intervention orders);
- other participants in the justice system, such as police officers, jury members and judicial officers; or
- family members of the above.

The scope of the Act should be extended to those entering into what are currently categorised within Victoria Police processes as 'Category B' arrangements. This will have the effect that the Act's witness protection principles, external monitoring, reporting and confidentiality provisions apply to the alternative arrangements provided to high-risk witnesses who have been considered for but either declined to enter the program or have been considered unsuitable.

6.4 Program location and structure

6.4.1 What happens in other jurisdictions?

Across Australia and internationally, several different models operate for the location of a witness protection program within an organisation.

As mentioned, in Victoria the Chief Commissioner of Police is responsible for the administration of all aspects of the program including decisions to enter, exit and suspend protection, the kinds of protection measures offered and the implementation by Victoria Police of these decisions. Police are similarly responsible for witness protection programs in all other Australian jurisdictions with the exception of Queensland, where the Crime and Corruption Commission (CCC) administers the program. In that State, the CCC's Commissioner determines entry into the program. In practice, police officers seconded to the CCC from the Queensland Police Service advise the Commissioner and implement the protection measures.

In many European jurisdictions, responsibility for witness protection is institutionally separate from police.[88] An independent agency (whether linked to a Ministry of Justice, an independent Commission, a Prosecution Service or the judicial arm of government) is responsible for admission into the program, protection measures and continued support for the protected witness.[89] Police (or other relevant investigative agencies) provide advice about the criminal background of the applicant, the nature of the investigation and the nature of the crime involved, and assist the protection service to assess the threat to the applicant and his or her immediate relatives.[90]

A further model separates decisions about entry, the kinds of protection measures offered and termination from the implementation of those decisions, which is entrusted to the relevant police force or a different independent agency. In the US, the Office of Enforcement Administration at the Department of Justice makes decisions related to entry into the witness protection program at the Federal level. This is done in consultation with the US Marshalls Service which evaluates the risks and is responsible for ensuring the protection of witnesses who are not in custody, while the Federal Bureau of Prisons has responsibility for incarcerated witnesses.

A Canadian Parliamentary Committee recommended a similar hybrid model with an independent Office of the Department of Justice comprising police officers, Crown prosecutors, psychologists and criminologists (with appropriate security clearance) making decisions about witness admission and monitoring protection arrangements.[91] Police forces are responsible for threat assessments, determining the level of security and implementing the protective measures.

In the UK, some individual police forces maintain their own witness protection services. However, the UK Protected Persons Service performs a co-ordination role to standardise practice across different services.

Why is separation of protection and investigation functions important?

The key policy reason for separating witness protection and investigating functions within a policing agency is to ensure the integrity of the criminal justice process. This separation serves to minimise the risk that the provision of protective assistance might be seen as an inducement for the giving of evidence favourable to the prosecution and thereby compromise its reliability and credibility. It follows that where a protected witness is a registered human source, the person's entry into the program would ordinarily be expected to signal an end to the performance of any role as an active informer.

Traditionally, the courts have been wary about reliance upon the evidence of accomplices or other informants who are perceived as benefiting in some way from cooperation with the authorities. Juries are specifically instructed that it is dangerous to convict on such evidence unless it is adequately supported by other independent evidence.[92]

Witnesses generally, while appropriately supported when necessary, must be kept at a proper professional distance by investigators in order to avoid both the fact and perception of contamination and unreliability arising from an overly close association. In the case of a person under protection, this is perhaps even more important but at the same time can be more difficult. There is likely to be an ongoing reliance upon the support of the police as their protector and a belief, which may or may not be justified, that their safety is dependent upon a successful prosecution outcome. This, in turn, can give rise to a significant risk of an identification of interests and a sense of "team membership" that may impact upon the perceived reliability of the witness' evidence. On the other hand, it is not unknown for witnesses to exploit their importance to the prosecution and, using a threat of withdrawal of cooperation, to make increasing and potentially compromising demands or employ their position as witnesses to their personal advantage.

The line between the provision of protection and proper support for a witness and the gratification of the individual's exploitative demands to encourage continued cooperation may sometimes be difficult to discern. Nevertheless, it can assume great importance when an assessment is made of the investigation and the probative value of the evidence adduced.

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[88] Council of Europe *Protection of witnesses and 'pentiti' in member and observer States* questionnaire results - www.coe.int/t/dlapil/codexter/pcpw_questionnaireReplies_en.asp Accessed 5 November 2014.

[89] US Department of Justice, Office of the Inspector General Audit Division, *Executive Summary – United States Marshals Service Administration of the Witness Security Program* 2005.

[90] Council of Europe *Terrorism: Protection of Witnesses and Collaborators of Justice* Strasbourg: Council of Europe Publishing 2006.

[91] House of Commons, *Review of the Witness Protection Program – Report of the Standing Committee on Public Safety and National Security* March 2008.

[92] *Evidence Act 2008* section 165. *Jenkins v R* (2004) 211 ALR 116.

In order to secure the integrity of the process and to ensure that any information or evidence that a witness may subsequently provide cannot reasonably be seen as the *quid pro quo* for advantages received, it is crucial that all arrangements or assurances of assistance and support should be fully recorded.

Any undertakings given to the witness with regard to their security, in particular, should be set out with precision, including all conditions and expectations from the witness and all, save those relating to their specific security arrangements, should be transparent. In the case of persons in Category A arrangements, these are set out in all jurisdictions in a MoU that must be formally adopted by, or in relation to children, on behalf of all parties. One issue that has arisen in the past for WitSec members and may still create difficulties has been that they have not been engaged at an early enough stage of the process. By the time that they became involved, unrealistic expectations had been raised that they could not satisfy. I note that in the recent changes to Victoria Police processes, attention is being given to this matter with a view to avoiding confusion and misunderstanding.

Where witness protection programs reside within police organisations, internal measures can be implemented to ensure a practical separation of the investigatory and protection interests. These include:

- implementing 'sterile corridors' between the investigators and those responsible for protection;
- practical measures such as physically locating staff separately from other police officers, appropriate internal controls over sensitive information and training and human resource decisions being made with this in mind;
- separate reporting lines within the policing organisation for those responsible for protection and those responsible for investigations;
- mandating non-delegable control of the program in a very high-level official such as the Chief Commissioner or Deputy Commissioner (including decisions relating to admission, termination, resourcing and dispute resolution);
- including representative/s from outside the police force on any committee to advise the Chief Commissioner; and
- including representative/s from outside the police force on any internal committee tasked with the general oversight of the witness protection program.

It is my view that the Chief Commissioner should continue to be responsible for Victoria's Witness Protection Program supported by secure external monitoring of systems and principles.

A national program

…

Note: This section has been summarised by the Department of Justice & Regulation so as to guard against disclosure of covert police methodologies

In Australia, there are separate national and state witness protection programs as well as some established by separate investigatory agencies. The terms of reference included consideration of legislative arrangements to support a national witness protection scheme.

As mentioned above, Victoria's Act followed a recommendation from the 1988 Commonwealth Parliamentary Joint Committee on the National Crime Authority *Review into Witness Protection* for complementary witness protection acts to be enacted in all States and Territories. The Committee rejected the option of a national witness scheme run by a new independent agency, it being considered that there was insufficient demand to justify the costs involved. Instead, the Committee recommended that a National Witness Protection Liaison Committee be established under the auspices of the then Australian Police Ministers' Council to provide a forum for greater co-ordination and co-operation with the Australian Federal Police assuming an expanded national witness protection role.[93] This Committee no longer exists. I understand that some limited discussion on witness protection issues takes place within ANZPAA's Crime Forum. However, it does not appear that this has been pursued with any vigour. To date no protocols with respect to co-operation have been developed.

[93] The current equivalent is the Law, Crime and Community Safety Council.

The 2014 amendments to Victoria's Witness Protection Act introduced a number of elements already contained in the Acts of other jurisdictions. There remain some minor and technical differences between the Acts themselves, which are explored in the table at **Appendix B.**

The respective Witness Protection Acts of all other Australian jurisdictions allow for mutual recognition and inter-jurisdictional co-operation. Witness Protection legislation in five Australian jurisdictions (Northern Territory, South Australia, Western Australia, New South Wales, and the Commonwealth) has been declared a *complementary witness protection law* under Victoria's Act. The Acts of all other jurisdictions contain mechanisms to declare Victoria's law to be a *complementary witness protection law*. There appear to be such declarations pursuant to the Acts of the Commonwealth,[94] Queensland,[95] Western Australia,[96] New South Wales and South Australia.

In theory, the Australian Federal Police witness protection program could be used by other States. In practice, however, this does not occur. As in the United States, a national program may not remove the need for state-based programs.

Across jurisdictions, there are some differences in how the Acts are implemented. There are also practical difficulties in developing greater co-operation among jurisdictions.

While the challenges are not insurmountable, significant work and momentum would be required to overcome them. These challenges, however, are practical in nature and cannot be solved or facilitated through legislative change.

Although the establishment of a national scheme for witness protection is highly desirable, there is little likelihood that this will occur in the foreseeable future. What can be said at this stage, however, is that the Review identified no legislative impediments to achieving this objective or implementing greater co-operation with other Australian jurisdictions.

6.4.2 Recommendation

Recommendation 3 – principle based discretion

The Chief Commissioner should maintain responsibility for the implementation of the Witness Protection Act and a broad discretion based on the purposes and principles of the Act.

6.5 Obligations and protections

6.5.1 Immunity

Section 12(3) of the Act provides that:

> *No action or proceedings can be brought against any person to whom this section applies in respect of any act, matter or thing done by that person in the course of his or her duties in accordance with this Act.*

If police fail to meet a term of the MoU, the participant's only redress is making a complaint to the Independent Broad-based Anti-corruption Commission.

Those immune from proceedings include:

- registry staff from Births, Deaths and Marriages – who facilitate police officers making entries on the Registry of Births, Deaths and Marriages;
- police officers – who make decisions and perform protection functions under the Act;
- the Ombudsman – who, prior to February 2013 had a complaints function in respect of police officers and police employees;

[94] Witness Protection (Complementary witness protection laws) Declaration 2011 - F2011L00356. Available at: www.comlaw.gov.au/Details/F2011L00356
[95] Clause 5, Witness Protection Regulations 2011 (Qld).
[96] Western Australian Government Gazette 6 December 1996 at 6782. Available at: www.slp.wa.gov.au/gazette/gazette.nsf/searchgazette/C98451BBF361A1D5C8257257008105E4/$file/Gg191.pdf

- the IBAC Commissioner – who has the function of investigating complaints and between February 2013 and 1 July 2014 had the function of conducting merits reviews into decisions to terminate people from the witness protection program; and
- the OPI Commissioner – who, prior to February 2013, had the functions that IBAC has now.

The extent of immunity has been judicially considered by the Court of Appeal. The Court held that section 12(3) does not prevent application for judicial review and probably extends to criminal liability as well as civil liability.[97]

The immunity is broad and needs to be considered against the background that there is a very wide discretion in relation to any acts, matters or things done under the Act.[98] Over time, the activities undertaken, all of which gain the protection of the immunity, have changed.

Criticisms of broad absolute immunities

The almost absolute immunity provided by the Act:

- removes an incentive for Victoria Police as an organisation to exercise an appropriate level of care in the exercise of witness protection functions under the Act;
- deprives a person who suffers loss or damage any legal right to seek redress or compensation;
- allows for little external judicial or other scrutiny over conduct or decisions made under the Act; and
- applies to any conduct under the Act, including misconduct.

Considerations bearing on the grant of immunities are addressed in the *Government policy and guidelines: indemnities and immunities June 2008*:

Absolute immunities are very rare as they effectively deprive the person who suffers loss or damage caused by the act or omission of another person of any legal right to seek redress in the form of damages or other compensation…

As an immunity fundamentally affects people's legal rights and powers, statutory immunities are rarely provided and indemnities are preferred as a way of transferring risk. This is because a statutory immunity removes some of the incentives for a person, class of persons or body to exercise an appropriate level of care in the exercise of his of her powers.

The fact that a person may be exposed to the risk of legal proceedings through the performance of his of her duties is not sufficient justification for the creation or continuation of an immunity where legislation is being amended or revised.

What was the original purpose of the immunity in the Witness Protection Act?

The objective of such an extensive immunity in the Act is unclear. The immunity was significantly broader than that recommended in the 1988 Report by the Commonwealth Parliament Joint Committee on the National Crime Authority (the 1988 Parliamentary Report). That Report recommended that witness protection legislation should include only a narrow immunity to facilitate the co-operation of organisations who alter records for witness protection purposes:

…doubt on the part of the bodies being approached may be eased if it is provided that no civil or criminal liability shall attach to any person only because the person has altered a record or issued a document in a new name for the purpose of the protection of a witness.[99]

The Committee was not convinced that a broader absolute immunity for police or other conduct was required, stating that:[100]

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[97] *Applicants A1 & A2 v Brouwer* [2007] VSCA 139; (2007) 16 VR 612 per Maxwell P, Neave and Redlich JJA: "action or proceeding ... against any person" means "a proceeding in which the person is exposed to liability. The phrase is not apt to encompass a proceeding that challenges the validity of a decision made (or refused to be made) by that person. Such a proceeding, of which the present is an instance, is not as a matter of ordinary language an action 'against' the person. Rather, the action is in respect of the person's official act, that is, the decision or refusal".

[98] See Section 3A(1) of the *Witness Protection Act 1991*.

[99] 1988 Report by the Commonwealth Parliament Joint Committee on the National Crime Authority para 5.48.

[100] 1988 Report by the Commonwealth Parliament Joint Committee on the National Crime Authority para 5.52.

It was suggested to the Committee that agencies providing witness protection services should be indemnified from all liability both in respect of their own acts and in respect of the acts of protected witnesses. The Committee does not believe that any alteration to the ordinary common law in this regard is justified. The proposal appears to derive from the provision in the United State Witness Security Reform Act to the effect that no civil liability is to flow from the decision to provide or not to provide witness protection. However the committee believes that this provision is the product of considerations peculiar to United States law, in particular the development by the courts in that country of a duty to protect government witnesses and informers giving rise to liability to damages if protection is not provided. The Committee does not believe that there is any reason why liability should not attach to a witness protection agency if it has been negligent in accordance with ordinary concepts, for example, by failing to carry out a psychological evaluation of a protected witness as required under its own standard procedure.

The Witness Protection Bill's second reading speech in 1991 did not contain any mention of the immunity and the Parliamentary documents relating to the Bill contain no indication as to how or why this policy was adopted. Consistent with the practice of the time, an explanatory memorandum did not accompany the Bill.

In 1996, the *Witness Protection (Amendment) Act 1996* amended the *Witness Protection Act 1991* to facilitate co-operation with other Australian jurisdictions and make other technical amendments. The Amendment Act expanded the category of those people covered by the immunity to include the Deputy Ombudsman, who at the time had the complaints investigation and appeals function under the Act. Again the rationale for the broad immunity was not explained, save that in the second reading speech for the Witness Protection (Amendment) Bill 1996 it was said that the immunity "ensures that the ability of these officers to undertake their functions is not compromised".

The Court of Appeal later expressed the view that it appeared that the legislature's concern was to ensure that those endowed with functions under the WP Act were not induced to act over-cautiously in order to avoid personal liability, whether civil or criminal.[101] Whatever weight may have been properly attributable to this consideration in the past, it now must be regarded as very much reduced due to recent legislative changes with respect to police liability.[102]

What have other inquiries said about the scope of the immunity?

A further review by the Commonwealth Parliament Joint Committee on the National Crime Authority titled *Witnesses for the Prosecution: Protected Witnesses in the National Crime Authority* in September 2000 (the 2000 Parliament Inquiry) endorsed the recommendation previously contained in the 1988 Parliamentary Report.

The immunity was also briefly mentioned in the 2012 Review of Victoria's Witness Protection Program (redacted version).

…

What happens in other jurisdictions?

Witness protection legislation in four other Australian jurisdictions contain similar broad immunities,[103] while in the others, liability arising from conduct under their respective act is transferred to the State.[104] See **Appendix C** for details.

None of the relevant parliamentary documents for these Acts provide any indication of the rationale or justification for the particular level of immunity adopted.

What other contexts justify extensive immunity?

Broader public policy considerations have been seen to justify the creation of very extensive immunities in the following contexts:

- judicial or quasi-judicial settings (flowing from common law immunities);
- schemes requiring or encouraging information disclosure;
- schemes requiring the taking of blood or other medical procedures; and

[101] *Applicants A1 & A2 v Brouwer* [2007] VSCA 139; (2007) 16 VR 612 per Maxwell P, Neave and Redlich JJA.
[102] *Victoria Police Act 2013*.
[103] Commonwealth New South Wales, Northern Territory, and Tasmania
[104] ACT, Queensland, South Australia and Western Australia

- national security settings (Commonwealth legislation).

Even in these contexts there are limitations on the immunity. The immunity provided by the Witness Protection Act is notably as extensive in its protection if not wider than that provided in any of these contexts.

Judicial or quasi-judicial settings

In the performance of judicial or quasi-judicial functions, the necessity for very broad based immunities is well-established. For example, a judge of the Supreme Court of Victoria is immune from liability for civil wrongs or torts where he or she has acted in the performance of his or her duties as a judge. This immunity has evolved through the common law and the considerations of different cases by the courts. In turn, legislation confers the same immunity upon judges appointed to the County Court and magistrates as well as upon those exercising quasi-judicial functions such as Victorian Civil and Administrative Tribunal (VCAT) members and members of the Police Registration and Services Board when exercising appeal and review functions.[105] The policy reasons justifying judicial immunity include:

- ensuring that the judicial function is fairly and efficiently exercised without improper interference, fear or favour;
- promoting judicial independence; and
- achieving finality in the litigation, except insofar as the law provides for appeal or permits review (collateral challenge should not be able to avoid the principle of judicial immunity or widen the opportunities for appeal and review)

It is important to note, however, that in judicial and quasi-judicial settings, other controls are in place to provide an aggrieved person with a remedy and provide incentives for proper exercise of powers. Hearings are normally conducted in public, reasons are usually required to be published and appeal mechanisms to higher courts or bodies exist.

A similar but controversial common law immunity applies to legal practitioners, witnesses and prosecutors for in-court conduct as well as for conduct intimately connected with in-court conduct.[106] Witness immunity in court is based on the need for witnesses to be able to speak freely and ensure that the court is fully informed. However, their evidence is normally given on oath, must be relevant to the issues raised in the proceedings and is subject to a degree of control by the Court.

Information disclosure schemes

Limited immunities are found in some schemes where legislation imposes a legal duty upon individuals to disclose information. These immunities serve to remove barriers to disclosure of information for public interest reasons.[107] It is also common for information disclosure provisions not to include such immunities.[108]

Medical practitioners

Limited immunities are also found where medical practitioners are required to perform certain invasive procedures, such as taking a blood sample. Immunities in this context are generally limited to authorised procedures that are conducted with reasonable care.[109]

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[105] See the *County Court Act 1958*, *Magistrates' Court Act 1989*; *Victorian Civil and Administrative Tribunal Act 1998*; and *Victoria Police Act 2013*.

[106] *Giannerelli v Wraith* (1988) 165 CLR 543; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) ALR 92. Interestingly, in the UK, the common law barrister's immunity no longer applies: *Hall v Simon* [2000] 3 WLR 543.

[107] Section 40, *Children, Youth and Families Act 2005* requires any person acting in the course of his or her professional duties who forms a reasonable belief that a child is in need of protection to disclose this information to the departmental head of the Department of Health and Human Services. The Act confers protection on any such person who acts in good faith in respect of that disclosure. Section 39, *Protected Disclosure Act 2012* gives whistleblowers an immunity from liability arising from making a protected disclosure. Note that Section 167(3) *Victoria Police Act 2013* requires police officers to make a complaint about the conduct of police if they have reason to believe that the police officer is guilty of misconduct, which is covered by the Protected Disclosures Act. The immunity is limited and does not extend to untruthful information or liability for a person's own conduct other than the disclosure itself.

[108] An example in the policing context includes the requirement that police officers provide information to the coroner in his or her investigation into a death or fire. This requirement is not accompanied by any statutory immunity. See section 36 of the *Coroners Act 2008*.

[109] See for example, *Victoria Police Act 2013* (drug and alcohol testing scheme); *Public Health and Wellbeing Act 2005* (Part 8 – management and control of infectious diseases, micro-organism and medical conditions); *Road Safety Act 1986* (see Part 5 – Offences involving alcohol and drugs).

National security

Commonwealth national security legislation contains controversial limited immunities for both criminal and civil actions of intelligence officers during special intelligence operations by agencies such as ASIO and ASIS.[110] In summary, the protected conduct must be performed in accordance with authorisations for specific covert activities for purpose of collecting intelligence on serious threats to the security of Australia and Australians. This immunity does not extend to:

- more serious offences against the person or property (including 'entrapment' style offences)
- torture;[111] or
- tort or other civil proceedings in relation to serious injury, loss or damage.

United States Federal Witness Protection Program

The legislation facilitating the United States Federal Witness Protection Program provides that "the United States and its officers and employees shall not be subject to any civil liability on account of any decision to provide or not to provide protection under this chapter".[112] Under this program, decisions to enter a person into the program and the protection measures provided are made by the Department of Justice. The protection plans, however, are implemented by the US Marshalls Service. While the decision whether to enter a person onto the program or not is protected from litigation, the implementation of that decision is not.

What does the immunity mean in witness protection practice?

Concern about the creation of a 'special relationship' potentially giving rise to enforceable legal obligations to protected witnesses who are not on the program have driven several of the witness protection reforms adopted by Victoria Police.

…

As I have earlier indicated, I am strongly of the view that the approach to the scope and practices under the Witness Protection Act have been viewed from too limited a perspective. There are many good reasons why the category of persons falling within its compass should be extended and that the work undertaken with respect to them should be regularised. For example:

- risks can be better managed through the tools available under the Act. The name change under the Act is untraceable, the Act contains protections against disclosure of information and guards against disclosure through court proceedings;
- the Act requires documentation of the agreement, meaning all parties are clearer on what is required; and
- the Act provides at least some level of legitimacy for conduct that might otherwise be seen as inducements or tainting the evidence that the witness is to give.

Limiting potential liability for failure to honour undertakings is not a reason to regularise this work.

The new witness protection policies that commenced on 1 July 2014 require witness protection or assistance arrangements to be properly negotiated, authorised and documented. These processes reduce, rather than increase potential liabilities. Entering into a witness protection arrangement and documenting that arrangement has a number of other practical and organisational benefits including:

- all parties are clear about the arrangements;
- operationally, Victoria Police retains corporate knowledge about its arrangements so that there can be proper management and continuity of those arrangements;
- documenting the arrangements is an important part of obtaining the appropriate authorisations for the arrangements;

[110] *National Security Legislation Amendment Act (No. 1) 2014*. This Act implemented recommendations from the Parliamentary Joint Committee on Intelligence and Security (PJCIS) *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation* of May 2013 (PJCIS Report).

[111] Commonwealth Attorney-General George Brandis was required to include the torture exception in order for the Bill to be passed in the Australian Senate.

[112] 18 U.S. Code § 3521 - Witness relocation and protection.

- a properly documented arrangement is less likely to undermine the integrity of the witness protection program. The key reason that police protect witnesses is to ensure that the witness' evidence can be provided to the Court in a criminal trial. Proper protection measures and the documentation of those measures will protect police from arguments that the evidence was obtained by inducement, or tainted in some other way; and
- it provides accountability and protection for the decision maker.

If the current immunity is removed, or narrowed, the standard liability scheme will still apply to both the police officers making the decisions under the Act, as well as those in the WPU who are tasked with implementing the decisions. Witnesses will be able to use court processes to seek redress or compensation if police do not honour terms of the MoU and witnesses are harmed as a result.

Victoria Police put forward a number of arguments in favour of the retention of the immunity in the Act.

First, Victoria Police contended that its absence may have a 'chilling effect' leading to police officers acting in a defensive frame of mind when carrying out their duties. Police officers may become distracted from the primary task by extraneous concerns regarding civil liability.

Interestingly, this argument is not supported by Victorian witness protection practice. For many years, despite the protection of the immunity being available, WitSec preferred the use of ad hoc informal arrangements. There was no 'chilling effect' over these arrangements despite there being:

- no immunity protections for this work;
- no formal policies or legislative authority to conduct this work; and
- higher and sometimes uncontrollable risk involved in this activity.

Second, Victoria Police suggested that potential litigants may, in absence of immunity, use litigation to expose sensitive aspects of the witness protection program or gain access to protected documents. There was concern expressed that, in order to ensure the security of the process, Victoria Police may find it necessary, despite the real merits of any claim, to settle such cases. There is no reason to suppose that issues of this kind, which are encountered in a variety of other sensitive areas of public administration, cannot be handled through the normal court processes and existing mechanisms under the Act.[113]

Third, Victoria Police advised that in its view, "the immunity provision provides members with protection from criminal prosecution for actions done under, and in compliance with, section 3A of the Act". However, it also advised that the immunity would "not extend to misconduct". Presumably, it considers that some criminal actions would not constitute misconduct. It is difficult to accept that a provision could authorise criminal activity at the same time as it prohibits misconduct. There are some provisions in the Act that authorise behaviour that would otherwise be criminal.[114] But this is achieved by removing the criminality of the conduct concerned in the particular circumstances and not through a grant of immunity.

Fourth, the Review sought to understand the operational needs and risks that would be affected by removal of the current broad immunity. The only specific matter drawn to my attention was an express concern with respect to documents secured in the process of creating an assumed identity for a protected person.

Victoria Police argued that a broad immunity was required as the current specific authorisations for otherwise criminal conduct in the Act were too narrow. It asserted:

"that it may be reasonably necessary in order to provide immediate protection that police make an application for a range of identification documentation, such as a KeyPass or library card prior to the protected person's official name change in the Register of Births. These types of acts cannot be limited to an exhaustive list and may constitute the offence of creating or using a false document. Accordingly, without immunity members will potentially be exposed to criminal and civil liability prior to a participant having their name changed in the Register of Births", and *"there is no protection for members engaging in acts on behalf of a witness with an assumed identity".*

[113] For example, the requirement to conduct certain witness protection related proceedings in closed court and the presumption in favour of closed court proceedings for others.

[114] For example, see section 8(2) in relation to entries in the Register of Births, Deaths and Marriages and sections 9L and 9M in relation to conduct under an assumed identity.

It is not clear whether the practice being referred to is the gaining of authority to obtain multiple documents evidencing an assumed identity, or whether these other documents are obtained through some separate process. If the former, the Act already allows (in fact it requires) the assumed identity authority to list the different documents that will evidence the assumed identity.[115] If the latter is the practice, this is more concerning. The *Witness Protection Amendment Act 2014* introduced an interim protection scheme under which the use of temporary assumed identities can be authorised. The temporary assumed identities scheme has been designed to ensure appropriate accountability, record keeping, and monitoring of the use of any identity documents procured under it. It enables the obtaining of identity documents from both private and public providers.[116] If the temporary assumed identity scheme in the legislation is being bypassed and documents are being obtained outside the scheme then this is both a cause of concern in itself and certainly does not support the case for the retention of a broad immunity.

Fifth, Victoria Police argued that removing the immunity would depart from the Commonwealth's approach and would be inconsistent with the original intention of the Victorian Parliament that there should be a common approach to witness protection between the various jurisdictions.

As I have earlier indicated, and in common with many other areas, the jurisdictional limitations and pursuit of perceived territorial imperatives have prevented the development of a rational common scheme for witness protection across Australia. This has occurred despite it being the expressed legislative intention of eight Parliaments. There is no legislative barrier to co-operation, but there are long-present issues of trust. In consequence, the development of a national scheme is likely only to remain an aspiration for the foreseeable future. Even if this somewhat pessimistic view was rejected, in practice the major interactions, based on experience to date, will be with other State jurisdictions, rather than the Commonwealth. Among the States, there are different immunity arrangements. Witness protection legislation in New South Wales, Northern Territory, and Tasmania contain absolute immunities, whereas in the Australian Capital Territory, Queensland, South Australia and Western Australia, liability arising from conduct under the respective Acts is transferred to the State. In this context, there is no good reason why the Victorian Parliament should not be prepared to undertake reforms directed to the improvement of its own witness protection arrangements.

Finally, Victoria Police argued that the immunity provisions protect some other parties and its removal would leave the other parties open to litigation. The bodies encompassed by the immunity provision include the Registrar and persons employed at the Registry of Births, Deaths and Marriages, police officers, the Ombudsman, IBAC, OPI and 'an officer of an approved authority'. If the protections available to each of these bodies with respect of functions under the Act is considered inadequate, this could be addressed by the provision of a narrow and clearly targeted provision.

Conclusion

As a general proposition, the existence of immunities is inconsistent with public and private accountability for wrongdoing. It is recognised, however, that there can be circumstances in which wider public policy considerations may require a grant of legal protection. Such protection should always, however, be confined to what is necessary in the circumstances and accompanied by other measures to ensure the integrity of our public processes and systems.

I appreciate the concerns of Victoria Police to limit liability and involvement in mischievous litigation intended to create embarrassment or extract settlements by what are effectively blackmail threats to expose operational processes. However, this apprehension can be properly addressed through the normal court processes. The risks of such embarrassment could be substantially reduced through the adoption and implementation of better structures and systems of witness protection.

Witness protection decisions involve a complex balancing of interests. I accept that there is public interest in ensuring that those decisions are not influenced by the possibility or threat of litigation. For this reason, I am satisfied that, as is the case in the United States, no liability should flow from the decision to admit or refuse admission to an individual to a witness protection program. This immunity from civil liability, however, is not justified without an adequate accountability mechanism to ensure the decision is made in the public interest and in accordance with the purposes and principles underpinning the witness protection legislation.

[115] See section 9H(4)(c)(vi) which requires the listing, in the authority, of the evidence of the assumed identity. While only one identity can be authorised, the instrument may authorise multiple evidences of the assumed identity.

[116] I understand a Letter of Understanding is in place with VicRoads to gain these documents. I am not aware of any Letter of Understanding with private providers.

The standard protections, such as those applying to police officers generally, should apply to other witness protection activities such as implementation of decisions or termination from the program.[117]

I am also satisfied that the immunity originally recommended by the Commonwealth Parliamentary Inquiry in 1988 is justified on the basis that it ensures the co-operation of Births, Deaths and Marriages in giving access to the register. The Supreme Court processes in obtaining orders to alter records provide the requisite integrity and accountability mechanism.

Legislative amendment should ensure that an MoU, or other documentation of 'Category B' protection arrangements, cannot include clauses to render measures offered as unenforceable.

6.5.2 Recommendations

Recommendation 4 – obligations and protection

The Act be amended to remove the unjustifiably wide immunity presently available for police conduct in relation to witness protection arrangements. The general indemnity provisions for police conduct and the conduct of IBAC and other relevant officers should be substituted with the following exceptions:

- no liability should flow from a decision under the Act to enter or not to enter a person into the program; and
- the present provisions with respect to the making, alteration or cancelling of entries or records in the Register of Births, Deaths and Marriages in accordance with an order of the Supreme Court should remain.

Recommendation 5 – rights of protected people

The Act should be amended to ensure that the terms of memoranda of understanding entered into at both Category A and Category B levels should be legally enforceable by persons entering into them.

6.6 Case management – a review period

As earlier mentioned, at the time of the Review's initial request, Victoria Police was unable to provide even the most basic data concerning the operation of the witness protection system, including such matters as the number people on the program and the number of active cases. While I am aware that action has been taken to remediate the situation, I am troubled that the situation was not only able to develop, but continued for many years.

…

I am informed that a remediation project has now identified all of those who have theoretically been under protection and that measures are being put in place to take appropriate case management action. I am also aware that internal Victoria Police policies now require at least six monthly reviews of cases.

However, given that even the previous 12 months of data could not be provided to the Review for the stated reason that the administration required would be 'prohibitively onerous', I am of the view that the legislation should complement Victoria Police's new policies by requiring a legislated review at least every two years for all people subject to protection or alternative arrangements under the Act.

6.6.1 Recommendation

Recommendation 6 – mandatory case review

To ensure a basic level of active case management, the legislation should require all persons protected under the Act be reviewed at least every two years.

6.7 Accountability, transparency and public confidence

All parties involved in our witness protection structures and the community at large must be able to rely upon the integrity and adequacy of our endeavours in this area and be confident that there will be proper implementation of any protection measures agreed upon.

[117] *Victoria Police Act 2013*

The Courts need to be able to rely on the fact that a person is protected under the Act in performing their functions to authorise entries to the Registry, in making orders for procedural measures to protect witnesses and ultimately when making decisions and instructing juries as to whether the credibility and reliability of evidence of protected witnesses may have been compromised by virtue of the measures provided or inducements offered.

The Victoria Police investigators with whom I spoke in the course of the review all indicated appreciation of their responsibility for witnesses' safety and wellbeing. Where those witnesses are also victims, there are further overlays of obligations and duties. It is the investigators who have worked with the witnesses to encourage them to provide evidence in spite of the serious risks with which they may be confronted or may perceive. Investigators must play their part in having those risks assessed and addressed. The witness or potential witness needs to have confidence that arrangements with respect to their protection will be honoured.

Accountability to the community for the satisfactory operation of witness protection structures presents a number of significant challenges. They arise in large measure from the importance of maintaining a necessary level of security in this area. …

I have in the course of the review had the opportunity to examine a number of documents provided to the Minister for Police and the Department in respect of the Minister's functions and responsibilities. These include:

- all the departmental files about Victoria Police requests for financial conferrals to make payments over the Chief Commissioner's financial delegation for relevant matters;
- a copy of the redacted version of the 2012 Review …
- a copy of the un-redacted version of the 2012 Review;
- copies of cabinet papers and other papers supporting the *Witness Protection Amendment Act 2014*;
- a copy of the … Report into …; and
- a copy of the Review into informer management.

I have also requested information from Victoria Police about a number of matters covered in these files, reports and documents. As earlier indicated, much of this was not available as it had never been collected. Some of the documents indicated that there was less than adequate disclosure to the Minister. Public confidence cannot be maintained in such circumstances.

I have provided some commentary above about the current roles and responsibilities of those involved in witness protection arrangements. In addition to those comments, I have a number of further observations about the current governance frameworks.

First, there are legitimate security considerations requiring an appropriate level of security at an operational level. For this reason, the general mechanisms for external accountability on the use of executive powers and funds cannot be available for witness protection activities. This is why the *Witness Protection Act 1991*:

- requires certain court proceedings under the Act to be closed and establishes a presumption in favour of closed court proceedings for others;[118]
- makes it an offence to disclose witness protection information;[119] and
- exempts documents detailing activity under the Act from disclosure under FOI provisions.[120]

Second, the current involvement of organisations external to Victoria Police in the witness protection function is not directed to the performance of the function of external accountability and transparency:

- the Supreme Court's involvement in authorising entries in the Register of Births, Deaths and Marriages[121] is designed to provide assurance about the integrity of the Register of Births, Deaths and Marriages and not as an accountability mechanism over police decision making under the Act;

[118] *Witness Protection Act 1991,* section 13.
[119] *Witness Protection Act 1991,* section 10.
[120] *Witness Protection Act 1991*, section 24.
[121] *Witness Protection Act 1991*, section 7.

- the Registrar of Births, Deaths and Marriages facilitates police access to the Register for the purpose of making entries authorised by the Supreme Court. The Registrar's role rightly does not extend beyond this;
- while decisions under the *Witness Protection Act 1991* may be subject to Supreme Court judicial review, the very broad discretion vested in the Chief Commissioner results in a very limited area of operation for this mechanism; and
- the IBAC has powers to investigate police conduct following a complaint or on its own motion. IBAC does not, however, have the own motion 'systems review' powers under which OPI conducted its 2005 Report into Victoria Police's Witness Protection Program. IBAC's merits review function over decisions to terminate a person from the program and restore their original identity were removed as at 1 July 2014 with IBAC's support. IBAC suggested to the Review that any 'real time' involvement in witness protection decisions undermines its ability to conduct investigations following complaints or on own motion.

Finally, I appreciate that the governance arrangements that commenced on 1 July 2014 will, if fully implemented, improve the situation considerably. I note, however, that:

- .... Bodies independent of police are involved in witness protection decisions in some other jurisdictions. For example, in Western Australia, the Director of Public Prosecutions (or his or her representative) sits on the Witness Protection committee. In Queensland, witness protection decisions as well as their implementation are the responsibility of the Crime and Corruption Commission. …; and
- the WPU has been moved under the responsibility of the Deputy Commissioner Specialist Operations. This means a closer structural alignment of the interests of the investigators and those responsible for protection.

I do not want to be taken as denigrating the work or commitment of those who, whether within the unit or in other operational roles, have been engaged in the protection of victims, witnesses or information sources against possible reprisal. I have, however, pointed to what I regard as a problematic framework within which they have been required to function and the consequences of those deficiencies for the satisfactory operation of the structures for witness protection.

It is in this context that I recommend the adoption of two governance and accountability measures to promote confidence in the program:

- external monitoring; and
- external reporting.

6.7.1 External monitoring

While consultations with police officers directly involved in the witness protection function, as well as the investigation function, revealed that those officers welcomed the involvement of an external person in witness protection, the formal Victoria Police response indicated that it does not support the involvement of an external person in the program for a number of reasons. I will address each in turn.

First, Victoria Police argued that external mechanisms are appropriate where "police are given extraordinary authority (for example telephone interception and surveillance devices)". In contrast, participation is "voluntary" and pursuant to an "agreement between Victoria Police and the protected person". External oversight and monitoring is obviously important where extraordinary covert police powers may interfere with a person's individual rights, however, the monitoring process that I consider is necessary in this situation is not designed to arbitrate the use of powers vis-à-vis an individual's rights. Rather, it is directed to assuring the community that the witness protection program is being properly administered and conducted in the public interest.

Second, Victoria Police contended that "should an external oversight regime be adopted, its only relevance would be in relation to the acceptance of witnesses onto the scheme or their removal from it. Currently a review provision, consistent with other States, exists where application may be made to the Chief Commissioner in relation to involuntary terminations and restoration of former identity." As I indicated on more than one occasion in discussion with representatives of Victoria Police, a merits review of the kind contemplated in this argument is not being suggested. Such a mechanism existed up until 1 July 2014 and I do not intend to recommend its reintroduction. The monitoring process recommended is not intended to 'second guess' decisions or replace decisions with an external

assessment. By contrast, it is designed to provide assurance to the community (including the Chief Commissioner, key 'partners' in the witness protection system, police officers, witnesses, potential witnesses, the Minister, Parliament and the public at large) that our witness protection arrangements are being constructed, operated and implemented in the public interest consistent with legislatively adopted principles. This ultimate aim is to enable justified public confidence in our approach to this area. If necessary, deficiencies in the system or failures to comply with appropriate standards must be exposed and measures put in place to improve the situation.

Third, Victoria Police has expressed concern that "if an independent community representative is appointed to the WPEC, his or her involvement in administering the witness protection program could never be wholly independent. Should legal action arise out of a decision made by the WPEC, any independence of the member would be eroded as they would instead become a potential witness in the proceedings". Victoria Police is further concerned that should the immunity provision be removed, no protection would be available to an independent community representative engaged in this oversight role. These are curious propositions and any technical difficulties could be easily addressed.

Fourth, Victoria Police argues that it has "developed strong internal governance and appropriate internal review mechanisms which results in ongoing policy improvements such that there is no identifiable need for independent oversight". Bearing in mind the history of witness protection arrangements in Victoria and in particular the fact that it has only been in the last several months that the current arrangements have been adopted and are yet to be evaluated, their presence does not provide a persuasive argument against external oversight. In any event, the independent monitoring scheme I propose is intended to complement and embed the internal governance changes, while providing appropriate flexibility for their improvement.

The monitor's role should be legislatively established and protected. The monitor should be required to report on their operations in their annual report subject to appropriate safety caveats and should be able to report to the Chief Commissioner and Ministers as they see fit.

While the arrangements with respect to the performance of this function is a matter for the Government, I note that the Public Interest Monitor (PIM) is established in legislation to perform a number of specific monitoring roles of an essentially similar character. The PIM also has structures and systems in place to ensure appropriate security in the performance of these functions.

6.7.2 External reporting

Reporting on witness protection activities has been recommended several times previously:

- March 1991 – Victorian Parliament Legal and Constitutional Committee *Report upon a mechanism for monitoring the Operation of the Witness Protection Act 1991* – a public report – recommended a legislative requirement for reporting to the Minister and tabling in Parliament;
- July 2005 – OPI *Review of the Victoria Police Witness Protection Program* – a public report – recommended general witness protection information be included in Victoria Police's annual report; and
- November 2012 – …

These recommendations have not been acted on for two suggested reasons. First, that disclosure of some witness protection information may undermine the efficacy of the program and expose a protected witness to increased risk. Second, reporting creates an unnecessary administrative burden. Neither of these arguments possesses any real substance. There is no reason to suppose that an appropriate form of reporting would reveal operational processes or expose individuals to increased danger. Nor if there was proper recording of the activities undertaken should it be difficult to produce a report concerning them.

Reporting promotes:

- accountability for the use of public money, powers and functions given by Parliament;
- monitoring of trends over time and potentially across jurisdictions (which can lead to better policy making);
- better decision making in relation to Witness Protection Program decisions; and
- the maintenance of community confidence in witness protection practices.

What happens in other jurisdictions?

The table below summarises current reporting practice in other jurisdictions, including practice under Assumed Identities legislation:

	Vic	ACT	Cth	NSW	Qld	SA	Tas	WA
Witness protection reporting	No	No	Yes	No	Yes[122]	Yes	No	Yes
Assumed Identities reporting	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

The Commonwealth, South Australian and Western Australian Witness Protection Acts require police to report to the Minister and require the Minister to table a report in Parliament.[123] The provisions require reporting about the general operations, performance and effectiveness of the program. The Commonwealth and South Australian legislation also requires reporting about specific provisions that allow interaction with the courts in respect of protected witnesses. To balance public reporting with witness safety/program effectiveness, the provisions require that the tabled reports not prejudice the effectiveness or security of the program.

The level of information contained in reports varies from a table containing numbers to the Commonwealth's report, which includes high-level commentary about the operation and governance of the program. There was no evidence that these reports have undermined the safety of any person or prejudiced an investigation or prosecution over the past 18 to 20 years since they commenced.

What happens under other 'identity change' legislation?

The *Crimes (Assumed Identities) Act 2004* (AI Act) allows the Chief Commissioner and IBAC Commissioner to authorise personnel to use assumed identities for the purposes of criminal investigations, intelligence gathering or to enable them to safely exercise their functions in administering the Victorian witness protection program. Police and IBAC personnel are able to obtain similar identity documents under the AI Act to those that witnesses are able to obtain under the WP Act. For example:

- a new birth certificate; and
- an identity document produced by a government agency or private provider eg a driver licence (note: the Witness Protection Amendment Bill 2014 will introduce this new category of identity document).

The Assumed Identities Act was developed as part of a suite of 'Model Laws' designed to enhance cross-border investigative powers including controlled operations, surveillance devices and undercover police identity protection. The *Crimes (Controlled Operations) Act 2004*, as well as provisions that are now in Part IIA of the *Evidence (Miscellaneous) Provisions Act 1958*, form part of the suite of Model Laws.

Reporting requirements were included in the Model Assumed Identity Laws.[124] In contrast to witness protection legislation reporting provisions, the AI Act lists the matters that must be reported. To balance the rationales of reporting and secrecy, the Minister (in this case, the Attorney-General) must not table information that the Chief Commissioner reasonably believes would:

- endanger a person's safety;
- prejudice an investigation or prosecution; or
- compromise any law enforcement agency's operational activities or methodologies.

Conclusion

To promote public accountability, there should be public reporting on witness protection activity. Public reporting of witness protection activity can occur without undermining the policy rationales of the witness protection program, including safety imperatives. There is no reason for different reporting

[122] Reporting is part of financial reporting requirements, rather than a legislative requirement and the function is performed by the Crime and Misconduct Commissioner, rather than Queensland Police.
[123] Section 27 *Witness Protection Act 1994* (Cth); Section 28 *Witness Protection Act 1996* (SA); Section 37 *Witness Protection (Western Australia) Act 1996*.
[124] Section 31 *Crimes (Assumed Identities) Act 2004.*

requirements for the use of identity change legislation to protect witnesses compared to law enforcement personnel.

Similar to arrangements in the Acts of the Commonwealth, South Australia and Western Australia, the Act should require the Chief Commissioner to report to the Minister on the operation of the Witness Protection Act. Subject to appropriate public safety caveats, the Minister should be required to report publicly.

6.7.3 Recommendation

Recommendation 7 – public accountability, monitoring and reporting

To ensure appropriate public accountability:

- an independent body should monitor the operation of the Act to provide assurance that the witness protection principles recommended are given practical effect; and
- subject to necessary safety and operational caveats, there should be public reporting on the operation of the Act.

7 Understanding the problem – witness intimidation

As the Terms of Reference indicate, the issues concerning witness protection have to be considered in the context of its "role in the broader legal framework relating to the investigation and prosecution of crime" as well as the "level of witness intimidation in Victoria". Of course not all of the forms of witness intimidation can be addressed through a statutory witness protection scheme.

7.1 Witness intimidation – description

Broadly defined, witness intimidation includes any behaviour intended by threat or pressure, express or implied, to discourage or prevent a witness or victim from meaningfully participating in the justice system.[125] Witness intimidation may discourage or prevent:

- a witness from reporting crimes or other wrongdoing (such as serious regulatory breaches);
- the investigation, charge or prosecution of crimes or wrongdoing; or
- the justice system from otherwise addressing an offender or intimidator's behaviour. For example, through the seeking or enforcement of intervention orders.

Prior or potentially successful intimidation can encourage the planning and conduct of future crimes – the perpetrator being confident that victims and witnesses will remain silent and that there will be little or no likelihood of being held accountable.

7.1.1 Who is vulnerable to witness intimidation?

As could reasonably be expected, a review of the available literature identified the following categories of people as being particularly vulnerable to intimidation:

- victims of family violence;
- witnesses to organised crime or gang-related crime, including terrorism;
- informers who co-operate with police in respect of organised or gang-related crime, including terrorism;
- human trafficking victims, including those subject to forced labour, sex slavery and forced marriages;
- child and juvenile victims and witnesses – scenarios include family violence and abuse, victims of human trafficking and juvenile victims, members of gangs or children of organised crime members;

[125] *Macquarie Dictionary* (5th edition, 2009, Macquarie Dictionary Publishers, Sydney, Australia) Intimidate: 1. to make timid, or inspire with fear; overawe; cow. 2. to force into or deter from some action by inducing fear.

- victims and witnesses in institutional settings or insular communities – scenarios include prisons, institutional group homes, aged care facilities, facilities for those with mental or physical disabilities;
- people who otherwise experience significant barriers to effective participation in the justice system – for example, victims of sexual offences, people with disabilities and mental disorders and people from culturally and linguistically diverse communities;
- witnesses or whistleblowers to organisational corruption and misconduct; and
- other participants in the criminal justice system – for example, police, prosecutors, lawyers, jurors, judges and prison officers.

7.1.2 What sort of behaviour can intimidate?

Intimidators can and must be expected to exploit any vulnerability the witness may be seen to possess, whether cultural, economic, social, family or religious. Intimidation involves the assumption of control that may be achieved through:

- isolation (including isolation from sources of support, for example, family);
- manipulation, guilt or inducements;
- implicit threats, looks, or gestures;
- explicit threats of violence;
- actual physical violence;
- property damage; or
- other threats, such as challenges to child custody or immigration status.

Threats may be carried out by:

- confronting witnesses verbally;
- sending notes and letters;
- making nuisance phone calls;
- parking or loitering outside the homes of witnesses;
- damaging witnesses' houses or property;
- threatening witnesses' children, spouses, parents, or other family members;
- attending court or other premises while wearing gang insignia;
- assault or even murder of witnesses or their family members; or
- exclusion or rejection from a family, social or community group.

Intimidation can be overt (where actual threats are made) or implicit (where there is a real but unexpressed threat of harm). The threat may be real or perceived and may be made without any actual intention of carrying it out.

Not all of these intimidation techniques, of course, can be addressed through witness protection measures but all may be relevant to the process of risk assessment and to the measures to be adopted in individual cases.

7.1.3 Who intimidates?

Intimidation and manipulation can come from many sources including:

- the perpetrator of the underlying crime;
- the offender's family;
- the offender's friends;
- organised crime networks or associates; and

- influential persons in community, religious or business relationships.

7.1.4 Who are the targets of intimidation?

An intimidator may target anyone who he or she believes will achieve the desired effect of preventing or deterring the meaningful participation in the justice system of an individual viewed as a threat. While the target is typically the actual victim or a witness to a crime, it could also be family members or friends of the victim or witness, criminal justice practitioners such as police, prosecutors, judges, jurors and prison officers, or other people whose potential participation in the justice system is further 'upstream' such as police informers, or potential police informers.

Intimidation may be designed to deliver a broad message to the community at large, or a specific community (such as the prison population or a particular social or cultural group) not to co-operate with authorities or participate in the criminal justice system.

7.1.5 Kinds of witness intimidation

The following table summarises the kinds of witness intimidation identified in the literature. Earlier studies tended to focus on case-specific or community-wide intimidation, more recent literature recognises cultural and system intimidation. While this Review's primary focus is on legislative measures that respond to case-specific witness intimidation, it is important to recognise that community-wide, cultural and system intimidation have the same detrimental effects and equally undermine the rule of law.

Kind of witness intimidation	Description	Who intimidates	Who is the target	Effect
Case-specific intimidation	Targeted acts of intimidation designed to prevent a person meaningfully participating in the justice system	Typically the offender, however, could be a family member, friend or associate of the offender	Typically the victim or witness, however, could be family or friends or even pets	Participation in the justice system is prevented and an offender escapes accountability
Community-wide intimidation	Acts that are intended to create a general sense of fear and an attitude of non-co-operation with the justice system	An organised crime organisation or other individuals or groups who have something to gain from preventing meaningful participation in the justice system	Members of specific communities (cultural groups or particular neighbourhoods, the prison population or members of organised crime organisations) or the broader community generally	Participation in the justice system is prevented and offenders escape accountability
Cultural intimidation	Norms of behaviour within a culture for dealing with criminal matters that do not involve the formal agencies of the criminal justice system	Family or friends of the victim or witness who try to dissuade him or her from participating in the justice system. Reasons may be varied, but may include bringing shame on the family or community group	Typically the victim or witness, however, could be family, the family's standing in the community, or the person or family's membership of a particular community	Participation in the justice system is prevented and offenders escape accountability
System intimidation	General feeling of being overwhelmed or undervalued by the justice system itself	Unintended consequence of the system or unintended behaviours of those who work within the justice system	The victim or witness	Participation in the justice system is prevented and offenders escape accountability

Table 1 Kinds of witness intimidation

7.2 Measuring witness intimidation

It is difficult to measure when and how witness intimidation occurs for a number of reasons. First, successful intimidation results in the crime as well as the activities to conceal it going unreported. Second, crimes may not be reported for reasons that have nothing to do with intimidation. Crime

statistics alone are therefore of limited assistance. Third, surveys and interviews with witnesses and other participants in the justice system capture a limited subset of the larger population of witnesses and not those who drop out of the system or who never come into contact with it. Fourth, intimidation can be overt (where actual threats are made) or implicit (where there is a real but unexpressed threat of harm), rendering its identification difficult. Fifth, witnesses can experience fear and feel intimidated whether or not they are in actual danger or indeed whether any attempt has actually been made to intimidate them. Finally, different methodologies are required to research case-specific, community-wide, cultural and system intimidation.

7.2.1 Data

Some data is available on individuals who are charged with or convicted of offences relating to witness intimidation or causing harm to a witness. While this is one measurement of case-specific intimidation, the data has a number of limitations. First and obviously, it does not enable an assessment to be made of successful intimidation. Second, instances of witness intimidation may result in the laying of other charges, such as contempt, property damage, assault, threats to kill or even murder and are not recorded as instances that will, on their face, be linked to witness intimidation.

It is not surprising that the literature reveals a lack of empirical data on the nature, scope and consequences of witness intimidation.[126] Nevertheless, a review of the available literature reveals that:

- in the US and Europe, threats to witnesses are common when organised crime organisations are involved and they often seriously undermine criminal prosecutions;[127]
- in the US and Europe, there is evidence of an increased incidence of violence and intimidation in situations involving organised crime and gangs;[128] and
- in the UK, 15 percent of respondents to the British Crime Survey who had been victimised and had some knowledge of the offender reported that they had later been victims of intimidation and in 85 percent of these cases, the intimidator was the original offender.[129]

There is, I believe, little reason to expect that the position in Australia would be significantly different and anecdotal evidence would suggest that the position is similar.

7.2.2 Anecdotal evidence

Participants in the justice system such as police, prosecutors, legal practitioners, judicial officers and prison authorities interviewed in the course of the Review related personally encountered situations of witness intimidation. Again, however, this anecdotal evidence would not include the most successful occasions where total concealment was achieved.

Another source of information about witness intimidation is reportage in the media. Whilst high profile examples of threats or crimes of witness intimidation are newsworthy and are reported publicly, they cannot be taken as providing any indication of the dimension of the problem. Paradoxically, sensationalist media reportage may, on occasions, even have contributed to its impact and effectiveness by increasing fear and apprehension.

7.3 Witness intimidation in Victoria

Victoria Police provided data about offenders processed for the summary offence of harass witness.[130] Between 2009 and 2014, 608 offenders were charged with this offence. It is noteworthy that this data indicated that between 2011-2014, more than half of the offenders were not related to, or associated with, the witness. As far as I have been able to determine, there has been no endeavour within

[126] Dandurand and Farr, *A Review of Selected Witness Protection Programs*, prepared for Public Safety Canada, Report No 001, 2010. This international literature review was commissioned following a recommendation by the Canadian Parliament.
[127] Council of Europe *Combating Organised Crime: Best Practice Survey of the Council of Europe*, Strasbourg: Council of Europe, 2005; Finn and Healy *Preventing Gang and Drug Related Witness Intimidation* Washington: US Department of Justice, Office of Justice Programs, National Institute of Justice 1996.
[128] Council of Europe *Ibid*; and Dedel, *Witness Intimidation. Problem Oriented Guides for Police Series*. No 42 Washington: United States Department of Justice, Office of Community Oriented Policing Services, July 2006.
[129] Tarling, Dowds and Budd *Victim and Witness Intimidation: Findings from the British Crime Survey* London: Home Office, Research, Development and Statistics Directorate, 2000.
[130] *Summary Offences Act 1966*, section 52A

Victoria Police to examine this phenomenon. The sources or reasons for this attempted intimidation do not appear from the material available.

The Review also sought data from the Office of Public Prosecutions (OPP) on discontinued trials. The OPP advised that during 2014 there were 162 such cases.[131] Data is not routinely kept on the reasons why cases do not proceed. A manual review, however, revealed that common reasons included:

- the complainant no longer wanted the matter to proceed and/or indicated a desire not to be further involved;
- the complainant and/or witnesses had absconded; and
- issues had arisen with respect to the reliability of the witnesses or complainants upon whose evidence a successful prosecution depended.

Aside from this limited material, there is little save anecdotal evidence available upon which an assessment can be made of the prevalence and extent of witness intimidation in Victoria.

There have been a small number of reported high profile cases involving the killing of proposed witnesses in criminal trials. In 2004, Terence and Christine Hodson were killed in their own home. In 2010, Carl Williams was murdered while in custody. On both occasions, this resulted in the collapse of prosecution cases and the withdrawal of serious criminal charges. It has been reported that two other victims, Vicki Jacobs and Prudence Bird were killed in reprisal for the giving of evidence.[132] While at the extreme end in terms of the threat, consequence and effect, notorious cases of this kind can reasonably be expected to be in the minds of persons when deciding whether or not they are prepared to co-operate with authorities.

In the context of concerns about corruption in Victoria Police, specific instances of threats, intimidation and reprisals against police corruption whistleblowers began to gain public attention from the late 1980s onwards.[133] Allegations were made of instances of serious case-specific intimidation (for example, police-issue bullets being left at the house of a police corruption whistleblower) and a police culture that encouraged silence and deterred those from speaking up to expose wrongdoing. These concerns contributed to the creation of the Deputy Ombudsman (Police Complaints) in 1988, the creation of the Police Ombudsman in early 2004 and then establishment of the Office of Police Integrity in late 2004 with broad own motion systems review powers. The 2005 Review of Victoria Police's Witness Protection Program was the first OPI inquiry initiated under these powers.

While intimidatory effects of the system and cultural practices may not be intended to change a person's behaviour, they also provide a background within which the normal reservations of individuals to become involved are easily exploited. There has been recognition in Victoria of barriers experienced by vulnerable people in reporting crime and the susceptibility of vulnerable people to intimidation. These vulnerable people include, for example, victims of sexual assault,[134] people with disabilities,[135] people in group homes,[136] children,[137] people from certain cultural groups,[138] and human trafficking victims.[139]

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[131] Up until 15 December 2014.

[132] *Herald Sun* 'Vicki Jacobs shot dead as she slept, new clues may reveal who killed her' 17 December 2014; ABC *Australian Story: The Innocent* aired 20 and 27 October 2014.

[133] For example, see *The Age* 'Betrayed by the Brotherhood' 28 May 2004.

[134] 2004 Victorian Law Reform Commission *Report into Sexual Offences* found several reasons for low sexual assault reporting rates, including that people knew and feared their attacker, felt ashamed by what had happened and feared the way they would be treated in the criminal justice system. The Report recognised particular barriers to reporting and prosecution of sexual offences involving vulnerable people, such as children and those from certain cultural groups. Recent Sentencing Advisory Council research found that only around 12.6 percent of all sex offences are recorded by police and that this is due to a range of factors, including fear of retribution, fear of giving evidence, fear of not being believed or lack of knowledge and access to help. Sentencing Advisory Council, *Recidivism of Sex Offenders Research Paper* (2007) 7. See *The Age* 'Melbourne's legal fraternity considers restorative justice for sex assault victims' 15 December 2013.

[135] In July 2014, the Victorian Equal Opportunity and Human Rights Commission released research confirming the significant and complex barriers people with disabilities face when reporting crime to police, including fear for safety or concern about loss of support.

[136] *The Age*, 'Elderly and disabled face increasing threat of abuse' 19 September 2014. The Public Advocate in Victoria called for a formal inquiry into the safety of group homes for vulnerable people, citing a 37 percent increase in reports of abuse inside residential facilities and hospitals for disabled and mentally ill compared to the previous year. The Public Advocate feared that these cases represent the tip of the iceberg because many residents, patients and staff are incapable of reporting incidents or too frightened to do so.

[137] Throughout 2013, the Victorian Parliamentary Inquiry into Institutional Child Sex Abuse heard victims of institutional child sex abuse were too terrified to report crimes. Some victims explained that upon reporting criminal child abuse to other members of the institution, no action was taken or they were physically punished. The Inquiry heard evidence that the purpose of

Similarly, the intimidatory effect of reports of violence must be substantial, particularly in the family violence context upon an unknown but very large number of women and children in the community. Family violence continues to represent a large proportion of serious assaults and homicides in the community, with 44 Victorians dying as a direct result of family violence in 2013. It is a community-wide problem for Victoria and not simply a law enforcement concern. A 2004 report found that intimate partner violence is responsible for more ill-health and premature death in Victorian women under the age of 45 than any other well-known risk factors.[140] The Victorian Royal Commission into Family Violence is likely to raise public awareness of the issues and may further drive increased reporting, enforcement activity and demand for services. It is important to encourage this reporting, however, it must be accompanied by the provision of adequate support structures including those directed to the physical protection of complainants.

The Review spoke to a wide range of participants in the justice system – police officers, prosecutors, judicial officers, victim support workers and corrections officers. All had first hand experience with actual or suspected witness intimidation.

My personal impression based on a long period of involvement in the criminal justice system is that witness intimidation in its different forms is a far more pervasive problem than is generally recognised. In different roles, I have encountered numerous situations in which I was confident or at least strongly suspected that evidence had not been forthcoming or had been withdrawn or modified because of fear of reprisal. I recall one occasion when presiding in a criminal trial, a female prisoner who was called as a witness by the prosecution stated quite directly that she refused to give evidence out of fear of her fellow prisoners while in custody and their associates after she was released. In the particular circumstances, I doubted neither the truth of her expression of concern nor its reasonability. Trial judges and magistrates not uncommonly find themselves troubled by the presence of individuals in court rooms who they suspect are there for the principal purpose of intimidating witnesses. This technique seems to find particular favour among members of bikie gangs.

7.4 Conclusion

Witness intimidation can have serious consequences for the proper functioning of our society – victims and witnesses can suffer additional harm, offenders may escape accountability for their actions and the general public can lose confidence in our processes for law enforcement. Criminal behaviour may not only continue unchecked but be effectively encouraged by the failure of the justice system to deal with it.

Witness intimidation is difficult to measure. This continuing and largely unacknowledged problem merits more investigation than was possible within the scope of the Review.

8 Other responses to witness intimidation

The United Nations Guide: *Good practices for the protection of witnesses in criminal proceedings involving organized crime* concludes that:[141]

…good practices… take a holistic approach to witness protection…These measures provide for a continuum of protection that starts with the early identification of vulnerable or intimidated witnesses,

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grooming victims and their families was not only to access the primary victim of the sexual offending but also to manipulate the victim and those around them so that the offending would continue unchecked. Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and other Organisations *Betrayal of Trust* November 2013.

[138] See for example *The Age* 'Yeshivah scandal Secret tapes – Sex victim pressured by lawyer' 28 January 2015, *Herald Sun* 'Standover on Abuse – Jewish victims ostracised by their own, inquiry told' 4 February 2015. *The Age* 'Jewish sexual abuse families branded informers for going to police' 4 February 2015.

[139] In October 2014, Victoria Police launched an information package designed to help police identify and understand the existence of human trafficking in Victoria. The awareness package includes videos, prompt cards, posters, lanyard cards and Quick Response cards and was developed in partnership with the Australian Federal Police. The package seeks to improve police identification of human trafficking, and improve police response to human trafficking, including understanding the problem of human trafficking as not limited to trafficking in the sex industry, but as also including forced marriage and labour trafficking in cafes, farms and in construction. Data released concurrently with the package indicated a doubling in federal police investigations into human trafficking in the past two years to 60, with both state and federal police warning that because of the fear and culture of silence confronting trafficking victims, it is likely that many cases are never reported. The Age *Fear hinders investigations: Sex traffic, forced marriage on the rise*, 31 October 2014.

[140] VicHealth Report *The Health Costs of Violence* www.vichealth.vic.gov.au/Programs-and-Projects/Freedom-from-violence/Intimate-Partner-Violence.aspx Accessed 31 October 2014.

[141] United Nations Office of Drugs and Crime, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*, 2008.

continues with the management of witnesses by the police and the enactment of measures to protect the witness's identity during courtroom testimony, and culminates with the adoption – in extreme cases – of measures for permanent change of identity and relocation.

In Victoria, at least in theory, a range of measures consistent with this standard are available to address witness intimidation. They broadly fit into the following categories, each of which is described below:

- measures to provide information and support to witnesses and victims;
- measures to protect witnesses (including the statutory scheme);
- measures to deter or prevent intimidation;
- coercive questioning; and
- measures to avoid the problem in the first place.

8.1 Providing information and support

Setting to one side any reasonable concerns that an individual may have about possible personal risks, it is often a very difficult decision for them to provide information to the police or other investigating authority or to give evidence in court concerning their knowledge of criminal conduct. The person may be apprehensive about being perceived to be implicated or being associated with persons of criminal disposition, becoming caught up in a protracted legal process or reluctant to come forward for a vast range of other understandable reasons. These may be related to their family circumstances, personalities, relationships or the potential impact of their association with the matter upon their employment position or prospects. It is also common enough for people to be hesitant about speaking in a public forum of any kind and, particularly, in the adversarial environment of a courtroom where their credibility and integrity may be challenged.

The *Victims' Charter Act 1996* provides a framework of principles for the State's response to persons adversely affected by crime including both victims and witnesses. The Act requires investigatory agencies, prosecuting agencies and victims' services agencies to provide clear, timely and consistent information about relevant support services, possible entitlements and legal assistance available to persons adversely affected by crime and if appropriate. It also requires investigatory agencies to refer persons adversely affected by crime to relevant support services and to entities that may provide access to entitlements and legal assistance.[142]

In Victoria, specialist counselling and referral services are provided through the Victims of Crime Helpline, Victims Assistance and Counselling Program and the OPP's Witness Assistance Service.[143] These agencies may provide counselling, information about giving evidence in court and other support services for vulnerable witnesses and victims. Police and the OPP may refer people to these services. Counselling and information is not intended to protect witnesses from threats to their physical safety and can only encourage witnesses to seek assistance.

8.2 Protecting witnesses

8.2.1 Preventing/minimising the risk of a person who co-operates with police being identified

There are a number of things that can and are being done to make it more difficult for those co-operating with police to be identified by those who might do them harm. These measures are largely non-legislative.

Anonymous crime reporting

Anonymous crime reporting services such as Crime Stoppers enable people to assist police by providing information without being identified. While the information provided in this fashion cannot be

[142] Section 7 *Victims' Charter Act 1996*

[143] The OPP's Witness Assistance Service (WAS) gives priority to matters involving death, sexual assault and/or family violence and matters involving particularly vulnerable victims/witnesses. Of the 754 prosecution matters (involving 2,977 victims and witnesses) referred to the WAS during the 2013/14 financial year, 457 involved sexual assault (60.6% of the 754), 326 involved family violence (43.2% of the 754), and 66 involved families of deceased (8.8% of the 754)

used in court, intelligence obtained may assist police to make other inquiries and adds to the body of intelligence available to them.

Police practices

Police employ a number of practices to make it more difficult for a witness to be identified by those who may seek to engage in acts of reprisal. Most of these practices do not rely on the use of legislative powers. For example, police frequently use methods to obtain witness statements that do not make the fact of the person's co-operation obvious to the offender, neighbours or the surrounding community. Internal police practices, supported by common law principles, govern the use of human sources. These seek to manage the safety risks to those who provide information. In Victoria, there are also legislative provisions relating to some aspects of covert police operations,[144] including the protection of the identities of police officers involved.[145]

Persons in custody

Specific measures are in place to manage the risks faced by individuals in custody who are co-operating or considering co-operation with police. Following the murder in 2010 of a prisoner, Carl Williams, an agreement was entered into between Corrections Victoria, Victoria Police, the Australian Federal Police and the Australian Crime Commission to establish an Interdepartmental Custodial Witness Committee. The Committee is a forum to identify witnesses in custody and share information between law enforcement and corrections authorities. Under these arrangements, Corrections Victoria maintains responsibility for risk management while facilitating law enforcement access to witnesses in custody. Discussions with Corrections Victoria and Victoria Police indicate that the new arrangements are developing satisfactorily. Legislative provisions permit police to visit prisoners in custody,[146] or obtain a Court order to permit them to temporarily remove a prisoner for interview.[147] The management of the risks, however, is a matter of practice. There will always be difficultly in ensuring security in a closed prison environment. Concealing police visits, removal of prisoners for interviewing or movements of prisoners will inevitably be problematic. Some actions should clearly be avoided. I note in this context that a number of agencies described with concern occasions on which witnesses in custody and perpetrators were transported to and from court in the same prison van. It was not surprising that the witnesses were sometimes reluctant to give evidence.

In-court measures

For a number of reasons, protecting the anonymity of witnesses becomes more complex once a matter proceeds to court. First, the use of any measure to conceal the identity of a witness needs to be balanced with the presumption in favour of open court proceedings and the accused's right to a fair trial.[148] Only very rarely will the court allow a witness to give evidence without the accused being able to challenge fully the credibility and reliability of its source. This ordinarily would require knowledge of the identity of the witness.[149] Second, knowledge and control over measures to protect the anonymity of witnesses in court proceedings are unlikely to reside in the same person or organisation. For example, knowledge and control respectively may reside in police, prosecutors, the judicial officer, court staff, corrections staff or even broader government agencies in terms of the court facilities and court security measures available.

Within these constraints, the Court has at its disposal a number of procedural and practical measures to protect a witness from being more broadly identified. For example, a judge can:

- list a matter under a pseudonym so that it does not appear on the public court list;[150]
- permit a witness to give evidence under a pseudonym order (with the actual identity being disclosed to the Court and the defence);[151]

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[144] Cf the UK's scheme for the use of covert human intelligence sources (informers) contained in *Regulation of Investigatory Powers Act 2000* and the *Code of Practice on the Use and Conduct of Covert Human Intelligence Sources*.

[145] See for example, *Crimes (Assumed Identities) Act 2004* – a scheme to provide for the use of assumed identities for law enforcement purposes; *Crimes (Controlled Operations) Act 2004* – a scheme to effectively authorise police to perform conduct that would otherwise be unlawful for a limited, specific law enforcement purpose; and Part IIAA of *Evidence (Miscellaneous Provisions) Act 1958* – a scheme to provide for the protection of the identity of Victorian and interstate police officers acting under such schemes in Victoria or equivalent schemes interstate.

[146] Section 41 *Corrections Act 1986*.

[147] Police custody transfer order sections 56B-56F*Corrections Act 1986*.

[148] See section 25 *Charter of Human Rights and Responsibilities Act 2005* and the *Open Courts Act 2013*.

[149] In practice, this has only been used to protect undercover police operatives. See *Jarvie v Marsden &Ors* [1995] 1 VR 84.

[150] Procedures vary between Courts.

[151] See note 26 above.

- make a suppression order so that a witness' name, address and other details cannot be published; and
- order hearings to be conducted in closed court.

8.2.2 Other court measures

Other procedural court measures are also available to reduce the difficulties that may be encountered by vulnerable persons giving evidence. The Court may allow:

- the use of pre-recorded evidence;[152]
- a witness to give evidence from behind a screen so that the public and the accused cannot see them, but the judge, jury and lawyers can;[153]
- a witness to have a support person in the witness box while giving evidence;[154] and
- a witness to give evidence via CCTV.[155]

The first of these measures was implemented following the 2004 Victorian Law Reform Commission *Report into Sexual Offences*. While not a direct response to case-specific intimidation, these measures also serve to assist in ensuring witness' safety.

Police, protective services officers and security contractors provide court security.[156] Jury members may also be empanelled by number rather than by name. The Victoria Law Reform Commission recently recommended this practice occur on all occasions.[157]

8.2.3 Minimising contact between a witness and the offender or potential intimidator

Court precinct

Courts are public places and have generally not been well designed to separate or minimise contact between parties. The requirement for a single public entrance for security and weapons screening and the lack of waiting rooms and other amenities to separate the parties make it challenging for witnesses, victims and offenders to be kept separate. The offender may be supported by family, friends and others who may also represent a source of intimidation for the witness. Victoria Police raised the practice of outlaw motorcycle gang members wearing colours or otherwise identifying themselves in court to intimidate witnesses.

Enforcement action

In some circumstances police may have options to take more serious enforcement action against an intimidator to prevent them from being able to contact the witness. For example, police have options to arrest a person under existing warrant powers or enforce bail, parole or intervention order conditions, all further discussed below.

8.2.4 Personal protection, relocation and re-identification

A wide range of measures can be employed to protect witnesses. However, whether they are as a practical proposition available in any given case is quite another matter. These extend from the provision of information to help witnesses protect themselves to permanent arrangements for re-identification and relocation.

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[152] This only applies to a child or cognitively impaired complainant witness in a sexual or indictable offence involving assault, injury or threat of injury. See Part 8.2 of the *Criminal Procedure Act 2009*.

[153] This only applies to complainant witnesses in sexual offence and family violence matters. See Division 4 of Part 8.2 of the *Criminal Procedure Act 2009.*

[154] Ibid.

[155] See Division 2 of Part IIA of the *Evidence (Miscellaneous Provisions) Act 1958*. Safety is one consideration in making a decision. *R v Cox & Ors (Ruling No 6)* (2005) 165 A Crim R 326 at [7]; *R v Goldman (2004)* 148 A Crim R 40*; DPP v Finn (Ruling No 1)* [2008] VSC 303.

[156] In metropolitan areas, Court security services are provided by protective services officers and security contractors with powers under the *Court Security Act 1980*. In regional areas, police officers provide court security. Effective deployment of court security resources relies in part on the identification and communication of particular risks to staff responsible for tasking and co-ordinating court security resources. Again, this is the responsibility of a broad range of justice stakeholders including police, court staff and prosecutions staff.

[157] *Juries Act 2000*. *Jury Empanelment: Report* Victorian Law Reform Commission, September 2014. I note the recommendation is yet to be implemented.

8.3 Deterring intimidators

Both legislative and non-legislative measures are already available to deter people from intimidating witnesses. Again, however, their use is largely dependent on the knowledge, practice and skill of a wide range of participants in the justice system and are not limited to the knowledge and control of police alone.

8.3.1 Punishing intimidators – offences

There are currently two offences directed to behaviour that constitutes witness intimidation:

- the summary offence of harass witness – section 52A of the *Summary Offences Act 1966* provides that it is an offence to harass a person because that person has taken part, is about to take part or is taking part in a criminal proceeding in any court as a witness or in any other capacity. Its maximum penalty is 120 penalty units or 12 months imprisonment; and
- the common law offence of attempting to pervert the course of justice – the elements of this offence are contained in the common law and the offence holds a maximum penalty of 25 years imprisonment.

The summary offence under section 52A has a number of limitations. First, the narrow scope of the conduct encompassed – similar offences in other jurisdictions apply to a broader range of actions in relation to witnesses. For example, in other jurisdictions it is an offence to:

- cause, or threaten to cause, any injury or detriment (NSW, ACT, QLD);
- influence through procurement, persuasion or inducement (NSW, QLD, WA, NT);
- threaten or attempt to cause or procure any physical injury to a person or property (NT);
- prevent, obstruct, dissuade (NSW, SA, Tas);
- use, cause, inflict, procure or threaten any violence, punishment, damage, loss or disadvantage (Cth, Tas);
- stalk (NT); and
- cause or procure any physical injury to a person or property (NT).

Second, the maximum penalty available in Victoria does not reflect the seriousness of the kinds of behaviour that can be involved – the maximum penalty for harassing a witness is 120 penalty units (approx $17,700) or 12 months imprisonment. In other jurisdictions, penalties for comparable offences are higher. For example:

- threatening or intimidating a witness (NSW): 10 years imprisonment;
- influencing a witness (NSW): 7 years imprisonment;
- retaliation against or intimidation of a witness (QLD): 7 years;
- giving benefit, preventing, dissuading, deceiving a witness (SA): 10 years; and
- intimidation of a witness (Cth): 5 years.

Third, Victoria's offence does not extend to actions taken against third persons. In contrast, in other jurisdictions it is an offence to:

- threaten, do or cause injury or detriment to *any person* intending to influence a person called or to be called as a witness (NSW);
- threaten a person with the intention that that person, or *a third person*, will not attend as a witness (ACT);
- give a benefit to a witness, or to *a third person*, as a reward or inducement (SA);
- cause, or threaten to cause, any injury or detriment to a witness or the *member of a family* of a witness (Qld); and
- threaten *a person* with the intention of inducing a person who is, or may be, involved in a criminal investigation or judicial proceedings (NT).

Finally, Victoria's offence does not apply to potential witnesses or people who are believed to be witnesses but only to a person who *has taken part, is about to take part or is taking part* in a criminal proceeding as a witness. Again the situation can be contrasted with that in some other Australian jurisdictions where it is an offence to:

- threaten *any other person*, intending to influence any person not to bring material information about an indictable offence to the attention of a police officer or other authority (NSW);
- threaten, do or cause any injury or detriment to another person because *the person believes* the other person will or may be or may have been called as a witness (NSW); and
- give, offer or agree to give a benefit to another person who *is or may be required* to be a witness (SA).

A number of the interstate offences referred to above were introduced as part of a project to codify the common law offence of attempting to pervert the course of justice in those jurisdictions. I am also aware that the Victorian Parliamentary Law Reform Committee in 2004 considered administration of justice offences and recommended codification of Victoria's remaining common law offences. To date, this recommendation has not been implemented. I understand this may be revisited at a later stage.

Neither of Victoria's existing offences can been seen to address adequately or appropriately the particular issues of witness intimidation. What is required is a new, broader based offence that would include the kinds of conduct addressed in the other jurisdictions and attract the penalties of similar order. Intimidation involves calculated intentional behaviour. It should be made crystal clear that it will not be tolerated and that those who engage in it will incur the risk of a significant punitive response.

There is a further dimension to this issue that I consider has received inadequate attention to date. The common law indictable offence of attempting to pervert the course of justice rests on a broadly based concern with the impact of the conduct upon the administration of justice and not its effect upon affected individuals. It may be committed in many ways of which the intimidation or interference with those who cooperate with the authorities is only one. Charges are regularly laid under this provision but relatively few result in conviction. While the character of the conduct constituting the offence could be expected to be taken into account in the sentencing process, the separate criminality towards individual victims and the fact that these victims have experienced or continue to fear reprisal against them or others associated with them is not adequately represented in this charge. The section 52A offence also deals with this inadequately.

Witness intimidation may involve a single act or the adoption of a course of conduct. Some overt acts may themselves constitute an offence. For example, assault, stalking, property damage and overt threats and behaviours involving the use of telephonic or other electronic devices can constitute offences in their own right. Where this occurs in the context of witness intimidation, the connection to witness intimidation would normally be regarded as constituting an aggravating feature of the offending. Other forms of witness intimidation, however, might not on their face be sufficient to justify prosecution. In these cases, it is the calculated objective behind the behaviour that renders it criminal. Proof of that intention is often extremely difficult to establish and much observed intimidatory activity has not been able to be addressed. This failure has the potential effect of increasing the power of the intimidator and constitutes a continuing problem for our legal system.

I am of the view that there exists a gap in the law that justifies the introduction of a new offence of witness intimidation. The offence should be an indictable offence triable summarily as this provides a range of trial processes and penalties adaptable to the individual circumstances of the case.

8.4 Recommendation

Recommendation 8 – deterring witness intimidation

There should be a new indictable offence, triable summarily, that would cover the range of witness intimidation behaviours addressed in the various interstate provisions.

The offence should have a maximum penalty of five years.

8.4.1 Bail and parole conditions

An accused's application for bail may be refused if the police or court is satisfied that there is an unacceptable risk that the offender might interfere with witnesses, including the victim.[158] Bail may be granted including a provision that there be no contact with the victim or other witnesses. If the accused person does not comply with this condition, police may apply to the court to revoke their bail and have the accused returned to custody.[159]

The Adult Parole Board could be expected to take into consideration threats by a prisoner of reprisal against witnesses in deciding whether or not to grant or revoke parole. Similar to bail conditions, a parolee may have certain conditions imposed.

These conditions cannot address potential threats that come from a source other than the accused, for example, from family, friends or associates.

8.4.2 Intervention orders

A civil intervention order is a court order made by a Magistrate to protect a person from another person.[160] An intervention order can include conditions to stop the perpetrator from:

- hurting, harassing, threatening or intimidating the person;
- coming within a certain distance of the person's house;
- making contact by any means, including email, text messages and phone; and
- damaging property.

There is no information available as to whether intervention orders have been used in witness intimidation scenarios, although there would appear to be no reason in principle why this could not occur.

8.4.3 Warnings

A formal caution or warning from the court, a police officer or the Adult Parole Board to the accused and/or their family may be sufficient to discourage some attempts at witness intimidation, particularly if supported by the real possibility that the available tools outlined above will be used and acted on if witness intimidation does occur.

8.5 Coercive questioning

While witnesses may be summonsed to give evidence in Court,[161] or subjected to coercive questioning through other schemes,[162] these methods will normally provide only very limited protection against witness intimidation. In any event, they are not, nor should they be, broadly available.

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[158] *Bail Act 1977*.
[159] A breach of a bail condition is an offence in itself. Sections 30A and 30B *Bail Act 1977*.
[160] *Family Violence Protection Act 2008* and *Personal Safety Intervention Order Act 2010*. There are three ways Family Violence Intervention Orders may be obtained: Application and Summons, Application and Warrant and Family Violence Safety Notice (where police issue the notice). Safety Notices are not available in Personal Safety Intervention Order matters. The Court, however, runs a 24 hour service and police may apply for a Personal Safety Intervention Order on behalf of a person where an urgent need arises.
[161] For example, see *Magistrates Court Act 1989*, section 43; County Court Criminal Procedure Rules, Rule 1.09, Supreme Court Criminal Procedure Rules, Rule 1.12.
[162] *Major Crimes (Investigative Powers) Act 2004*, section 5.

9 Concluding remarks

As will be apparent from this Review, the provision of protective support for witnesses is both fundamentally important and extremely difficult for our legal system. The issues presented are multilayered and interactive. The recommendations at which I have arrived have been developed in an endeavour to achieve a proper balance between these competing factors without, at the same time, imposing unrealistic expectations upon Victoria Police which, at the end of the day, will have the responsibility in this area. No witness equals no case.

10 Appendix A – Methodology

To help prepare this report and formulate the recommendations contains, the Review:

1. met with Victoria Police personnel;
2. requested written responses from Victoria Police to a number of questions;
3. met with other stakeholders in the justice system;
4. met with interstate jurisdictions; and
5. conducted a review on the papers.

Discussions with Victoria Police personnel

The Review met with a number of personnel at Victoria Police. First, I would like to thank former Chief Commissioner Ken Lay. Without his cooperation and commitment to improving this important area of the justice system, this review would not have been possible. I would also like to thank the following people for their time and input: … and all the current and former staff of the Witness Protection Unit, with whom I met.

Information from Victoria Police

The Review requested a significant amount of information from Victoria Police. The requested information falls broadly into the following categories:

- statistical information about the witness protection program;
- information about the operation of the witness protection program;
- information about the effectiveness of the witness protection program;
- information about arrangements outside the legislation;
- information about broader police responses to witness intimidation; and
- information about the practical use, effect and justification for the immunity within the Act.

Broader justice stakeholders

The review met with and is grateful for the time and input from personnel from the following organisations:

- the Supreme, County and Magistrates Court;
- the Independent Broad-based Anti-corruption Commission;
- the Office of Public Prosecutions – prosecutions staff;
- the Office of Public Prosecutions – witness assistance unit;
- the Public Interest Monitor;
- Corrections Victoria;
- Registry of Births, Deaths and Marriages;
- Adult Parole Board;
- Community Operations and Strategy, Department of Justice & Regulation;
- The Police Association; and
- Australia New Zealand Policing Advisory Agency.

Interstate jurisdictions

The review met with and is grateful for the time and input from personnel from the following organisations:

- the Australian Federal Police;
- New South Wales Police;

- Queensland's Crime and Corruption Commissioner;
- Western Australia Police; and
- Northern Territory Police.

Literature review

The review was informed by:

- a review of witness protection legislation in Australia, a summary of which is extracted at **Appendix B**.
- a review of witness protection legislation and arrangements in several international jurisdictions;
- previous reviews of witness protection programs and witness protection laws within Australia and internationally, for example:
    - reviews conducted by Parliamentary committees and tabled in the following Parliaments:
        - the Commonwealth (1988 and 2000);
        - New South Wales (2001);
        - Western Australia (2000 and 2007);
        - Canada (2008);
    - publicly available reviews by oversight bodies including:
        - Office of Police Integrity Review (2005);
        - Executive Summaries of reviews conducted by the US Department of Justice Office of the Inspector General Audit Division into aspects of the US Witness Security Program (2005 and 2013);
    - various reviews and policy documents prepared by the United Nations Office on Drugs and Crime and the Council of Europe;
- confidential Victorian reviews including: …
- media articles from Victoria and other jurisdictions;
- academic, legal and policy literature on the problem of witness intimidation;
- examination of relevant departmental files including:
    - briefings and other material relevant to the preparation of the *Witness Protection Amendment Bill 1996*;
    - documentation associated with all Ministerial requests for witness protection related payments in excess of the Chief Commissioner's delegation.

Appendix B – Table comparing interstate witness protection legislation

Provision	Other States' Acts
Who may be included in the program?	Queensland has narrower inclusion requirements. A person may be included if: • the Chairperson considers the person needs protection because the person has helped or is helping a law enforcement agency, or because of the person's relationship with such a person; and • the Chairperson considers it appropriate. In Queensland, the danger needs to arise because the person has helped or is helping a law enforcement agency in the performance of its functions or because of their relationship or association with such a person. Other States, however, have a broad definition of witness (meaning any person).
Inclusion in program not to be a reward for giving evidence	WP legislation in every jurisdiction other than Victoria, Tasmania and the ACT include a 'statement of principle' to the effect that inclusion in the program is not to be a reward for giving evidence.
List of protection and assistance that can be provided under the Act	Compared to the Victorian provision, some other jurisdictions more fulsomely set out the protection and assistance that can be provided. For example: • financial assistance (Cth, NSW, SA, WA, NT, ACT); • assistance finding employment or accessing education (Cth, SA, WA, NT); • assistance in becoming self-sustaining (Cth, SA, WA, NT); and • provision of ongoing counselling or psychological support (NSW). Note: OPI recommended provision of ongoing counselling and psychological support be considered for inclusion in the Victorian Act (see p 16 of 2005 report). Protection of this kind can already be provided under the Act. While these matters could be included in 3A(2) of Victoria's Act, they are not necessary by virtue of the 'catch all' provision at 3A(2)(e).
Optional terms that may be included in an MoU	Compared to the Victorian provision, other jurisdictions set the optional terms of an MOU in more detail. For example: • terms and conditions (Cth, SA, WA, NT); • agreement by witness not to compromise integrity of program or protection (Cth, SA, NT); • agreement to comply with directions of Commissioner (Cth, SA, WA, QLD); • agreement to undergo drug and alcohol counselling or treatment (Cth, SA, WA, QLD); • agreement to allow fingerprints to be taken (SA, WA); • agreement to allow a sample of blood to be taken for DNA analysis (SA); • agreement to allow photographs to be taken (NSW, SA, WA); • financial support arrangements (Cth, SA, QLD, NT); and • disclosure requirements of witness whilst in program (Cth, WA, QLD, NT). Note: These things can already be included in an MOU by virtue of the 'catch all' provision at s5(2)(j) of Victoria's Act.
Variation of MoU	Witness Protection legislation in every jurisdiction other than Victoria, Tasmania and the ACT provides for the variation of an MoU or protection agreement.
Framework for providing protection or assistance outside the program	Queensland is the only jurisdiction with a legislative framework for providing protection (other than interim protection) to those outside the witness protection program.
Payments made under the program may not be confiscated	Witness Protection legislation in the Cth, NSW, SA, QLD include provision that payments made by police under the program cannot be confiscated or used for pecuniary penalties.
Review right with respect to decision to suspend assistance or restore identity	The Victorian Act includes a review right to termination decisions, but not for suspension decisions or decisions relating to the restoration of an original identity. The NSW Act provides a right of review in respect of decisions to suspend protection and assistance. The TAS and NT Acts provide a right of review in respect of decisions to restore the former identity of a witness.
Requirement to keep records or a register	The Cth, SA, NSW, and QLD legislation requires police to keep a register of particulars relating to people in the program, and deals with access to the register Cth legislation requires police to keep records (other than original copies of birth and marriage entries, which is required in Vic) including: • original MoU; and • documents returned to the Commissioner.

Reporting requirements	The Cth, SA and WA WP Acts require the Commissioner to keep the Minister informed of general operations, performance and effectiveness of the program, and require the Minister to report to Parliament annually. The WA Act includes a provision that this report must not prejudice the security or effectiveness of the program.
Immunity / Protection for Liability	VIC, Cth, NSW, NT and TAS Acts contain absolutely immunities. ACT, QLD, SA and WA transfer liability to State/Territory.
Judicial review of decisions under the Act	The Cth and QLD legislated to exclude judicial review of decisions under the Act as a reflection of the 'confidentiality' of the program.

Appendix C – Comparison of witness protection legislation protections

Jurisdiction	Absolute immunity?	Liability transferred?	Criminal immunity?	Scope of conduct covered	People covered
Commonwealth - Section 21	Yes	No	Yes	• performance or purported performance; and • in good faith; and • under the Act.	Commissioner, delegates of the Commissioner and other persons performing functions in relation to the program.
ACT Section 27	No	Liability transferred to State	No	• honestly and without recklessness; • in the performance or reasonable belief in the performance; • under the Act	Any person.
NSW Section 40	Yes	No	Yes	• in good faith • exercise or purported exercise of a function conferred by or under the Act.	Any person.
NT Section 39(3)	Yes	No	Likely – but not certain	• in the course of exercising powers or functions • for the purposes of the Act.	Commissioner, Deputy Commissioner, authorised police officer, officer of an approved authority, BDM staff or the Ombudsman.
Qld Section 44	No	Liability transferred to State	Likely – but not certain	• in good faith; and • without negligence; • in the exercise or purported exercise; • of a function under the Act.	A person
SA no WP specific immunity. General police indemnity applies.	No	Liability transferred to State	Yes	• an honest act or omission • in the exercise or discharge or the purported exercise or discharge • of a power, function or duty conferred by law.	A police officers.
Tas Section 15	Yes	No	Likely – but not certain	• in the course of duties; and • in accordance with the Act.	BDM staff, police officer, Ombudsman or officer of an approved authority.
WA Section 38	No	Liability transferred to State	No – actions in tort only	• in the performance or purported performance; and • in good faith; and • under the Act.	Any person
Victoria Section 12	Yes	No	Likely – but not certain	• in the course of duties; and • in accordance with the Act.	BDM staff, CCP, police officer, Ombudsman, IBAC Commissioner, OPI Commissioner or officer of approved authority.