ABSTRACT. Witness protection in Australia has, to date, been less than successful in implementation and execution. An ad hoc system of Commonwealth and state/territory witness protection programs have co-existed with often substandard outcomes for participants, law enforcement and the criminal justice system. Although in accordance with Australia’s federal system of government, the framework of witness protection that has emerged has resulted in numerous witness protection programs in operation across states and territories with little in the way of consistency, cooperation and coordination. Reform in Australia’s witness protection system is needed to improve and streamline programs for the benefit of witnesses, communities and the criminal justice system. This article addresses shortcomings and draws attention to worthwhile changes that would benefit and enhance domestic witness protection.

I INTRODUCTION

This article will consider Australia’s method and implementation of witness protection and whether a lack of cohesion between Commonwealth and state/territory witness protection programs has compromised the protection of witnesses who provide important and often pivotal testimony in criminal trials. In particular, disparities and inconsistencies between Commonwealth and state or territory programs that have developed under the provisions of the Australian
Constitution will be examined. This lack of uniformity has created an uneven and vulnerable witness protection regime in Australia.\(^1\) The research questions this article will address are whether structural difficulties have compromised the effective operation of witness protection programs in Australia and what improvements can be made to the implementation and administration of domestic programs. The study will utilise doctrinal and reform-oriented methodology including analysis of domestic and international primary and secondary legal sources in addition to academic literature in the field in order to identify deficiencies in existing law and policy and recommend reform in the area.

Initially, an introduction to the notion of witnesses in the criminal justice system and programs that have been introduced to provide for their protection in addition to definitions and background discussion will be provided. Next, the article will address witness protection in Australia including Commonwealth and state/territory programs introduced under the federal system before an overview of global developments in witness protection to illustrate alternative frameworks and policies in overseas jurisdictions. The discussion will then move to an analysis of difficulties and shortcomings in Australian witness protection before proposing useful improvements and developments. The article will then conclude with recommendations for an improved, cohesive national witness protection regime.

1.1 *The Notion of Witness Protection*

Witnesses act as both the eyes and ears of the criminal justice system by imparting to courts what was committed, and, in what circumstance (Demir, 2018, p. 62). The importance of witnesses should not be underestimated as they provide police, who are often seen as gatekeepers in the criminal justice system, with important evidence (Cook & Davies, 2017) which is then judged for veracity by the jury.

\(^{1}\) In 2018, for example, police informant and former outlaw motorcycle club member, Steven Utah, was granted asylum in Canada following attempts on his life by incensed club members after his cover was revealed. In fact, the case revealed shortcomings in Australian witness protection measures. See Robertson, J. (2018, August 22). Australian bikie infiltrator’s refugee case shows police informants could end up dead. In *ABC News*. Retrieved from https://www.abc.net.au/news/2018-08-22/police-informants-warned-after-bikies-infiltrator-gains-asylum/10147818.
Considered good practice for criminal justice systems, witness protection essentially refers to proportionate responses to a threat using methods that safeguard at-risk witnesses to ensure their cooperation and testimony before, during and after trials (Kramer, 2010, pp. 4–5).

However, witness participation can also be seen as something of a paradox as notwithstanding their important participation in prosecutions they can provide the nexus between the accused and the offence at issue-witnesses are often taken for granted in the criminal justice system with limited regard for their welfare or importance (Fyfe & McKay, 2000a, p. 675) and have received minimal attention by either the academy or policy makers (Fyfe & McKay, 2000b, p. 278). In the United Kingdom, an increase of witness importance has, however, emerged since the 1990s (Fyfe, 2005, p. 517). Cook and Davies also note that there has been an attempt at re-balancing of criminal justice policies at the expense of offenders since the 1990s, including by elevating the status of prosecution witnesses, although they remain defined more by need in the criminal justice system (Cook & Davies, 2017). Notwithstanding these developments, it is the author’s contention that the rights and contribution of victims and witnesses in criminal justice systems have been neglected.

1.2 Witness Intimidation

The intimidation of witnesses by those they testify against in trials, particularly but not restricted to, organised crime identities, requires a state response in the form of protection which represents a practical requirement and an obligation toward citizens themselves (Bakowski, 2013, p. 1). Organised crime is a fluid notion that essentially describes transactions in markets of illegal goods and services. Windle et al. (2018, p. 3) describe organised crime as a continuing criminal enterprise which is maintained by force, control, threatening behaviour and corruption that profits from the public demand of illegitimate activity. Witness intimidation is a longstanding obstacle in trials and techniques employed to threaten or coerce witnesses have also evolved in recent years including social media intimidation directed at, for example, expert witnesses and prosecutors (Browning, 2014, pp. 192–194, O’Brien, 2015). The intimidation of witnesses, has also generated disquiet and diminished public confidence in criminal justice agencies (Allum & Fyfe, 2008, p. 92).

Moreover, Fyfe and McKay, for example, argue that American research undertaken by a Brooklyn criminal court in New York re-
vealed that by the 1970s, one in three witnesses feared reprisal from defendants who would seek revenge while one in four witnesses had been threatened (Fyfe & McKay, 2000b, p. 279). The study took advantage of a relatively large sample size and utilised several interviews of witnesses pre and post-trial. Earlier research into witness intimidation conducted by the Victims Services Agency in Washington DC’s Superior Court which utilised victim surveys and prosecutors’ management information system, identified that almost 30% of witnesses feared reprisal from offenders (Davis et al., 1990, p. 1).

Further, in a number of American cities, witness intimidation was considered routine by the 1990s according to the Chair of the House of Representatives Senate Sub-Committee on Crime and Criminal Justice, which posed a significant threat to the justice process by threatening integrity and adding to disillusionment for those who rely on the criminal justice system for redress and protection (Fyfe & McKay, 2000b, p. 279).

Although the notion of witness intimidation is long standing and relatively common in legal disputation whether criminal or non-criminal, notable figures such as Al Capone in Chicago, although far from the first to resort to such tactics, intimidated and, on occasion, killed witnesses during the 1930s prohibition era prompting authorities to enact targeted legislation to protect witnesses (Lennon, 2017). Witness protection can also provide support for eye witness testimony which can effectively be as vital as physical evidence in the course of a trial as convictions of perpetrators in organised crime, drug trafficking, white collar crime, gang violence and, more recently, security or terrorism offending have also benefited from witness testimony (Demir, 2018, pp. 62–63). Witness protection has also been identified as a substantive issue for the International Criminal Court (Eikel, 2012, pp. 97–98) in addition to the International Criminal Tribunal for the Former Yugoslavia and the Criminal Tribunal for Rwanda (United Nations, International Residual Mechanism for Criminal Trials, 2019).

As a result, witness protection remains a difficulty for criminal justice systems and therefore requires effective protection measures and security of witnesses by authorities which is challenging given the closed character and secretive nature of organised crime organisations (Dandurand & Farr, 2010, p. 5, Kramer, 2010, p. 10). In particular, the time honoured code of silence amongst members is well entrenched in Italian Mafia, outlaw motor cycle gang, drug traffick-
ing and other organised crime groups, typically leading to severe repercussions for members including death in the event of code violation (Kramer, 2010, p. 10). Along with the avoidance of detection and prosecution, witness and informant intimidation has traditionally been practised by organised crime groups who leverage power and influence from public fear campaigns in order to maintain and advance their standing and function in addition to generating risk of collaboration for witnesses (Dandurand & Farr, 2010, pp. 5, 9).

1.3 Witness Protection Typology and Classification

Known variously as witnesses, informants, collaborators or repentants, a witness or participant, for the purposes of the witness protection process, includes those persons, irrespective of legal status, who act as informant, undercover operative, or judicial officer and are eligible under legislation or policy to enter a witness protection programme (United Nations Office on Drugs and Crime, 2008, p. 4). Further, witnesses that have participated in offending and have intimate knowledge of the criminal organisations are referred to as justice-collaborators or ‘supergrasses’ who are uniquely placed to provide inside information of structures or operations, activities and are often motivated to provide testimony for reasons of immunity, sentence reduction or protection for themselves and families (United Nations Office on Drugs and Crime, 2008, p. 19, Greer, 2013, p. 123). A victim-witness typically describes a person that has been harmed by criminal actions who can then file a complaint, testify in court (Demir, 2018, p. 64) and supply evidence (Dandurand & Farr, 2010, p. 6). A protected witness generally refers to a witness who is provided with protection from retaliation or intimidation but more commonly describes those witnesses engaged in witness protection programs or those who require protection because of a relationship with a protected witness (United Nations Office on Drugs and Crime, 2008, p. 7).

1.4 The Value of Eyewitness Testimony in the 21st Century

Notwithstanding their contribution to courts, there is concern that eyewitnesses may, in fact, be of declining importance in proceedings due to the increased reliance of physical or digital evidence that is not susceptible to a lack of reliability or a tendency toward traumatization displayed by eyewitnesses. Egregious errors of identification by witnesses have, for example, compromised criminal justice systems
for a significant length of time largely driven by advances in DNA identification technology (Ross et al., 2013, p. 516). Given the heavy reliance of computers and computing in society including in criminal activity, the use of evidence generated digitally is unsurprising (Kerr, 2005, p. 280). In the International Criminal Court, the use of digital derived evidence has been increasingly used to prosecute perpetrators of international offences.

For example, although eyewitness evidence may be introduced to provide information regarding the commission of an offence, mobile phone and computer records (including social media) in addition to video and satellite imagery may establish environmental details that an eyewitness may have overlooked (Ali et al., 2019, p. 7). Although the use of digital technology may well become a primary evidentiary source in future, the use of digital technology is not without challenges, however, as courts need to vigilant with respect to authenticity, reliability, collection and admissibility (Ali et al., 2019, p. 7). Original approaches to criminal procedure which had previously been tailored to eyewitness testimony will require ongoing development to align with advances in digital evidence technology.

1.5 Witness Protection Programs Defined

Described as one of the more unusual services offered by governments during peacetime (Fyfe & McKay, 2000b, p. 282), a witness protection program refers to covert operations that provide, with strict admission criteria, relocation and identity change for witnesses who are at risk due to their cooperation with law enforcement authorities (United Nations Office on Drugs and Crime, 2008, p. 5). Law enforcement agencies increasingly rely on those who can inform and testify against former associates and subsequently require protection (Dandurand & Farr, 2010, p. 28). As a consequence, witness protection programs are necessarily expensive for states and significantly disruptive for the identified witness and are typically reserved for circumstances where a witness is to provide crucial prosecution testimony and there is no alternative, feasible way to ensure their security (Bakowski, 2013, p. 2). Essentially, witness protection programs admit witnesses primarily (Bakowski, 2013, pp. 2–3) on the level of danger to the witness as a consequence of providing testimony; the importance of the case; the personality and familial situation of the witness; the relevance of testimony and the improbability that the information in question can be obtained elsewhere.
1.6 Costs of Testifying

By allowing witnesses to escape criminal or civil penalties, any success of witness protection programs extract a price from societies where an unbalanced weighting of witness rights for protection can outweigh a right for community security (Levin, 1985, p. 211). This can occur, for example, when unpaid debts are incurred by protected witnesses prior to relocation (Bakowski, 2013, p. 4) or where additional crimes have been committed by protected witnesses (who have been provided with new identities) including unlawful killing, or in cases of marriage dispute, violation of custody orders or visitation rights where divorced witnesses have been able to conceal new identities from spouses (Levin, 1985, p. 211). Further, state and local law enforcement officials are often not apprised of the presence of protected witnesses or their background (Levin, 1985, p. 211). The relocation of protected witnesses with criminal backgrounds into unsuspecting communities also raises security concerns in addition to impacting the rights of community members which has long been a criticism of witness protection programs in the United States (Bakowski, 2013, p. 4).

1.7 Benefits and Drawbacks of Witness Protection Programs

Witnesses have been encouraged to participate in witness protection programs to end association with criminal elements and offending which, in turn, has resulted in the development of a new, non-criminal lifestyle while others have simply participated in programs to garner protection (Office of Police Integrity Victoria, 2005, p. 40). Rehabilitation, arguably, is also a benefit of witness protection programs as is the ability to lead a sustainable crime-free life which may well be as important to a witness as stability and security (Office of Police Integrity Victoria, 2005, p. 40) although it should be acknowledged that successful reintegration requires support services and instruments to assist former criminals to reorganise and adjust to non-criminal lifestyle not least of which are psychological services (Allum & Fyfe, 2008, pp. 99–100).

Risk to third parties as a consequence of witness protection operations remains a concern for authorities, however, as does risk to communities by protected witnesses who can potentially inflict harm in new, relocated areas when one considers that the majority of protected witnesses are convicted criminals (Allum & Fyfe, 2008, p. 98). Moreover, risk to communities where unrealistic expectations
that violence will end may arise in circumstances where witnesses have received lengthy custodial sentences as criminals, families and associates have long memories potentially leading to vengeance and further cycles of violence (Office of Police Integrity Victoria, 2005, p. 40). Also of concern is the reliability of witnesses who may not be truthful in testimony and, on occasion, fabricate evidence or wrongly accuse other criminals which has occurred in Italy where organised crime identities have been known to plant Mafia associates as state witnesses in order to discredit prosecutions against them (Allum & Fyfe, 2008, p. 99).

II WITNESS PROTECTION IN AUSTRALIA

2.1 Division of Powers Under the Constitution

Australia has a federal system of government with state and territory governments responsible for significant areas of lawmaking including that of law and order under the provisions of the Australian Constitution. Essentially, the division of powers provide the Commonwealth with both exclusive2 law making power and shared so-called concurrent powers3 with states. The remaining powers are considered residual which authorise states to exercise law making power in these areas (Clarke, Keyser, & Stellios, 2013, p. 499).

Law and order remains a state responsibility and although the Commonwealth has no general law making in the area, concurrent and executive4 constitutional powers enable the Commonwealth to enact criminal laws that have focussed initially on offences against Commonwealth officers or institutions but have since expanded to address areas of national concern (Australia Parliament History of Criminal Law). Section 122 of the Constitution also allows the

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2 Exclusive lawmaking powers of the Commonwealth include Commonwealth places (s. 52) and customs (s. 90).

3 The concurrent lawmaking areas are categorised into 40 areas and include subject matters such as trade and commerce with other countries and amongst the states under s 51(i), marriage s 51(xxi), postal, telegraphic, telephonic and similar services s 51(v), naval and military defence s 51 (vi) and external affairs s 51(xxix). In the event of a conflict in shared lawmaking between the Commonwealth and states under s. 109, the Commonwealth law will prevail over state law to the extent to which there is inconsistency.

4 Executive Commonwealth powers are concerned with the execution and maintenance of the Constitution and are exercised by the Governor General pursuant to ministerial advice.
Commonwealth to enact law for territories until they achieved self-government, which in the case of the Northern Territory occurred in the late 1970s (Northern Territory (Self Government) Act 1978 (NT)) and the Australian Capital Territory in the late 1980s (Australian Capital Territory (Self Government) Act 1988 (ACT)).

The division of powers under the Constitution provides a form of protection of the people from centralised arbitrary government by separating legislative power between federal and state/territories branches in a vertical arrangement can be said to perform a similar function to the horizontal separation of powers\(^5\) into legislative, administrative and judicial functions (Walker, 1998). The division of powers ensures that no individual level of government has unfettered lawmaking power or can impinge upon another. Indeed, the drafters of the Constitution were mindful of this very risk when crafting the framework and favoured the federal system which prevented the concentration of power rather than unitary system which relies upon a central or sovereign government (Zimmerman & Finlay, 2011). The federal system can also be said to be offer identified advantages such as the promotion of innovation and agility through competition between federal and state governments, government stability and state autonomy (Zimmerman & Finlay, 2011).

The federal model is not without disadvantages, however. Unsurprisingly, inefficiency, excessive duplication and excessive bureaucracy and a reduction in accountability particularly in a country like Australia with a relatively small population yet with six state and two territorial governments (Zimmerman & Finlay, 2011). Concerns such as these will be considered in light of Commonwealth and state or territory witness protection programs below.

### 2.2 Commonwealth Witness Protection

As a result of the constitutional division of law-making power in Australia, the Commonwealth in addition to states and territories have enacted witness protection legislation in order to formalise witness protection resulting in nine separate programs. Standalone witness protection legislation was first introduced by the Commonwealth in the mid 1990s (Witness Protection Act 1994 (Cth)) although witness protection had been carried out by Australian state police

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\(^5\) The Separation of Powers refers to Montesquieu’s notion that lawmaking be separated into three sources. The parliament creates and amends law, the executive puts law into operation and the judiciary interprets and enforces the law.
forces from the 1980s in response to perceived danger to witnesses that was limited to the guarding of witnesses’ in their own homes and spasmodic relocation to motel accommodation or country towns (Parliamentary Joint Committee on the National Crime Authority, 1988, p. 54). A proposal for the protection of witnesses including provision for the Attorney-General to facilitate witness protection was raised by the Williams Royal Commission into drug trafficking during 1980 and, later, by the Stewart Royal Commission of 1983 which suggested that, with state and commonwealth agreement, a national witness protection scheme could be established (Parliamentary Joint Committee on the National Crime Authority, 1988, p. 54).

During 1984, a Police Ministers’ Council recommended the establishment of a committee to develop relocation arrangements between states (Parliamentary Joint Committee on the National Crime Authority, 1988, p. 54). In 1985, however, the Australian Police Council decided against adoption of a national witness protection scheme as existing bilateral state and territory arrangements were considered to be satisfactory which was the attitude of the Australasian Crime Conference and the Police Commissioners Conference that were both held in 1987, although greater coordination and cooperation was called for (Parliamentary Joint Committee on the National Crime Authority, 1988, p. 54).

2.3 The National Witness Protection Program

During 1988, the Parliamentary Joint Committee on the National Crime Authority enquiry and subsequent report into witness protection recommended the enactment of complimentary witness protection programs in all states and territories (Parliamentary Joint Committee on the National Crime Authority, 1988, p. 54). By the 1990s, however, legislative activism in witness protection had gained momentum federally and in states and territories. The Commonwealth enacted the Witness Protection Act 1994 (Cth) (Parliament of Australia. Witnesses for the Prosecution, 2000, p. 3) which provided a statutory witness protection framework allowing the Australian Federal Police (AFP) to coordinate a national program, known as the National Witness Protection Program (NWPP). This program authorises (Parliament of Australia Witnesses for the Prosecution, 2000, pp. 3–4); (Witness Protection Act 1994 (Cth) ss. 7–10, 11, 18–19, 20, 22, 24, 27) placement and removal of witnesses; assignment of new and restoration of previous identities; establishment of a participant register; safeguards for identity documents such as tax file
numbers and passports; the creation of offences for divulgence of 
information regarding participants and mechanisms to prevent par-
ticipants from using new identities to avoid civil or criminal liability.

The NWPP is the responsibility of the Commissioner of the AFP 
who administers the program through the Director of witness pro-
tection and the witness protection committee which is comprised of 
the Deputy Commissioner of the AFP and senior officials (Parliament 
of Australia. Witnesses for the Prosecution, 2000, p. 3). The Com-
missioner has ultimate authority but is obligated to consider certain 
criteria (Parliament of Australia. Witnesses for the Prosecution, 2000, 
p. 5; Witness Protection Act 1994 (Cth) ss 7–10, 11, 18–19, 20, 22, 24, 
27) when assessing eligibility for entry to the NWPP including the 
wartress’s threat to the public if included in NWPP; whether they have 
a criminal record; whether psychological or psychiatric evaluation 
has taken place; seriousness of offence; nature and importance of any 
evidence; perceived danger to the witness; the nature of any rela-
tionship between the witness and other witnesses being considered for 
inclusion in the NWPP and viability of alternative methods of pro-
tection.

Essentially, under the legislation, witnesses, who are referred to as 
participants upon acceptance into the NWPP, are provided with 
relocation, identity change and integration back into communities by 
the NWPP (Parliament of Australia. Witnesses for the Prosecution, 
2000, p. 4). The Commissioner of the AFP can also enter agreements 
with State and Territory Commissioners of Police and the Chair of 
the National Crime Authority (NCA) in order to protect witnesses 
subject to those agencies (Parliament of Australia. Witnesses for the 
Prosecution, 2000, p. 4).

Participants in the NWPP are those persons who have or have 
agreed to provide evidence on behalf of the Crown in criminal pro-
ceedings or offences, have made a statement in relation to an offence, 
require protection and assistance or are associated with such persons 
(Witness Protection Act 1994 (Cth) s. 3). The Commissioner of the 
AFP can also make arrangements with an approved authority which 
can include state or territory Police Commissioners, the Australian 
Crime Commission Chief Executive and the Integrity Commissioner 
in order to provide protection to witnesses subject to operations 
conducted by those entities (Witness Protection Act 1994 (Cth) s. 3). 
By and large, participants enter the NWPP as a result of providing 
evidence in organised crime proceedings or serious corruption and 
drug offending including importation of significant amounts of illegal
drugs and in circumstances where inclusion in the NWPP is considered the only method of ensuring their protection (Commonwealth of Australia, Australian Federal Police, 2012, p. 3).

The length of participation in the NWPP is determined according to individual circumstances such as duration of court proceedings and ongoing security issues and participants are not granted entry into the program until a memorandum of understanding which identifies the basis of their participation has been signed (Commonwealth of Australia, Australian Federal Police, 2012, p. 4). Participants can be removed from the NWPP (Commonwealth of Australia, Australian Federal Police, 2012, p. 4) where a term of the memorandum of understanding is breached or where a participant gives false or misleading information to the Commissioner; where the integrity of the program is compromised by a participant’s threatened or actual conduct; or circumstances where a participant is no longer considered to be high risk due their successful relocation into a new community combined with sufficient passage of time. Participants can, however, be released from the NWPP if they request termination in writing which will bring protection and assistance to a conclusion (Witness Protection Act 1994 (Cth) s. 18).

2.4 State and Territory Witness Protection Programs

Australian states and territories introduced witness protection programs supported by legislation commencing with Victoria in 1991 with the enactment of the Witness Protection Act 1991 (Vic). Prior to this, witness protection in Victoria was conducted on an ad hoc basis through the Victoria Police Protective Security Group which was heavily scrutinised in the aftermath of a high profile witness protection operation that absorbed $4.5M and revealed shortcomings in the program including the lack of specialist trained officers and a suitable organisation structure to deliver witness protection in that state (Office of Police Integrity Victoria, 2005, p. 6).

6 Note also that the Witness Protection Amendment Act 2014 (Vic) and Witness Protection Amendment Act 2016 (Vic) introduced changes that made the Victorian regime more aligned with Commonwealth and State/Territory witness protection programs including increased independent oversight and reporting functions, the creation of new offences for witness intimidation and clarified principles to be considered when making decisions regarding inclusion in witness protection in Victoria. See also Victoria State Government New Laws to Protect Witnesses and Boost Integrity. https://www.preier.vic.gov.au/new-laws-to-protect-witnesses-and-boost-integrity/.
In the early 1990s, witness protection in Victoria was remodelled on a modified version of the U.S Marshalls witness protection program although there have been minor amendments introduced since (Office of Police Integrity Victoria, 2005, p. 6). In New South Wales, specific witness protection legislation was introduced in 1995 (Witness Protection Act 1995 (NSW)) although witness protection has been operational in that state since the 1980s as a component of policing in the Special Weapons and Operations Squad which provided guarding of witnesses at safe premises (Parliamentary Joint Committee on the National Crime Authority, 1988, p. 53).

In Western Australia stand-alone witness protection legislation was introduced in 1996 (Witness Protection Act (Western Australia) 1996 (WA)) that authorises the relocation of witnesses’ interstate and reciprocal relocation arrangements with other jurisdictions. Previously, witness protection had been conducted in that state on an ad hoc basis by the state police (Parliamentary Joint Committee on the National Crime Authority, 1988, p. 54). South Australia (Witness Protection Act 1996 (SA) and the Australian Capital Territory (Witness Protection Act 1996 (ACT)) enacted protection legislation in 1996, Tasmania (Witness Protection Act 2000 (Tas)) and Queensland (Witness Protection Act 2000 (Qld)) in 2000 and the Northern Territory in 2002 (Witness Protection (Northern Territory) Act 2002 (NT)).

The state and territory witness protection legislation is referred to as complimentary witness protection law under the Commonwealth legislation (Witness Protection Act 1994 (Cth) s 3AA). The Commonwealth legislation also provides for the issue of Commonwealth identity documents such as passports, tax file numbers or other prescribed documents to those persons registered on a state or territory witness protection program in circumstances where there is both complimentary witness protection law in force in addition to ministerial arrangements between the Commonwealth and the relevant state or territory (Commonwealth of Australia, Australian Federal Police, 2012, p. 3).

The integrity of Commonwealth identity documents is crucial in the establishment of new identities for witnesses and is protected under the Commonwealth legislation (Witness Protection Act 1994 (Cth) s. 24) with ministerial arrangements in place with all states and territories except Tasmania and the Northern Territory where witness protection programs are not yet operational (Commonwealth of Australia, Australian Federal Police, 2012, p. 6). The Commonwealth
witness protection legislation has been largely replicated by New South Wales, the Northern Territory, South Australia, Victoria and Western Australian in their legislation which contain similar eligibility criteria requirements to the Commonwealth as does the Australian Capital Territory while Tasmania directly references the Commonwealth eligibility requirements (Witness Protection Act 2000 (Tas) s. 5)).

Queensland also further expands the Commonwealth criteria by considering the extent to which the witness has or can offer to help authorities in addition to previous applications and periods of witness protection (Witness Protection Act 2000 (Qld) s. 6(3)(d)). Queensland offers a point of departure from the remaining states and territories in that witness protection is regulated by the Crime and Corruption Commission in that state, an independent body presided over by a chairperson rather than a Chief of Police or Commissioner as is the case elsewhere (Witness Protection Act 2000 (Qld)). Victoria also adds the requirement that the Public Interest Monitor must be taken into consideration (Witness Protection Act 1991 (Vic) s. 3(b)(3)). The Public Interest Monitor in that state represents the public interest by providing greater accountability and protection for the privacy and civil liberties of citizens such as in the collection of evidence related to orders or warrants (Government of Victoria, 2020).

III GLOBAL DEVELOPMENTS IN WITNESS PROTECTION: THE PREVAILING INTERNATIONAL LANDSCAPE

Witness protection programs date from the 1960s in the United States and were implemented to protect witnesses persuaded to testify against Italian-American Mafia organised crime figures and were consequently at risk (Demir, 2018, p. 65) of intimidation and murder by Mafia associates (Bakowski, 2013, p. 3). Famously, in what was the first notable example of witness protection in the United States, Joseph Valachi testified against former Mafia associates before the congressional committee during 1963 and was subsequently incarcerated in protective custody until his death in 1971 (Trotter, 2012, p. 532).

Witness protection programs were formalised in the United States by the introduction of legislation (Organised Crime Control Act of 1970) which achieved limited success in infiltrating the Mafia code of silence or omerta and helped secure important convictions through the provision of identity change and secret relocation of cooperating
mafia associate witnesses (Fyfe & Sheptycki, 2006, p. 321). A review took place in the early 1980s resulting in a revised witness protection regime (*Comprehensive Crime Control Act of 1984*) that extended the rights of citizens effected by witness protection along with a requirement that the Attorney General define whether the need for protection of the witness outweighs public risk along with broader powers in offering relocation to witnesses, family members and better definitions of what could be provided to protected witnesses (Fyfe & Sheptycki, 2006, p. 322).

European nations referenced the United States model when initiating witness protection programs from the 1990s. The development of European witness protection programmes can be linked to increasing emphasis on combatting organised crime and the threat of terrorism (Bakowski, 2013, p. 5) and has seen nations enact specific legislation to govern witness protection such as Italy, the Czech Republic, Lithuania and Germany with Italy notable for the size and extent of witness protection (Fyfe & Sheptycki, 2006, p. 331) that is linked to a significant and comprehensive anti-Mafia agenda by authorities (Allum & Fyfe, 2008, p. 93). Although nations such as France, Denmark, Ireland, Greece, Luxemburg, the Netherlands and Spain do not have specific legislation to address witness protection, there are still statutory frameworks that operate to regulate witness protection in those jurisdictions.

There are also differences in the structure of witness protection programs amongst European nations. In the United Kingdom for example, witness protection is conducted through the Police services and during 2005 legislation was enacted to regulate the program (Bakowski, 2013, p. 5; *Serious Organised Crime and Police Act 2005* (UK)). The development of witness protection in Italy dates from the 1930s when the Criminal Code made provisions such as immunity from prosecution for cooperation with authorities which were further developed during the 1970s era of Red Brigade terrorism which in turn led to formalised witness protection programs to address organised crime in 1980s including the relocation of Mafia defectors (United Nations Office on Drugs and Crime, 2008, p. 13).

Italy conducts witness protection in a centralised format through the Ministry of the Interior which appoints the Central Commission that effectively runs the witness protection program with the Protection Service entrusted to coordinate the daily requirements of the program including assistance, protection, support and care of state witnesses (Allum & Fyfe, 2008, p. 94). By way of contrast, decisions
regarding witness protection are made by senior police personnel and the officials of bodies such as the Serious and Organised Crime Agency (SOCA) in the United Kingdom while in Belgium witness protection is conducted by a Witness Protection Board comprised of public prosecutors, members of the Justice and Interior Ministry and senior police officers (Fyfe & Sheptycki, 2006, pp. 330–331). Modelled largely on the United States model, witness protection in the United Kingdom emerged to address the increasing concern over murder and violence directed at witnesses by organised crime members (Fyfe & McKay, 2000b, p. 280). Protection of witnesses in the United Kingdom is provided by police, SOCA, Her Majesty’s Revenue and Customs and the Scottish Crime and Drug Enforcement Agency (Dandurand & Farr, 2010, p. 26).

In France, witness protection is authorised by the public prosecutor or examining magistrate which is also the case in Spain and in Germany a regional and federal Bureau of the Protection of Witnesses and police make decisions with respect to admission to witness protection programs (Fyfe & Sheptycki, 2006, pp. 325–326, 330). Witness protection programs in Germany were developed to aid in the prosecution of terrorist organisations and neo-Nazi groups during the 1980s (Fyfe & Sheptycki, 2006, p. 342) and outlaw motorcycle gang members more recently with harmonised regional and federal witness protection programs emerging since 2001 including enhancement of admission procedures, decision making, confidentiality and training through the Federal Criminal Police Office (United Nations Office on Drugs and Crime, 2008, p. 12).

South Africa conducts witness protection through a national office under the authority of the Minister for Justice and Constitutional Development which empowers the Director to decide upon admission to witness protection programs, the types of crimes for which witnesses can request protection and procedures and penalties for disclosure or publication of information regarding witness protection program participants or officials (United Nations Office on Drugs and Crime, 2008, pp. 14–15). Protection of witnesses in South Africa is provided by the Police Service (Dandurand & Farr, 2010, p. 26). In Canada, witness protection is authorised at the federal level by the Commissioner of the Royal Canadian Mounted Police (RCMP) while at regional levels a number of provinces operate witness protection programs with a more integrated unit such as British Columbia, for example, which involves the RCMP, Police Services and municipal police (Dandurand & Farr, 2010, p. 15).
IV ANALYSIS AND DISCUSSION: STRUCTURAL DIFFICULTIES IN AUSTRALIAN WITNESS PROTECTION AND RECOMMENDATIONS FOR IMPROVEMENT

The division in law making powers mandated by the Australian Constitution has led to structural difficulties in witness protection across the various jurisdictions. These shortcomings contribute to both a lack of consistency and vulnerabilities in domestic witness protection. As discussed in Part II above, the Commonwealth and state or territories have independently enacted witness protection legislation to support individual witness protection programs. This diversity of witness protection legislation and programming has revealed inconsistencies between the various jurisdictions and the Commonwealth although there is, notes Kowalick, (Kowalick, 2014, p. 125) administrative coordination between the Commonwealth and states or territories to an extent such as in matters concerning complimentary witness protection programs including the provision of documents to the Commissioner that assist in assessment of a witness for inclusion in the NWPP in addition to shared costing of witness protection services (Witness Protection Act 1994 (Cth) s. 6(1), (2)(a)(b)(c)(i)(ii), (d)).

However, the use of the NWPP is not mandatory for state and territory jurisdictions under the Commonwealth legislation allowing witnesses who require relocation and re-identity to be freely incorporated into state and territory programs (Kowalick, 2014, p. 235). Further, cross jurisdictional coordination remains a problem with the NWPP with Australian jurisdictions not taking advantage of the program which remains underutilised (Kowalick, 2014, pp. 233–237) possibly due to mistrust and envy between rival states and territories; a lack of understanding and parochial attitudes; paucity of cooperation and coordination between state and territory police forces (although limited use of the program is evident) and the tendency for local witness protection programs to be employed except in circumstances where police agencies consider that the NWPP is better suited to specific witness protection operations.

Communication between police operations in different jurisdictions also remains a concern as cultural sensibilities have impeded the delivery of witness protection arrangements particularly where witnesses have been relocated interstate without effective coordination with police in host states or territories leading to compromised wit-

7 See Part IIA above.
ness protection and the possibility of witness injury or death (Kowalick, 2014, p. 161). Indeed, the lack of understanding and cooperation between state and territory police forces has been described as something of a gift for criminals (Coulthart & McNab, 2008, p. 153). The rivalry between Australian jurisdictions with respect to state and territory witness protection programs can in certain ways be linked to a desire to maintain independence and participate in a cooperative scheme rather than the national NWPP that would likely deliver better outcomes for witness protection participants although, as has been discussed, there is no compulsion to use the NWWP (Kowalick, 2014, p. 233).

Notwithstanding the provision of welfare, name changes and other protective measures offered by witness protection programs, participants are often compromised during resettlement and reacclimation into societies following their contribution to the justice process and will understandably harbour genuine concern for the duration of their lifetimes that offenders they have testified against will seek retribution (Kowalick, 2014, p. 232). Although there is common ground across Australian jurisdictions with respect to disclosure requirements of participants in state and territory witness protection schemes, inconsistencies are evident that do not assist in maintaining a consistent domestic witness protection regime (Kowalick, 2014, pp. 151–152). For example, in the Northern Territory, disclosure requirements differ from that of other states and territories by providing the Commissioner of Police with unrestricted authority to demand of witnesses’ disclosure of matters relevant to their individual circumstances (Kowalick, 2014, p. 152). This inconsistency between jurisdictions allows for more enterprising witnesses to be selective in their choice of state or territory witness protection program (Kowalick, 2014, p. 169). Slow court processing is also a drawback of witness protection programs for participants who can be placed under significant pressure which is exacerbated by delays adding to anxiety and apprehension.

Secrecy, which remains an important component of witness protection operations, can yet lead to practical difficulties in a number of areas. Although obligated to sign a memorandum of understanding, witnesses cannot retain a copy as that in itself creates a security concern as does the need for a professional witness such as a lawyer to be returned to a national register of practitioners when any knowledge of witness protection proceedings by the professional body would be contrary to secrecy required in witness protection
Accountability to the community and public confidence in the integrity of witness protection can also be hindered by the secrecy that surrounds these initiatives which limits analysis of their impact on the fight against organised crime. In 2016, a review into the operations of the Victorian witness protection program acknowledged the tension of maintaining adequate secrecy in witness protection while displaying accountability to the community noting that much documentation to be provided to the Department and Minister for Police in accordance with ministerial functions was not provided in addition to insufficient disclosure of witness protection operations which undermined public confidence (Vincent, 2016, p. 48).

More broadly, secrecy has also hindered assessment of witness protection programs in Australia as reporting remains uneven and incomplete. Although secrecy and confidentiality are necessary for effective operation of witness protection programs given the nature of security needed, a lack of reporting remains a difficulty in Australia suggesting that external reporting by independent agencies would be useful as it would encourage accountability over public money and parliamentary functions (Vincent, 2016, p. 51). Reporting shortcomings limit assessment of witness protection program impact and efficacy on serious and organised crime and further compromises development of useful programs to address serious drug or fraud offences and robust analysis of witness protection governance and accountability (including the release of program detail without undermining secure operation and confidentiality in critical areas) such as participant identity or locations (Kowalick, 2014, pp. 230–231). NWPP reporting appears the most comprehensive of the Australian witness protection programs and there is acceptable coverage of state witness protection programs in Queensland and Western Australia, although in South Australia, reporting remains limited (Kowalick, 2014, p. 254).

There has also been a tendency for police to view witness protection begrudgingly in investigations where it has, on occasion, been considered of insufficient value and an unfortunate necessity for productive investigations and consequently not afforded significance which has contributed to governance and record keeping failings. Effective cooperation and coordination between police personnel in different jurisdictions during relocation of participants can also be compromised by over use of confidentiality as can access to witness protection programs because police personnel may be unaware of or
may not know how to access witness protection programs for the benefit of advising any witnesses (Kowalick, 2014, p. 231). Indeed, the selection of law enforcement personnel to administer witness protection programs remains an important issue in the success or otherwise of any witness protection initiative. In common with many branches of policing, witness protection officers require specialist skills as witnesses need protection from criminals they may implicate in order for the operation to be successful, yet many have criminal history of their own (Semrad, Vanags & Bhullar, 2014, p. 8).

A difficult balance is therefore needed by police personnel in order to establish and nurture good working relationships with witnesses while safeguarding their compliance with restrictive lifestyles typical of witness protection that demands careful selection of personnel with appropriate interpersonal, policing and partition technique skills in order to distinguish working relationships and any emotional attachment as part of effective witness protection programs (Semrad, Vanags & Bhullar, 2014, pp. 8, 12). Immunity for police officers and other personnel involved in witness protection programs can also prove to be problematic. The Victorian review into witness protection found that excessive immunity for police can be deleterious as it can discourage the exercise of appropriate care in witness protection operations in addition to depriving people of legal redress for misconduct or breach which promotes little external scrutiny of conduct or decision making (Vincent, 2016, p. 42).

Australia, as is the case in many countries, note Semrad et al., does not have consistent witness protection duty selection processes specifically for police personnel although all Australian police force requirements include general mental ability testing and stand-alone witness protection operation selection testing is visible although uneven in coverage across Australia with several states and territories electing to forego any specialist selection criteria (Semrad, Vanags & Bhullar, 2014, p. 8). Compromises in selection of appropriate police personnel remains an impediment to successful witness protection operations given the importance of the role performed by witness protection police officers.

Witness intimidation remains a significant global difficulty for witness protection programs. Australia is no exception although obtaining meaningful figures of witness intimidation in the various jurisdictions is problematic. There has, however, been a high-profile murder of a witness protection participant who was scheduled to testify against organised crime figures. During 1995, Western Aus-
Australian police informant Andrew Petrelis died in controversial circumstances at his Queensland apartment from what was described as a self-administered overdose of heroin. Speculation at the time suggested that well know Perth criminal identities had discovered the whereabouts of the witness having obtained inside information of location and new identity particulars from serving Western Australia police officers and had forcibly administered the heroin to Petrelis, leading to his death.

The execution style murder of proposed witness Terrence Hodson along with his wife also focussed attention on witness protection in Australia and although witness protection was refused by Hodson, he was in fact scheduled to testify against high profile organised crime identities. His death led to the collapse of the prosecution case and withdrawal of serious criminal charges as did the murder of notorious Melbourne criminal identity Carl Williams in the Barwon maximum security prison during 2010 where he was serving a lengthy sentence for multiple murders and other serious offences perpetrated during the so-called Melbourne Gangland underworld war during the late 1990s and early 2000s (Vincent, 2016, p. 57). Further, witnesses Vickie Jacobs and Prue Bird were also murdered as a result of their testimony during this period (Vincent, 2016, p. 57).

A significant shortcoming of witness protection domestic witness protection programs in Australia concerns judicial review of decisions such as eligibility for inclusion into witness protection programs (Scolari, 2018) which remain a concern whether grounded in Commonwealth or State and territory legislation. For example, at the Commonwealth level, a failure to adequately consider entrance eligibility criteria under the NWPP by the Commissioner cannot be reviewed using administrative law procedures such as those found under the Administrative Decisions (Judicial Review) Act 1997 (Cth) due to the requirement that information relating to NWPP participants remains safeguarded (Commonwealth of Australia, Australian Federal Police, 2019, p. 197) which was the recommendation of the Parliamentary Joint Committee on the National Crime Authority in the late 1980s (Parliamentary Joint Committee on the National Crime Authority, 1988 p. XIV).

This lack of review mechanism points toward a structural limitation in the operation of the NWPP (Scolari, 2018). Review by the Ombudsman, however, does feature at the Commonwealth and state or territory levels but not consistently. For example, the Commonwealth Ombudsman has power to investigate complaints brought
against Australian Federal police officers under the *Australian Federal Police Act 1979* (Cth) and the *Ombudsman Act 1976* (Cth). The provisions of the NSW witness protection legislation, for example, allow for decisions concerning witness protection taken by the Commissioner to be reviewed by the Law Enforcement Conduct Commission (*Law Enforcement Conduct Commission Act 2016* (NSW)) and in Tasmania decisions of the Police Commissioner are subject to review by the Ombudsman (Scolari, 2018).

Another issue commonly experienced in witness protection programs is problematic family court proceedings. Feneley notes, for example, that it is common for a woman and mother who is a participant in witness protection to be involved in a custody and access dispute with the father of her children—the reason for her inclusion in witness protection (Feneley, 1997, p. 5). Courts are left in circumstances like this with the dilemma of deciding whether to grant access rights to the father in accordance with equitable principles that could, in turn, reveal the mother’s whereabouts which is an obvious safety concern (Feneley, 1997, p. 5).

Indeed, violence associated with organised crime represents a significant challenge for communities and witness protection operations, most particularly intra familial violence where children are entangled in disputes (Vincent, 2016, p. 35). Excessive duplication and conflict between varying police operations across the nine witness protection programs in Australia also remains a drawback potentially compromising participant safety and security (Kowalick, 2014, p. 163).

### 4.1 How can Witness Protection in Australia be Improved?

Reform in the Australian witness protection space is overdue. Australia’s federal constitutional framework has determined that the development of witness protection has been uneven and vulnerable since the establishment of witness protection programs and operations in the 1990s. This has resulted in a less than consistent and effective witness protection regime across the jurisdictions.

Although necessary in the operations of a witness protection program, secrecy can compromise governance and accountability of witness protection programs. Clearly, information concerning the identity and relocation particulars of participants should not be provided to those not part of police functions and should be kept secret along with the identity of officers or operating methodologies yet access to data of an administrative nature in important areas such
as offence type and category, costs, prosecutions and convictions would be useful in meaningful assessment of the efficacy of witness protection as a weapon against organised crime (Kowalick, 2014, p. 275). The effect of witness protection on familial relationships, particularly children, should also be a focus in Australian witness protection reform as would addressing inertia in court processing.

Cultural change in police operations that are central to witness protection operations should also be pursued. Improved record keeping and governance, selection criteria for police witness protection personnel, quality training programs and improved governance would elevate the standing of witness protection within police forces and help with shifting the position of witness protection from a necessary burden largely outside normal policing to one more valued and useful as an effective tool in the fight against organised and serious crime (Vincent, 2016, p. 26). Similarly, a reduction in excessive immunity of police personnel involved in witness protection operations could also be of benefit by encouraging greater care in witness protection and greater scrutiny over police decision making and conduct (Vincent, 2016, p. 42). External review of witness protection such as through the Ombudsman or parliamentary committees is also inconsistent between jurisdictions in Australia which remains a shortcoming in existing witness protection programs (Kowalick, 2014, p. 170).

Improved cohesion and less duplication and conflict between the Commonwealth and state witness protection could be realised through the establishment of an independent statutory body to regulate Australian witness protection practice and operations or, as an alternative, the introduction of more robust review mechanisms for witness protection decision making would be beneficial (Scolari, 2018). The establishment of independent statutory body, in particular, has the potential to increase public confidence in the value of witness protection by encouraging accountability in the use of public funding, powers and functions of parliament in addition to helping to monitor trends over time and across jurisdictions which would encourage better decision making and policy development (Vincent, 2016, p. 51).

The NWPP has provided a national witness protection program for several years yet remains poorly supported as states are not obligated to make use of the NWPP and, as has been discussed, prefer their own witness protection programs except in circumstances where the NWPP is seen as having something of an advantage.
Kowalick argues for a truly uniform, more integrated Australian witness protection program incorporating the NWPP with state and territory programs that would enhance cross jurisdictional coordination and attenuate many of the shortcomings that is contained in a three tiered protective regime with the most serious 1st tier high risk witnesses from either state or federal cases relocated and reidentified through the NWPP while other less at risk 2nd and 3rd tier participants in need of protection should be included in state or territory programs (Kowalick, 2014, p. 168). This structure ought to be coordinated by the Australian Federal Police or an independent Commonwealth agency which is not restricted by jurisdictional issues experienced by states and territories under the Federal system and which is supported by a robust legislative framework rather than the complimentary legislation in place at present (Kowalick, 2014, p. 240). If this were to materialise, a more cohesive witness protection program would be better placed to deliver more effective witness protection outcomes within Australia.

V CONCLUSION

At present, the division of powers of the Australian Constitution has resulted in nine separate witness protection programs including that of the Commonwealth NWPP which has resulted in a less than cohesive and effective witness protection regime in Australia. This article has examined the nature of Australia’s witness protection regime in particular the relationship between the NWPP and state programs. Although coordination and cooperation between the NWPP and states witness protection programs is evident to an extent, there is a level of antipathy toward the NWPP by states who prefer to utilise their own witness protection programs resulting in little use for the NWPP save for circumstances where the national program is seen to hold an advantage. Shortcomings of witness protection in Australia were addressed including the lack of compulsion on states to utilise the NWPP; a level of parochialism and mistrust by states; inconsistencies in disclosure and inclusion in programs; insufficient review mechanisms; excessive secrecy provisions; the need for cultural change; inadequate cross jurisdictional communication; deleterious impact of witness protection on familial environments; substandard governance and a lack of transparency amongst other limitations that serve to undermine domestic witness protection programs.
In light of these concerns, a more cohesive and effective national witness protection regime through the vehicle of the NWPP incorporating state and territory programs unhindered by jurisdictional drawbacks inherent in the federal system that is well supported by apposite legislation would better serve the interests of witnesses who remain valuable in the criminal justice system. Further research and analysis of a truly cohesive national witness protection regime would also be of benefit in this area.

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